

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

SPRINGS CHARTER SCHOOLS, AKA RIVER  
SPRINGS CHARTER SCHOOL,

OAH Case No. 2018031003

RIVER SPRINGS CHARTER SCHOOL,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2018060667

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on March 22, 2018, naming Springs Charter Schools, also known as River Springs Charter School. On April 9, 2018, OAH granted Student's first motion to amend her complaint. On May 29, 2018, OAH granted Student's second

motion to amend her complaint.<sup>1</sup>

River Springs filed a due process hearing request on June 13, 2018, naming Student. On June 21, 2018, OAH consolidated Student's second amended complaint and River Springs' complaint. OAH continued the consolidated matters for good cause on July 3, 2018.

Administrative Law Judge Rommel P. Cruz heard this matter in Temecula, California, on September 25, 26, and 27, October 4, 5, 9, 10, 11, 16, and 23, and November 9, 2018.

Punam Grewal and Michelle Powers, Attorneys at Law, represented Student. Mother attended the hearing on all days. Father attended the hearing on most days.

Deborah Cesario, Attorney at Law, represented River Springs. Kenneth Bounds, Co-Counsel, attended three days of hearing and Molly Thurmond, Co-Counsel, attended one day of hearing. Kathy Cox, Ed.D., Director of Special Education, attended the hearing on all days on behalf of River Springs.

OAH granted a continuance at the parties' request for the parties to file written closing arguments. On December 14, 2018, upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

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<sup>1</sup> River Springs filed its response to Student's second amended complaint on June 4, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

## ISSUES<sup>2</sup>

### STUDENT'S ISSUES

1. Did River Springs deprive Student of a free appropriate public education from March 21, 2016, to August 2017, by failing to provide appropriate present levels of performance, goals, instruction and services to address Student's unique needs in the following areas: (a) occupational therapy; (b) speech; (c) specialized academic instruction; (d) educationally related mental health; (e) behavior; and (f) social skills?
2. Did River Springs deprive Student of a FAPE from March 2016 through May 21, 2018, by reason of a material failure to implement the following services:
  - a) The specialized academic instruction offered in the individualized education

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<sup>2</sup> At the start of the hearing, Student withdrew Issues 1(d), 1(g), 1(i), 3, 7, 8, and 9 as originally set forth in the Order Following Prehearing Conference dated September 18, 2018. In addition, Student moved to rephrase Issue 2 to strike the language "in the least restrictive environment" and amend Issue 3 to reflect the time period of March 2016 to May 21, 2018. River Springs did not object and the ALJ granted Student's motion to rephrase Issues 2 and 3 as set forth in the Order Following Prehearing Conference dated September 18, 2018. Student also indicated she was no longer seeking independent educational evaluations as a remedy. In light of Student's withdrawal of any claims alleging a failure to assess Student, and any request for independent educational evaluations, River Springs withdrew what had been its Issue 2 as set forth in the Order Following Prehearing Conference dated September 18, 2018. The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.).

programs of March 30, 2016, April 26, 2016, January 12, 2017, March 23, 2017, April 28, 2017, and May 12, 2017; and

b) The specialized academic instruction, occupational therapy, speech and language, and counseling services offered in the August 4, 2017 IEP, during the period from April 19, 2018, through May 21, 2018?

3. Did River Springs deprive Student of a FAPE by failing to provide all of Student's educational records in response to Parents' requests, including the requests made in March and September 2016, and May 2018?

4. Did River Springs deny Student a FAPE by offering placement at Flabob Airport Preparatory Academy in the February 9, 2018 IEP?<sup>3</sup>

5. Did River Springs deny Student a FAPE by predetermining the February 9, 2018 IEP's offer of placement?

#### RIVER SPRINGS' ISSUE

6. Did the February 9, 2018 IEP offer Student a FAPE in the least restrictive environment, such that River Springs may implement the IEP without Parents' consent?

#### SUMMARY OF DECISION

This Decision holds that Rivers Springs denied Student a FAPE by failing to provide Student the specialized academic instruction called for in the December 4, 2015 IEP. During the 2016-2017 school year, River Springs failed to provide the 180 minutes a

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<sup>3</sup> The February 9, 2018 annual IEP was developed over two days, on February 9 and March 2, 2018. Therefore, Issues 4 and 5 are amended from how they were phrased in the Order Following Prehearing Conference dated September 18, 2018, to identify the IEP at issue as the February 9, 2018 IEP.

week of specialized academic instruction for over five months. River Springs further denied Student a FAPE in the December 4, 2015 IEP, as amended on April 26, 2016, and the January 12, 2017 IEP, by failing to offer an appropriate amount of specialized academic instruction to address Student's math deficits. Student significantly regressed in math over the 2016-2017 school year and extended school year. The approximately one hour a week of specialized academic instruction dedicated to math was inadequate due to Student's worsening math deficits. Furthermore, River Springs denied Student a FAPE by failing to implement the specialized academic instruction and related services at The Prentice School required by the August 4, 2018 IEP Amendment.

However, Student did not meet her burden of proving she was denied a FAPE resulting from a lack of goals and services in the areas of occupational therapy, speech, educationally related mental health, behavior, and social skills. The evidence did not demonstrate Student had deficits in those areas that warranted goals and services through her IEP. When River Springs did receive information necessitating goals and services in occupational therapy and speech and language, River Springs offered appropriate goals and services to address those needs. Moreover, Student did not establish that River Springs denied her a FAPE by failing to provide Parents the records they sought pursuant to their records requests.

Furthermore, Student did not meet her burden of proving River Springs predetermined the February 9, 2018 IEP offer of placement at Flabob Airport Preparatory Academy and failed to demonstrate that Flabob was not an appropriate placement in the least restrictive placement. River Springs proved by a preponderance of the evidence that the February 9, 2018 IEP, with placement at Flabob, offered Student a FAPE in the least restrictive environment. Accordingly, River Springs may implement the February 9, 2018 IEP without parental consent if Student seeks to receive special education and related services from River Springs.

## FACTUAL FINDINGS

### BACKGROUND

1. Student was 13 years old at the time of the hearing. She was eligible for special education under the category of Specific Learning Disability. At the time of hearing, Student was attending eighth grade at The Prentice School, a nonpublic school in North Tustin, California.

2. In 2011, at the age of six, Student was assessed by William Britt III, Ph.D., of Loma Linda University to determine whether she had an autism spectrum disorder and/or attention deficit hyperactivity disorder. Dr. Britt found Student's perception to be either at or above the expected level. He found this to be inconsistent with high functioning autism. Student was also determined to be in the low average range on social skills in the home environment, but in the average range in the school environment. Dr. Britt concluded that these findings were inconsistent with autism spectrum disorder. Dr. Britt did diagnose Student with attention deficit hyperactivity disorder and oppositional defiant disorder.

3. Entering the 2015-2016 school year, Parents sought updated information about Student to assist them in planning her educational program in anticipation of a change in school. In July and August 2015, Student was assessed by David Libert, Ph.D., who authored a neuropsychological report. Dr. Libert diagnosed Student to be on the low end of the autism spectrum, which accounted for her sensory sensitivity. He also opined that her autism affected her emotional responses in social interactions. Student was confused as to how to respond in typical situations. Dr. Libert diagnosed Student with attention deficit hyperactivity disorder; autism spectrum disorder without intellectual impairment, but with speech and language impairment; and social anxiety disorder. He recommended a psychotropic medication evaluation; individual and family therapy to address behaviors and appropriate self-expression; and a social skills

program to help her ease her stress when engaging with peers.

4. River Springs speech-language pathologist Marissa Miller testified at hearing. Ms. Miller was a licensed speech-language pathologist for 18 years and joined River Springs in August 2007. She possessed an American Speech-Language-Hearing Association Certificate of Clinical Competence. Ms. Miller conducted an average of 15 to 20 speech and language assessments each year and attended 70 to 75 IEPs a year. Ms. Miller testified persuasively; her responses were careful and confident.

5. Ms. Miller determined Dr. Libert's finding as it related to the speech and language impairment as unreliable, as Dr. Libert did not specifically assess Student in the area of speech and language. Ms. Miller pointed out that Dr. Libert did not use any testing instruments associated with assessing a speech and language disorder.

6. River Springs Director of Special Education Dr. Kathy Cox testified at hearing and offered a description of River Springs' educational programs. River Springs was an independent study charter school, authorized by the Riverside County Office of Education as a county-wide benefit charter school. As an independent study charter school, River Springs accounted for a student's daily attendance based on the time the student spent on an educational activity and the work produced, as opposed to whether a student was seated in a classroom. River Springs offered several independent study programs. One such program was its Homeschool program, in which parents provided the day-to-day instruction. A credentialed general education teacher, identified as an education specialist was assigned to the student to oversee the home instruction. The education specialist met with the student and parent a minimum of every 20 days to review the student's work, review the curriculum, and develop the learning plan for the next 20 days. Students in the Homeschool program had the option of attending one of River Springs' "student centers" one or more days a week for enrichment classes. Classes included art, drama, or more intensive instruction in core subjects. Other programs River

Springs offered were Academy programs, which resembled more traditional educational settings. Academies offered onsite classes three to five days a week, where students received instruction from credentialed teachers.

7. Parents enrolled Student at River Springs in the summer of 2015 for Student's fifth grade year and chose to participate in the Homeschool program. Mother was Student's homeschool instructor. Student attended enrichment classes at the Riverside student center twice a week and homeschooled the other three days. Mother was also homeschooling Student's two siblings.

8. Prior to the start of the 2015-2016 school year at River Springs, Keri Gillette met with the family in the home and briefly assessed Student's reading abilities. Ms. Gillette was an education specialist for River Springs and the credentialed teacher assigned to Student for the 2015-2016 and 2016-2017 school years.

9. Ms. Gillette possessed a clear multi-subject teaching credential and a Cross-Cultural, Language, and Academic Development (CLAD) credential. As an education specialist, Ms. Gillette was the credentialed teacher who signed off on the work parents did in the home with their children. Ms. Gillette provided some instruction to Student from time to time as needed, but Mother provided the day-to-day instruction. Ms. Gillette was at times argumentative and evasive in her response during her examination at hearing, which diminished the persuasiveness of her testimony.

10. Mother requested River Springs assess Student for special education and related services. On September 15, 2015, River Springs administered i-Ready diagnostic tests to Student in the areas of math and reading. Student's overall math score was 469, placing her at a fourth grade level. Her overall reading score placed her at a third grade level.

11. River Springs school psychologist Robin Aghbashian prepared a psychoeducational assessment report dated December 4, 2015. Ms. Aghbashian had

been a school psychologist since 2009. She joined River Springs in October 2015. She conducted around 70 assessments per year. Ronda Escalera, resource specialist program teacher, conducted the academic assessments portion of the evaluation. Ms.

Aghbashian took into account Dr. Britt's 2011 and Dr. Libert's 2015 neuropsychological reports. Ms. Aghbashian observed Student in the classroom and administered, among other tests, the Woodcock-Johnson Tests of Achievement, Third Edition; Beery-Buktenica Development Test of Visual-Motor Integration; the Test of Visual-Perceptual Skills; Wechsler Intelligence Scale for Children, Fourth Edition; and Asperger Syndrome Diagnostic Scale. Mother and Ms. Gillette provided input.

12. The December 4, 2015 psychoeducational assessment did not assess Student specifically in the area of speech and language. However, Ms. Aghbashian did administer the Asperger Syndrome Diagnostic Scale (ASDS), which Mother completed. The ASDS was a diagnostic instrument to measure behaviors associated with Asperger Syndrome. The ASDS provided scores that demonstrated that no follow up assessments were needed in the area of pragmatics.

13. Ms. Miller opined that the results of the ASDS, coupled with the results from the Wechsler Abbreviated Scale of Intelligence administered by Dr. Libert, demonstrated there was no reason to suspect a need to further evaluate Student in the area speech and language. Student scored a 103 in verbal comprehension on the Wechsler, which Ms. Miller explained was an uncharacteristically high score for a child with a speech and language disorder.

14. Occupational therapist Corey Whigham provided occupational therapy services for River Springs, including direct services and assessments of students. Mr. Whigham was certified by the National Board of Certification for Occupational Therapy. Since 2007, he conducted approximately 25 to 30 occupational therapy assessments a year for students with special needs and attended approximately 50 to 60 IEP team meetings annually.

15. Mr. Whigham provided thoughtful, detailed responses in his examination and his testimony was persuasive. Mr. Whigham opined that the findings and test protocols provided by the Beery-Buktenica Development Test of Visual-Motor Integration, the Test of Visual-Perceptual Skills, and the Woodcock-Johnson Tests of Achievement, Third Edition, administered as part of Ms. Aghbashian's evaluation demonstrated that Student's visual-motor skills warranted monitoring but not to the degree that occupational therapy service were needed. In addition, Mr. Whigham opined that Student's written entries in the Woodcock-Johnson raised no concerns as it related to Student's occupational therapy needs.

16. The December 4, 2015 psychoeducational assessment report concluded that Student had deficits in attention processing and sensory-motor processing. Ms. Aghbashian found a statistically significant discrepancy between Student's estimated cognitive ability and academic scores in the areas of basic reading, reading comprehension, math calculation, and math reasoning. She opined that this made it hard for Student to work through grade-level curriculum in those areas. The psychoeducational assessment report was provided to Parents prior to the December 4, 2015 IEP team meeting.

17. In her testimony, Ms. Aghbashian opined Dr. Libert's diagnosis of autism spectrum disorder was not reliable, as Dr. Libert relied solely on parental input without administering any standardized assessment tools to provide an objective measure. Ms. Aghbashian explained that the result of her psychoeducational evaluation, along with the findings of the neurological assessment reports did not warrant further assessments in the areas of speech, occupational therapy, behavior, mental health, or social skills.

#### DECEMBER 4, 2015 INITIAL INDIVIDUALIZED EDUCATION PROGRAM

18. The IEP team reviewed Student's initial IEP over two days, on December 4

and 18, 2015. Mother, Father, Ms. Aghbashian, Ms. Gillette, and Ms. Escalera were among those who attended. Ms. Aghbashian presented her December 4, 2015 psychoeducational assessment report and the IEP team discussed Student's present levels of performance. The IEP team determined that Student was eligible for special education under the category of Specific Learning Disability. The IEP team identified Student's areas of need to be in basic reading, reading comprehension, written expression, math calculation, and math reasoning. Six annual IEP goals were developed to address those areas, with the following service offered: 60 minutes three times per week for a total of 180 minutes of specialized academic instruction in a group setting. The resource specialist program teacher and teacher were responsible for each of the goals. Parents chose to continue Student in the Homeschool program. Extended school year was not offered as the IEP team did not have sufficient information at the time to determine that extended school year was necessary. However, the IEP team agreed that if Student significantly regressed and could not recoup her learning within a reasonable amount of time, the IEP team would reconvene to discuss the need for extended school year services. The IEP did not offer goals, accommodations, and services in the areas of occupational therapy, speech, educationally related mental health, behavior, and social skills. Mother consented to the IEP by her signature dated December 17, 2015.<sup>4</sup>

#### MARCH 30, 2016 IEP AMENDMENT

19. On March 30, 2016, an Amendment to the December 4, 2015 IEP was developed. Parents and River Springs agreed that no IEP team meeting was required for the amendment. The Amendment was for the sole purpose of amending the Special

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<sup>4</sup> No explanation was offered at hearing as why Mother's signature for consent to the IEP was dated the day before the December 18, 2015 IEP team meeting.

Factors page of the December 4, 2015 IEP to indicate Student's participation in the California Assessment of Student Performance and Progress in the subject of science with "CMA with Designated Supports" and "CMA with Accommodations" was noted in the IEP. However, Parents did not consent to the IEP Amendment.

#### APRIL 26, 2016 IEP AMENDMENT

20. Student struggled to retain new information that was presented, which necessitated the addition of extended school year services. On April 26, 2016, an IEP Amendment was developed to address the concern of regression over the summer. Parent and River Springs agreed that no IEP team meeting was required for the amendment. The IEP Amendment's extended school year worksheet stated that Student had been progressing in reading, but her ability to recoup in the areas of basic math and math reasoning was a concern. Student had great difficulty recalling what she had been previously taught in the area of math computation, specifically multiplication and division. The IEP was amended to include extended school year services to provide Student 60 minutes once a week of specialized academic instruction in a group setting from June 13, 2016, to July 15, 2016. Mother consented to the IEP Amendment on May 4, 2016.

21. At hearing, Mother testified that she repeatedly told Ms. Escalera and Ms. Gillette about her struggles to teach Student in the areas of math, reading, and writing. Ms. Escalera was providing Student with specialized academic instruction. Mother shared that Student was not making the progress Mother was hoping for. Ms. Gillette suggested Mother give it more time as Student was making progress. Ms. Gillette recommended the curriculum Student's younger brother was using. However, using the same curriculum as her younger brother was hard on Student, as Student's younger brother teased her about her inability to work at grade level. Mother also shared with Ms. Gillette that communicating with Student was difficult as Student yelled and screamed at her.

22. Mother testified that the specialized academic instruction for the 2015-2016 extended school year was limited to math. Ms. Escalera explained to her that math was the only area of concern identified for regression and one hour per week was all that would be provided. Ms. Escalera did not provide Mother with an explanation as to why more hours could not be provided. At hearing, Mother expressed her concern that one hour of instruction time was insufficient as Student required time to adjust once she got to the session, thereby limiting the actual amount of specialized academic instruction she actually received. During the extended school year of 2016, Student was provided three out of the four sessions of specialized academic instruction.

#### 2016-2017 SCHOOL YEAR: SIXTH GRADE

23. The 2016-2017 school year began on August 29, 2016. On September 4, 2016, Mother emailed River Springs inquiring who would be providing Student with specialized academic instruction as Ms. Escalera was no longer available to do so. On or about September 12, 2016, resource specialist program teacher Kristina Mason replaced Ms. Escalera and began instruction with Student.

24. In September 2016, River Springs administered two i-Ready diagnostic tests to Student in reading and math. Student's overall reading score was 502, placing her at a third grade level. The test concluded that Student had not acquired fundamental decoding skills and needed instruction in phonics. The testing also identified vocabulary as another area of concern. The i-Ready score indicated Student had gaps in grade-level word knowledge that needed to be addressed. For math, Student scored 423 overall, placing her at a second grade level. Student's math score demonstrated regression in math compared to her September 5, 2015 i-Ready math scores.

25. At hearing, Ms. Gillette testified that i-Ready math results demonstrating

regression was not a new concern at the time, as the concern was already there. Neither she nor anyone else from River Springs sought to revisit the December 4, 2015 IEP to evaluate whether the goals and services to address Student's math deficits remained appropriate, specifically whether Student required more weekly specialized academic instruction in the area of math.

26. On September 16, 2016, Mother emailed Ms. Gillette informing her that a math curriculum needed to be selected. Mother expressed that she felt there was no structure or consistency with math. In her email, Mother expressed the need for a math curriculum with structure, and guidance for Mother. During the 2016-2017 school year, Student was introduced to five different math curriculums. Mother and River Springs struggled to find an appropriate curriculum for Student. Ms. Gillette suggested Mother visit a "curriculum warehouse" containing various math curriculums to choose. At hearing, Mother explained she was not qualified to select an appropriate math curriculum.

27. Student became more resistant to instruction, refusing to leave the home and car to attend specialized academic instruction at the student center. Mother informed Ms. Gillette of the behaviors and Student's feeling that the specialized academic instruction was not helping. Student's behaviors towards Mother, siblings, and family friends worsened. However, the negative behaviors did not occur at the student center.

28. During September 2016, Ms. Mason provided Student five, 60-minute sessions of specialized academic instruction. However, Ms. Mason went out on maternity leave the following month. River Springs emailed Parents on October 23, 2016, informing them of Ms. Mason's maternity leave.

29. River Springs program specialist Sheri Kosmal testified at hearing. As a program specialist for three years, Ms. Kosmal was responsible for overseeing the

implementation of IEPs for River Springs students. Prior to becoming a program specialist, she was an education specialist and resource specialist program teacher. She possessed a multi-subject teaching credential and a special education mild/moderate teaching credential. One of Ms. Kosmal's primary responsibilities was to support Student's specialized academic instruction teachers. When Ms. Mason left on maternity leave, Ms. Kosmal took the lead in finding a new instructor for Student.

30. Parents obtained an evaluation from the Stowell Learning Center, which prepared a Functional Academic and Learning Skills Assessment report dated November 14, 2016.<sup>5</sup> Stowell's Educational Director, Jill Stowell, authored the report. The purpose of the assessment was to identify any weaknesses in Student's underlying learning skills or basic academic skills that impeded Student from learning and functioning as comfortably and independently as she could, and to determine the best course of action for improving or correcting these challenges. Mother intended to have Stowell Learning Center provide the make-up specialized academic instruction and to continue providing instruction until River Springs found a specialized academic instruction teacher for Student. Parents paid \$500 for the assessment. Parents did not request an academic assessment from River Springs or notify River Springs they would be seeking reimbursement from River Springs for the cost of the Stowell Learning Center assessment report.

31. Following Ms. Mason's departure, Parents hired Paul Eisenberg to assist them in advocating for Student's educational program. On November 9, 2016, Mr. Eisenberg emailed a letter to Dr. Cox, pointing out that Student had been without specialized academic instruction for eight weeks, amounting to 24 hours of

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<sup>5</sup> The Stowell Learning Center's November 14, 2016 Functional Academic and Learning Skills Assessment report was admitted for remedies purposes only.

compensatory services owed. Mr. Eisenberg requested that River Springs fund 24 hours of compensatory academic instruction to be provided by the Stowell Learning Center. Furthermore, the letter indicated Parents' disagreement with River Springs' December 2015 psychoeducational and academic assessments and requested independent educational evaluations in the areas of psychoeducation, speech, and occupational therapy.

32. On November 16, 2016, Dr. Cox emailed Parents and Mr. Eisenberg a letter stating that special education teacher Terry Owens had been assigned to provide Student with specialized academic instruction beginning November 28, 2016. River Springs acknowledged that Student did not receive specialized instruction from September 19, 2016, through November 18, 2016, a total of 27 hours over that nine-week span.

33. River Springs denied the request to fund compensatory education services through the Stowell Learning Center, as River Springs believed it had qualified staff to provide the compensatory education services. Dr. Cox explained in her letter that Ms. Owens was available to provide an additional one to two hours each week, until the end of the 2016-2017 school year, to make up the lost instruction time. River Springs agreed to fund independent educational evaluations in the areas of psychoeducation, speech, and occupational therapy. On November 28, 2016, Mr. Eisenberg emailed Dr. Cox a letter requesting that River Springs provide Parents logs to verify dates and times specialized academic instruction was provided for that school year.

34. On November 28, 2016, Ms. Owens emailed Parents introducing herself as Student's new resource specialist program teacher. Mother asked if the missed sessions for the past 10 weeks would be made up; Ms. Owens responded that by the end of the school year the missed time would be made up, with a little of the time made up each week.

35. On December 2, 2016, Dr. Cox sent Mother and Mr. Eisenberg service logs for the 2016-2017 school year. Dr. Cox calculated that Student had received only five out of 34 sessions of specialized academic to that point. The 29 missed sessions, at 60 minutes per session, amounted to 1,740 minutes.

#### JANUARY 12, 2017 ANNUAL IEP

36. The IEP team met on January 12 and March 23, 2017, to review Student's Annual IEP. Mother, Mr. Eisenberg, Dr. Cox, Ms. Gillette, Ms. Kosmal, and Ms. Owens attended both meetings. River Springs offered Parents a copy and an explanation of their procedural safeguards, which they declined.

37. The IEP team identified Student's strengths and interests. Vocabulary and comprehension of literature were areas of relative strength. Mother shared that Student could retain information when it was read to her, but had difficulty retaining the information when it was not. Student's auditory comprehension was an area of strength. Student had a good attitude even when things were difficult. Mother remained concerned about Student's delays in math, reading, writing, and spelling and shared that the lack of specialized academic instruction was taking a toll on Student's emotional state.

38. The IEP team reviewed Student's progress on the prior IEP annual goals. Student partially met two goals in reading fluency and reading comprehension. Student did not meet her goals in reading and writing irregular words, writing accuracy, math calculation, and math reasoning.

#### Present Levels of Academic and Functional Performance

39. Student enjoyed reading and discussing stories that interested her. She independently read and understood at a second- to third-grade level. She answered 10 out of 10 comprehension questions correctly when asked about what she read. Student

read slowly and sounded out words she did not know. Her reading fluency and rate was improving. However, Student only accurately gave key details and retold a story 60 percent of the time after independently reading a passage. According to her Lexile level of 570, her reading comprehension was only at a second- to third-grade level.<sup>6</sup> Furthermore, Student only read grade level passages at 80 to 85 correct words per minute, when 120 correct words per minute was typical for a sixth grader.

40. Student's writing lacked organization. She wrote run-on sentences with no punctuation when free writing. At the IEP team meeting, Mother shared that Student understood basic editing rules, but did not consistently apply them. Student could fill out a graphic organizer but was unable to translate the information to a complete paragraph. She had good ideas, but required support in putting her thoughts into detailed sentences.

41. Student performed basic addition and subtraction, identified greater, lesser, or equal values, and determined measurements. She identified and named the value of coins and dollar bills. However, Mother shared that Student could only identify and write place value up to three digits (hundreds) and did not understand place value beyond that. In addition, she could only multiply single digit numbers (up to four digits by one digit), with the use of auditory and visual supports. She did not know multiplication facts and required a multiplication chart. Student could not divide independently without the use of manipulatives. Student preferred not to use computers to complete math assignments. Mother explained to the IEP team that she did not understand how Student best learned in math.

42. Student was in good health. No concerns were noted regarding her

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<sup>6</sup> The Lexile was a numeric measure that indicated the level of reading comprehension and correlated to levels of text and curriculum materials.

communication or gross and fine motor development. She carried on conversations with adults and peers on various topics, and could make her wants and needs known. She had good penmanship and could run, jump, and kick and catch a moving ball. Student was organized and cared for her own personal needs.

43. At the IEP team meeting, Mother shared that Student was respectful to adults and peers at school, but disrespectful to her family in the home. Mother explained that Student was physically and verbally aggressive to family and close family friends. However, Student displayed no frustration or anger while playing tennis or riding horses. Student interacted with her peers appropriately, was social in class, and kind and polite to her peers. She followed classroom rules. The IEP team identified Student's areas of need to be in basic reading fluency, independent reading comprehension, math, writing, language processing, and spelling.

#### Annual Goals

44. The January 12, 2017 IEP offered seven annual goals; three in the area of reading, three in mathematics, and one in writing. The first reading goal addressed comprehension. The annual goal for Student was to read an article, answer quiz questions, and cite evidence from the text when given a grade-level non-fiction article of a current event at a Lexile level of 950 or higher. Student needed to complete the task with 80 percent accuracy to meet the goal. The special education and general education teachers were responsible for this goal, measuring progress using data collected and reviewing Student's work.

45. The second reading goal focused on comprehension of a fictional passage. The annual goal had Student read a fictional passage, answer comprehension questions, and cite evidence from a grade-level passage at a Lexile level of 950 or higher. Student had to be 80 percent accurate to meet the goal. The special education and general education teachers were responsible for overseeing this goal, measuring progress using

data collected by the teachers and reviewing Student's work.

46. The third reading goal addressed fluency. The annual goal sought to improve Student's fluency using a sixth-grade level Dynamic Indicators of Basic Early Literacy Skills (DIBELS) assessment, with a goal to reach a level of at least 110 correct words per minute. The goal sought to improve her fluency a minimum of three words per minute each month. The responsible people for this goal were the parent, education specialist, and resource specialist program teacher. Observations and teacher charted data were used to measure progress.

47. The writing goal required Student to successfully fill out a graphic organizer and write an explanatory paragraph with at least five sentences that included an opening sentence, supporting sentences, and a conclusion, using correct capitalization and punctuation. She would receive instruction on how to complete the graphic organizer. Student had to be 70 percent accurate in four out of five trials, measured by work samples or curriculum-based assessments to meet the goal. The special education and general education teachers were responsible for overseeing this goal, measuring progress using data collected through observations and teacher charts.

48. The first math goal addressed multiplication to improve Student's ability to solve problems involving multiplication of multi-digit numbers up to three digits with regrouping. Student would be provided visual supports. Student had to correctly solve the problems with at least 70 percent accuracy in three out of five trials to meet the goal. The special education and general education teachers were responsible for overseeing this goal, measuring progress using teacher-made tests, chapter tests, and reviewing Student's work samples.

49. The second math goal focused on computation. Student had to use place value understanding and properties of operations to perform multi-digit arithmetic and solve 20 multi-digit problems involving a combination of operations, with 80 percent

accuracy in four out of five opportunities. The goal was measured through teacher observation and student work samples. The IEP offered two benchmark goals; the first benchmark called for Student to perform the task with 65 percent accuracy when given 10 multi-digit problems by May 12, 2017. The second benchmark sought 70 percent accuracy when given 10 multi-digit problems by November 12, 2017.

50. The third math goal centered on Student's understanding of money. The goal called for Student to demonstrate her understanding by adding dollar value items and demonstrate an understanding of "dollar up" strategy, such as paying \$4.75 with a five dollar bill. She was expected to correctly demonstrate this on four opportunities. The goal was measured through teacher observations and data collected by the special education and general education teachers.

#### Placement, Accommodations, and Services

51. Parents opted for Student to continue in the Homeschool program. The IEP offered 90 minutes twice a week of individual specialized academic instruction during the regular school year. For the extended school year, the IEP offered 60 minutes once a week of specialized academic instruction. The instruction would take place at a River Springs location. Collaboration between the specialized academic instruction teacher and educational specialist would occur monthly for 15 minutes. Either the teacher or a parent could read materials aloud to Student, or she could use audio books as needed. The use of visuals, graphic organizers, multiplication tables, and notes, among other things, were to be used to support instruction as needed. Demonstration of understanding of skills via multi-modalities was available as needed. Furthermore, consultation between the specialized academic instruction teacher and the parent would occur twice a month for 15 minutes at a time.

52. At the conclusion of the IEP team meeting on March 23, 2017, River Springs provided Mother with a copy of the proposed IEP for her review. Mother

consented to the IEP on April 5, 2017, initialing her agreement to all parts of the IEP.

#### SPECIALIZED ACADEMIC INSTRUCTION IN THE SPRING OF 2017

53. On February 2, 2017, Mother emailed Dr. Cox expressing concern about the quality of instruction Student received from Ms. Owens. Mother shared that she learned that all of the hours provided by Ms. Owens was spent either playing the game Scrabble for the entire duration or having Student read a book of her choice to Ms. Owens for the entire duration.

54. On February 2, 2017, River Springs emailed Parents informing them that Ms. Owens was unexpectedly unavailable to provide further services. River Springs was actively searching for a qualified teacher and any missed services would be made up in accordance with Student's IEP. The next day, Dr. Cox emailed a letter to Parents regarding the status of specialized academic instruction. Dr. Cox explained she did not have enough facts to ascertain whether some or all of the specialized academic instruction had been provided that school year. Regardless, Dr. Cox explained that River Springs would agree to provide hour-for-hour make-up sessions from the first day of the 2016-2017 school year, even though Student may have received some instruction that school year. Dr. Cox also explained that River Springs was vetting teachers to hire or contract with through a nonpublic agency to provide the make-up specialized academic instruction hours.

55. On February 15, 2017, Mother emailed Dr. Cox following up on her February 2, 2017 email requesting copies of all logs completed by Ms. Owens regarding the instruction she provided Student, the number of hours owed to Student as determined through Dr. Cox's investigation into the specialized academic instruction hours provided to Student, and the status of nonpublic agency instruction to be hired to provide the make-up specialized academic instruction. Dr. Cox responded to Mother by email on February 21, 2017, informing her that Ms. Owens did not maintain service logs,

and that River Springs would provide specialized academic instruction from the beginning of the 2016-2017 school year, equivalent to the amount of hours Student would have received regardless of whether or not Student was provided specialized academic instruction. However, no persuasive evidence was offered to establish that Ms. Owens was required to create and maintain the service logs Parents sought or that River Springs was required to maintain such logs as part of Student's school records.

56. On February 23, 2017, Parents received an email prepared by Dr. Cox regarding the status of Student's specialized academic instruction. Dr. Cox expressed concern that Student did not receive the specialized academic instruction as called for in her IEP. Dr. Cox explained that though Student may have received some specialized academic instruction during the 2016-2107 school year, River Springs offered to provide hour-for-hour make-up sessions to Student for the total time that she was to receive specialized instruction from the start of the school year through March 6, 2017, excluding the Thanksgiving and winter breaks. Dr. Cox calculated that school had been in session for 24 weeks to that point, and Student was to receive 180 minutes per week. Accordingly, Dr. Cox offered to provide Student 72 hours of specialized academic instruction to make up lost instruction time for the school year. The make-up instruction would be available before, during, and after school hours, as well as during the summer of 2017.

57. River Springs special education teacher Teresa Moran testified at hearing. Ms. Moran had been employed by River Springs for 16 years, the first 14 years as an education specialist and the last two years as a special education teacher. Ms. Moran was a credentialed special education teacher since 1980.

58. Ms. Moran began providing Student specialized academic instruction on March 6, 2017. On a few occasions, Tanya Croom provided instruction to Student. Ms. Croom's qualifications were not clarified at hearing. Ms. Moran described Ms. Croom as

more than an instructional aide, but not a teacher. Ms. Croom used the lesson plans prepared by Ms. Moran. The amount of instruction Ms. Croom provided was not documented. Ms. Moran recorded Student's attendance and collected work samples. Her notes, as well as Ms. Croom's, were used to complete a River Springs progress report. That report was submitted to River Springs' special education department. However, their notes and the works samples they collected remained in Ms. Moran's possession and were not provided to River Springs.

59. The instruction Ms. Moran provided Student was generally allocated one hour for English language arts and 30 minutes for math for each 90-minute session. She did not use a specific math curriculum. For reading, she began with the REWARDS program for Student, but stopped using the program after one month. Student did not possess the reading skills to benefit from the REWARDS program. Ms. Moran switched to another curriculum to work on fundamental reading skills. During her time with Student, she explained that Student was reading at a third grade level, and with support could read fourth grade and some fifth grade level passages. Ms. Moran had no concerns regarding Student's fine motor skills, attention to task, and conversational skills. Student communicated with her in an age-appropriate manner.

## INDEPENDENT EDUCATIONAL EVALUATIONS

### Independent Psychoeducational Evaluation

60. Perry Passaro, Ph.D. was licensed in clinical psychology and educational psychology. At the time of hearing, his practice consisted of providing cognitive behavioral therapy and conducting independent educational evaluations. Dr. Passaro testified at hearing, and though his testimony was internally consistent, his responses conflicted with more credible testimony and evidence, which diminished the persuasiveness of his testimony and written opinions.

61. Dr. Passaro and his daughter Claire Passaro, an educational specialist, conducted an independent psychoeducational evaluation of Student at the request of Parents. Dr. Passaro authored a psychoeducational assessment report dated April 28, 2017. Jamie Lesser, Ph.D., a licensed psychologist, observed Student in her writing class at River Springs for one hour on March 28, 2017. The purpose of the evaluation was to determine Student's developmental levels, identify her unique needs, and provide recommendations to address her needs, including the appropriateness of the services and placement offered by River Springs. Student was tested on four occasions from February 17, 2017, to March 6, 2017.

62. Mother provided input and described Student as emotional, argumentative, and difficult. Student at times showed intense highs of energy, followed by periods of sadness or depression. Mother opined that Student's social interaction skills were typical for a girl her age. Student was often angry with her siblings and was verbally and physically aggressive towards them. Mother observed behaviors consistent with obsessive compulsive disorders, which had worsened the past several months before Dr. Passaro's assessment. Mother further shared that Student was easily distracted and had difficulty sustaining attention to tasks or play activities. Student did not seem to listen when spoken to directly and she often avoided and disliked engaging in difficult tasks.

63. Ms. Gillette also provided input into the evaluation. Ms. Gillette opined that Student needed more one-to-one attention based on her observations during the previous month. Student completed less assignments compared to students her age. Ms. Gillette described Student as being extremely attentive to details regarding her school assignments, and Ms. Gillette believed this occasionally interfered with Student's classroom performance. She shared that Student typically listened when spoken to directly, remembered what she was asked to do, followed instructions, and finished her work.

64. Ms. Gillette rated Student's listening comprehension as advanced and oral expression as average. She also rated her levels of reading skills and comprehension, and mathematics calculation and reasoning as limited. In addition, Ms. Gillette rated Student's basic writing skills and written expression as limited. At the time, Student was receiving fourth grade level math calculation and reasoning instruction, third grade level basic reading skills and comprehension instruction, and second grade level basic writing skills and written expression instruction. Dr. Passaro diagnosed Student with autism spectrum disorder, depressive disorder, attention deficit hyperactivity disorder, oppositional defiant disorder, social phobia (social anxiety disorder), obsessive compulsive disorder, and a learning disorder in reading, mathematics, and written expression.

65. Dr. Passaro's report recommended, among other things, that Student be placed in a highly structured and individualized learning environment and provided support in the acquisition of basic academics. Dr. Passaro opined an instructional format of a very small group of no more than four students was the most appropriate intervention for instruction in reading, mathematics, and writing. Dr. Passaro recommended direct pull-out instruction for one hour each day in each area of academic need, totaling three hours of daily pull-out services. He proposed annual goals in the areas of reading, written language, mathematics, and social emotional functioning. Furthermore, Dr. Passaro recommended Student receive a speech and language evaluation and participate in speech and language therapy at least one hour a week to focus on pragmatic skills.

66. At hearing, Dr. Passaro opined that the increased intensive intervention of specialized academic instruction minutes individually or in a small group was necessary to meet the January 12, 2017 IEP's proposed academic goals. He opined that 180

minutes a week was not enough to close the gap considering how far behind Student was academically. Dr. Passaro also criticized the goals, accommodations, and services offered in the December 4, 2015 IEP as inadequate and failing to address all areas of Student's need, basing his opinion on his findings along with the findings of Drs. Britt and Libert.

#### Independent Speech and Language Evaluation

67. Brock Tropea was the owner and clinical director of Stepping Stones Therapy, Inc., a nonpublic agency. Mr. Tropea had been a speech-language pathologist for 17 years. He was licensed by the Speech-Language Pathology and Audiology Board of California, possessed a Professional Clear Clinical and Rehabilitative Services credential and a Certification of Clinical Competence by the American Speech-Language- Hearing Association.

68. Mr. Tropea conducted an independent speech and language evaluation of Student at Parents' request. The testing took place on February 5 and 26, 2017. Mr. Tropea administered the Oral and Written Language Scale, Second Edition assessment tool to assess Student's receptive and expressive language. It measured lexical (vocabulary), syntactic (grammar), and pragmatic (function) structures of oral language in addition to those requiring higher-order thinking (supralinguistics). In the listening comprehension subtest, Student scored an 84, placing her in the below average range compared to same-aged peers. Student scored higher in oral expression, in the average range.

69. Mr. Tropea administered the Test of Narrative Language to measure Student's ability to tell stories using various levels of picture support. Mr. Tropea opined that Student's overall language skills ranged between below average to average compared to same-aged peers. Student displayed the ability to use words and construct sentences of adequate length to convey a message. She struggled with the ability to

include the context of the message in most of her responses; the meaning of the essential component was not present.

70. Regarding pragmatics, Mother and Father completed the Social Skills Improvement System Rating Scales to evaluate Student's ability to effectively and appropriately use communication in relation to varying social and situational contexts, intent, and conversational rules. Parents rated Student in the average range in communication, assertion, responsibility, empathy, engagement, and self-control. Parents rated Student below average in cooperation. Their overall rating scales placed Student in the average range.

71. Mr. Tropea examined Student's expressive and receptive language abilities. Student scored below average in expressive and receptive vocabulary skills. Mr. Tropea opined that Student was slightly below average in expressive and receptive language, as well as semantics. Student's social and critical thinking skills were in the average range compared to same-aged peers. Narrative recall was also a deficit. At hearing Mr. Tropea explained that Student could answer questions adequately when told a story, but struggled to repeat/retell the story.

72. Mr. Tropea determined that Student did not meet the legal criteria for special education eligibility as a student who was speech and language impaired. However, Mr. Tropea opined Student could still benefit from speech and language therapy once a week for 60 minutes individually or in small group to focus on improving her expressive language and pragmatic/social skills. Mr. Tropea proposed four goals in his assessment report.

#### Independent Occupational Therapy Assessment

73. Richard Furbush was an occupational therapist since 1996 who conducted independent educational evaluations in the area of occupational therapy. Mr. Furbush conducted an independent occupational therapy assessment of Student and prepared

an assessment report. Student was assessed in one, three-hour session in a quiet clinical setting. Student was cooperative and diligent in her attempts to provide accurate and skilled responses to the assessment items. Mr. Furbush reviewed Dr. Britt's 2011 Neuropsychological Report, Dr. Libert's 2015 Neuropsychological Report, the December 4, 2015 IEP, and the December 2015 River Springs psychoeducational and academic assessment reports.

74. Mr. Furbush administered the Sensory Integration and Praxis Test. The Sensory Integration and Praxis Test provided a performance-based standardized assessment of sensory processing. The test evaluated areas of sensory and motor performance that may affect a person's ability to perform structured academic and related tasks in school. It provided insight into why some children have difficulty learning or behaving as expected.

75. The results of the Sensory Integration and Praxis Test demonstrated that praxis and visual skills were areas of strength for Student. Praxis is a person's ability to figure out how to use their hands and body in skilled tasks like playing with toys, using a pencil or fork, building a structure, straightening up a room, or engaging in many occupations. The results did show that Student had difficulty sustaining visual attention. Student demonstrated poor tactile perceptual functioning as well as vestibular/postural concerns. Mr. Furbush opined that tactile perceptual processing difficulties may lead to difficulties with emotional regulation. Testing results identified visual-motor skills as an area of need.

76. Mr. Furbush also found Student's grasp inconsistent during the assessment. Her writing pressure varied, and at times her writing was difficult to read as she wrote with decreased pressure, making the letters light. Her writing was legible; however, her writing speed was below age expectations. Mr. Furbush opined that this would impact her productivity.

77. The Sensory Processing Measure was a standardized questionnaire that provided information on sensory responsiveness, social participation, and planning. Mother completed the "Home" version. Her responses rated Student as "typical" in the areas of social participation, vision, body awareness, balance and motion, and planning and ideas, signifying those areas were not areas of concerns. "Hearing" was rated as an area of definite dysfunction and "touch" as an area of some problems. Student was frequently bothered by ordinary household sounds and responded negatively to loud noise by running away or covering her ears with her hands. She did not like the feel of new clothes, was bothered when someone touched her face, and had difficulty finding things in her backpack or purse through her sense of touch.

78. Mr. Furbush identified the following areas of need: speed of written work/productivity, visual motor accuracy and precision, emotional regulation, visual attention, sustaining attention to tasks, laterality concerns, tactile perceptual functioning, sensory sensitivities, vestibular/postural concerns, adaptive skills performance, and executive functions. Mr. Furbush opined these areas of need impacted her success and performance skills in her academic functioning.

79. Mr. Furbush recommended Student receive 60 minutes a week of direct one-to-one occupational therapy services for six months, at which time she should be re-evaluated to assess progress. In addition to direct services, Mr. Furbush recommended 30 minutes a week of collaboration between an occupational therapist and Student's educational staff to develop and implement accommodations and adaptations to support her learning.

80. Mr. Furbush proposed goals for the IEP team's consideration. Among the proposed goals was for Student to self-identify sensory strategies that increased her level of alertness and helped her sustain her attention to task and regulate her emotions.

81. At hearing, Mr. Furbush opined that Student likely presented during the 2015-2016 school year with many of the deficits he identified. He thought Student should have received occupational therapy services at that time. However, Mr. Furbush referenced only Dr. Britt's 2011 neuropsychological report to support his opinion.

82. On or about March 2017, River Springs occupational therapist Mr. Whigham observed Student in a classroom at River Springs' student center. He was advised that he could potentially be providing occupational therapy services to Student. Student was hand writing during the observation. His observation lasted approximately 10 minutes. Mr. Whigham explained at hearing that he was paying attention to Student's grasp of the pencil, whether Student used her non-dominant hand to stabilize the paper, her seated posture, any signs of discomfort, sensory deficits, movements, and Student's ability to maintain a sedentary task. He did not observe any occupational therapy concerns warranting a formal occupational therapy assessment.

#### APRIL 28, 2017 IEP AMENDMENT

83. On April 28, 2017, the IEP team convened to review the independent educational evaluations. Parents, Mr. Eisenberg, Dr. Cox, Ms. Gillette, Ms. Kosmal, Ms. Miller, Mr. Whigham, Ms. Moran, and school psychologist Eric Beam attended in person. Dr. Passaro, Mr. Tropea, and Mr. Furbush attended by phone.

84. Dr. Passaro shared his psychoeducational assessment report. At the meeting, he opined that Student was in the average range of cognitive functioning but demonstrated deficits in attention and visual motor processing. Student also demonstrated deficits that indicated a learning disorder in reading, writing, and mathematics. Dr. Passaro recommended a highly structured and individualized learning environment for one hour of daily intensive intervention in the each of the following areas: reading, writing, and math. Dr. Passaro opined that Student's grade-level equivalencies were significantly below grade level at the time.

85. Mr. Tropea presented his speech and language assessment report. Mr. Tropea shared at the meeting that Student did not meet eligibility criteria for a speech and language impairment. He opined that Student demonstrated deficits in the areas of speech and language warranting services of 60 minutes per week to address the areas of expressive language skills and to improve her pragmatic and social language skills.

86. Mr. Furbush shared his occupational therapy assessment report. Mr. Furbush recommended direct and collaborative services to address sensory integration, vestibular, and tactile issues. He opined that Student required access to appropriate equipment to support her movement needs.

87. At the meeting, Ms. Moran opined that Student was making progress but struggled with reading higher-level passages. Student had shown some improvement in her engagement and anxiety. Mother disclosed that Student did not like attending specialized academic instruction services because Student did not find it helpful, and was embarrassed about attending school because of her struggles. Mother stated that Student resisted going to school on days she knew difficult assignments would be covered. Mother shared that Student participated in social activities outside of the home. Mother expressed her concerns that Student's social anxiety stemmed from being with other students with disabilities. Mr. Eisenberg proposed Student be placed at Prentice.

88. River Springs amended the January 12, 2017 IEP to offer placement at a nonpublic school for the 2017-2018 school year to include therapeutic mental health services 50 minutes per week, speech and language services for 60 minutes per week, and occupational therapy services for 60 minutes per week. Mental health services would begin with individual therapy once a provider was identified. Ms. Miller and Mr. Whigham would develop goals in the areas of speech and occupational therapy for the IEP team to consider and approve. Dr. Cox would provide Parents with a list of

nonpublic school to consider and an IEP team meeting would be convened to include staff of the selected nonpublic school to finalize the placement. Dr. Cox testified that River Springs' decision to offer placement at a nonpublic school was based on Dr. Passaro's recommendation to place Student in a more therapeutic setting.

89. On April 28, 2017, River Springs mailed to Parents a form to complete to confirm Student's attendance for extended school year services from June 14, 2017, to July 21, 2017. The form indicated Student would receive one, 60-minute specialized academic instruction session weekly. On May 5, 2017, Mother signed the form indicating Student would be attending the extended school year for specialized academic instruction.

#### MAY 12, 2017 IEP AMENDMENT AND PRIOR WRITTEN NOTICE

90. On May 12, 2017, an IEP Amendment was developed without a meeting as agreed upon by River Springs and Parents. A Prior Written Notice regarding Parents' nonpublic school request and the request for a lump sum payment for compensatory education services was incorporated in the IEP Amendment document. The IEP Amendment added four additional goals in the areas of speech and language and one additional goal in the area of sensory integration. All four speech and language goals were consistent with the goals proposed by Mr. Tropea in his independent speech and language evaluation.

91. A speech-language pathologist was responsible for all four speech and language goals. Each goal was measured through observations and data collection. Student had to successfully accomplish each task in four out of five opportunities over three sessions.

92. The first two speech and language goals addressed pragmatics. No baseline information was provided for the first pragmatics goal. The goal called for Student to interpret and describe the meaning of body language and facial expression

of a person or tell what a person may be feeling when presented with a picture or video prompt. The second pragmatics goal noted a 'interpersonal negotiations standard score of 76,' as a baseline. Student had to identify a problem and brainstorm two appropriate solutions to the given problem when presented with a social situation.

93. The third speech and language goal addressed expression. No baseline was given for the goal. Student had to correctly sequence a short narrative giving six to eight details when presented with a picture.

94. The fourth speech and language goal addressed both pragmatics and expression. No baseline for the goal was identified. As an annual goal, Student was expected to improve her conversational speech by demonstrating the ability to make three comments and/or three on-topic follow-up questions to a pre-selected topic.

95. Student had one goal to address sensory integration. The IEP Amendment did not provide a baseline. The goal called for Student to utilize sensory strategies that increased her level of alertness and allowed her to sustain attention to task with fewer than three prompts in two out of three trials. The occupational therapist was responsible for the goal, but the IEP Amendment did not identify how the goal was to be measured.

96. The May 12, 2017 IEP Amendment did not modify the supplemental aids, services, or other supports offered in the January 2017 IEP. As for special education and related services, the May 12, 2017 IEP Amendment offered 314 minutes of daily specialized academic instruction in a group setting to be provided at a nonpublic school from June 14, 2017, to January 12, 2018. The IEP Amendment also offered related services at a nonpublic school consisting of individual counseling 30 minutes weekly, weekly speech and language services once for 60 minutes, and 60 minutes of occupational therapy services once a week. The IEP Amendment offered those services to begin on June 14, 2017, and to end on January 12, 2018. The IEP Amendment offered transportation services between Student's home and the nonpublic school twice a day

for 30 minutes each way for a total of 60 minutes daily, to begin on July 5, 2017, and to end on January 12, 2018.

97. The May 12, 2017 IEP Amendment also offered individual specialized academic instruction twice a week for 90 minutes a session to be provided at River Springs' facilities from January 12, 2017, to June 13, 2017. Individual counseling once per week for 50 minutes was offered at a location to be determined once a specific provider and intervention was determined.

98. The May 12, 2017 IEP Amendment offered extended school year services that began on July 5, 2017, and ended on August 1, 2017. The academic instruction and related services would be provided by a nonpublic school. The IEP Amendment offered 314 minutes of specialized academic instruction each day, 60 minutes of weekly speech and language services, 60 minutes of weekly occupational therapy services, 30 minutes of weekly individual counseling, and transportation from Student's home to the nonpublic school twice a day for a total of 60 minutes.

99. The May 12, 2017 IEP Amendment's Prior Written Notice section indicated River Springs' proposal to place student at Somerset Educational Services, a nonpublic school in Riverside, California. River Springs proposed Student begin at Somerset at the start of the extended school year on July 5, 2017. An IEP team meeting would be held with Somerset staff prior to the start of the extended school year, and would be scheduled once Parents consented to the IEP Amendment. River Springs also offered to coordinate a visit of Somerset for Parents if Parents requested to do so. Parents did not consent to the May 12, 2017 IEP Amendment.

100. On May 15, 2017, Mother emailed Ms. Moran requesting Ms. Moran provide all logs she and Ms. Croom completed for each day they instructed Student. Ms. Moran replied the next day seeking clarification as to whether Mother was requesting a record of Student's attendance, notes, and/or copies of Student's work.

101. On May 31, 2017, Mother emailed Prentice's admission office. Mother shared Student "only exhibits minimal behavioral issues and those are ONLY present at home when she gets frustrated. Those have never been exhibited in public or at school."

#### JUNE 10, 2017 PROGRESS REPORTS

102. On June 10, 2017, Ms. Moran provided a written summary of Student's progress toward her annual academic goals. In the non-fiction reading comprehension goal, Student read Newsela<sup>7</sup> passages at various Lexile levels ranging from 450 to 1,030, or second to seventh grade level. Student required support when reading higher level passages, but was able to discuss the story, provide main ideas and details, and answer quizzes with 80 percent accuracy. Student's improved reading allowed her to read higher level passages. In addition, Student silently read fifth grade passages and answered comprehension questions with 100 percent accuracy, which demonstrated improvement in reading comprehension as Student was only reading at a second to third grade level based on her Lexile level five months earlier.

103. Student's reading fluency also improved. In March 2017, she read 57 correct words per minute on a DIBELS Grade Six Benchmark. Reading the same passage later that month, she read 85 correct words per minute. On June 9, 2017, Student read 93 correct words per minute using a different passage. At hearing, Ms. Moran opined that by June 10, 2017, Student had progressed from her January 12, 2017 IEP baseline of 80 to 85 correct words per minute.

104. By June 10, 2017, Student had nearly mastered identifying and naming the value of coins and dollar bills. However, Ms. Moran's progress summaries for the remaining math goals addressing multiplication and computation reflected no progress.

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<sup>7</sup> Newsela was a collection of articles regarding current events.

105. On June 11, 2017, Mr. Eisenberg emailed a letter to Dr. Cox in response to River Springs' Prior Written Notice. After touring Somerset, Parents did not believe Somerset was an appropriate placement for Student. Mr. Eisenberg noted that Student did not require an educational program that focused on emotional, behavioral, or social skills development. Mr. Eisenberg pointed out that Dr. Passaro's recommendations all centered on academic remediation being the primary focus. Mr. Eisenberg opined that Somerset's program focused on students who had significant emotional and behavioral needs, "neither of which are primary for [Student]." Parents also toured Prentice. Student was accepted into the program and Parents believed Prentice offered the best possible opportunity for Student to succeed. Mr. Eisenberg requested that River Springs fund Student's placement at Prentice to begin over the summer, including funding for transportation. In addition, Mr. Eisenberg renewed Parents' request for a lump sum payment for compensatory education services to allow Parents more flexibility in choosing a program. Finally, Mr. Eisenberg proposed River Springs and Parents participate in an informal dispute resolution or mediation to work out their differences.

106. On June 23, 2017, Mother informed Dr. Cox by email that Student would not be attending extended school year that summer. Mother explained that a new instructor would not have sufficient time to familiarize herself with Student, Student's IEP, and the work that was done over the school year. Mother opined that the four hours of specialized academic instruction over the extended school year would be consumed with the new instructor familiarizing themselves with Student and her program, essentially denying Student any meaningful instruction.

107. On July 19, 2017, Dr. Cox emailed a letter to Parents and Mr. Eisenberg in response to Mr. Eisenberg's June 11, 2017 letter. River Springs did not agree to fund an educational program at Prentice based on River Springs' understanding that Prentice could not provide the necessary behavior interventions and counseling services to

address Student's behavioral needs. Additionally, Dr. Cox stated that not all classes at Prentice were taught by a credentialed teacher able to provide specialized academic instruction and that only some of the teachers had special education credentials. The letter also noted the potential impact on Student of the distance from Student's home in Riverside County to North Tustin.

108. In the July 19, 2017 letter, River Springs denied the request for a lump sum payment to cover the 72 hours of compensatory specialized academic instruction. River Springs reiterated its offer to fund 72 hours of supplemental instruction by a provider of Parents' choosing.

109. On July 28, 2017, River Springs provided Parents a Notice of Meeting, Individualized Education Program for a proposed meeting date of August 4, 2017. The Notice checked the purpose box of the meeting as "Other" indicating "Alternative Dispute Resolution (ADR): The ADR meeting is NOT an IEP meeting. ADR offers the opportunity to resolve disputes collaboratively. All components of the ADR are confidential." Mother signed the Notice of Meeting on July 29, 2017.

#### AUGUST 4, 2017 IEP AMENDMENT

110. On August 4, 2017, River Springs developed an amendment to the January 12, 2017 IEP based on the discussions that took place in an alternative dispute resolution meeting. The IEP was amended to reflect placement at Prentice as a nonpublic school for the first semester of the 2017-2018 school year. The following services would be provided at Prentice: three hours weekly of push-in specialized academic instruction to be provided by a credentialed special education teacher; 60 minutes weekly of individual speech and language services; 60 minutes weekly of individual occupational therapy services; and 30 minutes weekly of individual counseling services. In addition, River Springs would reimburse Parents for transportation of Student to and from Prentice in lieu of transportation being provided by River Springs.

No changes were made to the IEP goals at the time.

111. Prentice was a California certified nonpublic school staffed with credentialed general and special education teachers, a full-time school psychologist, two full-time speech-language pathologists, one full-time speech-language pathologist assistant, a full-time education technology specialist, and a part-time occupational therapist. Prentice offered small group instruction, with a focus on serving students with low to average IQs, with language-based learning disabilities.

112. The August 4, 2017 IEP Amendment also called for the IEP team to meet within 30 days of the start of the school year and to review Student's progress at the January 12, 2018 Annual IEP team meeting. At the Annual IEP team meeting, the IEP team would determine if services should continue and/or if any changes were necessary. The Amendment noted that River Springs was not offering Prentice as the specified school for purposes of stay put. The Amendment also indicated that continued placement at Prentice was contingent on whether or not Student was making sufficient progress based on her unique needs as indicated on the data provided. River Springs continued to offer Parents 72 hours of compensatory educational services to be provided by a provider of Parents' choice. On August 4, 2017, Parents consented to the August 4, 2017 IEP Amendment.

113. On August 22, 2017, River Springs and Prentice entered into a Service Vendor Agreement for Prentice to provide educational services to Student only for the first semester of the 2017-2018 school year. River Springs agreed to fund Prentice for the fall semester starting on August 24, 2017, and ending on January 26, 2018, in the amount of \$11,250. River Springs agreed to pay Prentice to provide specially designed instruction for three hours weekly at \$75 per hour, counseling and guidance services for 30 minutes per week at \$63 per hour, language and speech development and remediation for one hour each week at \$63 per hour, and occupational therapy services

for one hour each week at \$60 per hour.

#### 2017-2018 SCHOOL YEAR: SEVENTH GRADE

114. Prentice's Director of Program and Nonpublic School Coordinator Sabrina Clark testified at hearing. Ms. Clark oversaw all the programs at Prentice. She was responsible for ensuring proper implementation of IEPs. She possessed a clear multi-subject credential and special education mild/moderate credential.

115. On August 31, 2017, Prentice administered an i-Ready diagnostic test in reading. Student's overall score of 534 placed her at a third grade level. Though this was an improvement from her August 2016 i-Ready reading score of 502, Student was now four grade levels behind in reading at the start of her seventh grade year.

116. Cindy Shaw was a junior high math teacher and the head of Prentice's math department. She was credentialed in special education with over 21 years of teaching experience. During the 2017-2018 school year, she was a math resource specialist providing supplemental math instruction for students in the elementary and junior high grades. She provided push-in instruction in the general education classroom, as well as outside on a pull-out model.

117. Linda Nguyen was Student's math teacher for the first semester of the 2017-2018 school year. At the start of the school year, Ms. Nguyen used a seventh grade level common core math curriculum with Student. Ms. Nguyen used scaffolding to help Student, and took time during class to provide one-to-one instruction to her. In addition, Ms. Shaw came into the classroom to provide support to Student. However, Student struggled in math, and Prentice decided to lower the grade level of her math instruction. On September 5, 2017, Student was administered an i-Ready diagnostic test in math and scored a 415, which placed her at a second grade level.

118. During the first semester, Student was provided extra math support to learn concepts that Student had not yet mastered. Ms. Shaw came into Student's math

class twice a week to provide additional support to Student. On two different days a week, Ms. Shaw supported Student outside the general education classroom at the end of the school day to help Student understand her homework and review concepts.

119. During the second semester of the 2017-2018 school year, Student received math instruction solely from Ms. Shaw on a pull-out basis. Ms. Shaw provided math instruction in small groups of two to three students, and at times five students.

120. During the 2017-2018 school year, Prentice did not have a credentialed special education teacher to provide specialized academic instruction to Student in the area of English language arts. Furthermore, the English language arts teacher for junior high that year was not available to provide specialized academic instruction. Instead, Student was taught English language arts in the general education classroom. Ms. Clark testified that the assessments conducted by Prentice indicated that Student's greatest area of academic need was in math, and therefore Prentice and Parents decided to dedicate the entire 180 minutes a week of specialized academic instruction as called for in the vendor agreement to the area of math only. Ms. Clark testified that the vendor agreement did not specify what academic areas were to be addressed through specialized instruction.

#### OCTOBER 6, 2017 IEP AMENDMENT

121. On October 6, 2017, River Springs held an IEP team meeting to review Student's progress at Prentice. Mother, Mr. Eisenberg, Dr. Cox, Ms. Kosmal, Ms. Clark, River Springs school psychologist Jeremy Warren, Ph.D., Prentice school psychologist Steve Barnes, and Prentice general education teacher Michelle Garner attended.

122. Mother and Prentice staff indicated no changes to the IEP were needed regarding Student's strengths and preferences. Mother's previous concerns remained, with a renewed emphasis on Student's struggles in math.

123. The IEP team reviewed Student's progress in the areas of reading, writing,

and math. A comparison of Student's i-Ready reading scores from August 2016 to September 2017 demonstrated progress. At the time of the meeting, Student was reading 65 words per minute with 95 percent accuracy, which reflected a fifth grade reading level. For math, Student demonstrated second grade level skills based on i-Ready scores obtained by River Springs in August 2016 and Prentice in September 2017. Her overall math score dropped from August 2016 to September 2017. As for writing, Student could express her point of view and purpose throughout her writing. She continued to work on improving capitalization, punctuation, word usage, and paragraphing. She benefited from the use of a graphic organizer to organize her thoughts and to add details to her writing.

124. Behaviorally, Student was doing well. Mr. Barnes expressed no concerns regarding Student's behavior at Prentice. When asked if there were any indications in the classroom that Student had any school work-related anxiety, Mr. Barnes shared that most of Student's anxiety stemmed from her tendencies to be meticulous and perfect with her assignments. Mother shared that Student had difficulty expressing her frustration at home. Student had outbursts, often targeting Mother and her sister. Mother shared that Student's behaviors diminished over the summer break, with less stressors without school.

125. As to the IEP goals, the IEP team agreed to change one of the goals to a general reading fluency goal and to amend the speech and language goals by adopting the speech and language goals proposed by Prentice's speech-language pathologist. Parents did not consent to the IEP Amendment.

#### NOVEMBER 7, 2017 IEP AMENDMENT

126. The IEP team reconvened telephonically on November 7, 2017, to amend the IEP. The IEP team agreed to modify Student's speech and language services from individual to group sessions. The IEP was amended to provide two, 45-minute speech

and language group sessions each week. Parents did not consent to the IEP Amendment.

#### PREPARATION FOR THE ANNUAL IEP REVIEW

127. Since River Springs was not providing direct services to Student, it was River Springs' standard practice to collect information from teachers and service providers to prepare for an annual IEP. Accordingly, on December 13, 2017, Ms. Kosmal emailed Ms. Clark, requesting data, Student's current grades, and teacher feedback to assist Ms. Kosmal in preparing for the upcoming annual IEP on January 10, 2018. Ms. Kosmal suggested Prentice administer i-Ready diagnostic tests to obtain data on Student's progress. On December 21, 2017, Ms. Clark provided teacher surveys and work samples to Ms. Kosmal.

128. On January 8, 2018, Prentice occupational therapist April Simpson emailed Mother and shared that Student was doing very well and demonstrated no difficulties in any of the goals proposed in the independent occupational therapy evaluation. Furthermore, Ms. Simpson did not see any clinical concerns, including the area of bilateral motor coordination. Although, Ms. Simpson noted that Student's typed words per minute were low for her age, Ms. Simpson opined that clinically Student simply needed more practice, which did not need to be addressed in an occupation therapy session. Ms. Simpson recommended that Student be discharged from school-based occupational therapy services, as it was no longer clinically needed.

129. On January 9, 2018, Mother emailed the IEP team requesting to reschedule the annual IEP review due to being ill. River Springs provided Parents with an IEP team meeting notice dated January 17, 2018, for an annual IEP team meeting on February 9, 2018.

130. On January 12, 2018, Prentice administered another i-Ready diagnostic test in math. This time Student scored a 455, which placed her at a fourth grade level.

On January 12, 2018, Prentice administered an i-Ready test in reading. Student's overall reading performance was at fourth grade, with a score of 550, an improvement of one grade level since August 2017. The results indicated that Student was decoding accurately, however, her third grade-level vocabulary score suggested that substantial gaps in word knowledge made it very hard for her to read for meaning.

#### FEBRUARY 9, 2018 ANNUAL IEP

131. The February 9, 2018 Annual IEP was reviewed over two days, February 9 and March 2, 2018. Parents, Mr. Eisenberg, Dr. Cox, Ms. Kosmal, Mr. Barnes, Ms. Clark, Dr. Warren, Ms. Garner, Ms. Shaw, and Prentice speech-language pathologist Julianna Clark attended the IEP team meeting on February 9, 2018. Procedural safeguards were offered to Parents, who declined a copy and an explanation.

132. The IEP team noted Student's relative strengths were in vocabulary and comprehension of literature when read aloud or discussed. She had a good attitude and made an effort when faced with a difficult assignment. She retained information that was read to her, but had difficulty retaining information otherwise. Her auditory comprehension was an area of strength. Her reading significantly improved, but math and writing remained a struggle. Student had close friends, was social with her peers, and was more confident. Mother continued to be concerned about Student's delays in writing, math, and spelling.

#### Present Levels of Academic and Functional Performance

133. The IEP team reviewed progress on prior annual goals. Student met all her annual goals with the exception of her writing, reading fluency, non-fiction reading, and three math goals. The team reviewed and considered the results from diagnostic testing, Student's work samples, and feedback from her teachers and Mother in identifying Student's present levels of academic and functional performance. Ms. Garner explained

that Prentice had not provided Student specialized academic instruction in English language arts and that English language arts was only taught in the general education classroom.

134. At the meeting, members from Prentice shared that Student made significant progress academically, emotionally, and socially. At hearing, Ms. Shaw described Student at the start of the 2017-2018 school year as quiet, unengaged, and making little eye contact. However, Student soon came out of her shell as the semester progressed. It did not take long for her to adjust to Prentice. At the time of hearing, Ms. Shaw described her as a leader, confident, opinionated, engaged, and happy. At hearing, Ms. Clark and Mother shared the same opinion.

#### ACADEMICS

##### Reading

135. Student read and decoded at the sixth grade level. She also responded to who, what, where, when, and how questions in grade-level text with the support of a teacher or when a story was read aloud to her. With some prompting, she could restate facts and details of a text, independently predict the next event, and explain the plot and conflict of a story. Student was working on finding the main idea and supporting details of a text, as well as identifying cause or effect and fact or opinion.

136. Student was reading at fifth grade Lexile level, with 95 percent accuracy. As of December 2017, Student was reading sixth grade level material at a speed of 87 words per minute, an improvement of 22 words per minute. She read the material with 97 percent accuracy. The IEP team identified reading fluency as her primary reading deficit.

137. Student's January 17, 2018 i-Ready reading score of 550 reflected an overall reading level of fourth grade, vocabulary level of third grade with a score of 502, a comprehension literature level of fourth grade with a score of 542, and

comprehension informational text level of early fourth grade with a score of 615. Student demonstrated the ability to distinguish individual sounds in spoken words (phonological awareness), could accurately decode written words (phonics), and accurately recognized frequently occurring words (high-frequency words); and therefore, she did not require taking the relevant i-Ready subtests in those areas.

### Writing

138. Student could write and spell words from common word families and sight words. She could write complete sentences and identify incomplete sentences. She used punctuation marks correctly, and with support, could write a paragraph. Student could write multi-paragraph essays with the help of visual and teacher supports. When her written work was read back to her, she could edit her writing to correct punctuation and flow.

139. Student demonstrated early stages of establishing context, point of view, and purpose in her writing. She could express her point of view and purpose throughout her writing. Graphic organizers helped her organize her thoughts and add detail to her sentences. Using a graphic organizer, Student could complete a five-sentence explanatory paragraph with minimal staff support. She needed assistance with concluding sentences. She needed to improve her use of capitalization, punctuation, word usage, and paragraphing.

### Math

140. At the IEP team meeting, Ms. Shaw shared that Student was not receiving a majority of her math instruction at the seventh grade level, however Student made significant progress in math. From September 2017 to January 2018, Student improved two grade levels, from second to fourth, according to her mathematics i-Ready diagnostic tests. Ms. Shaw shared her opinion as to Student's present mathematical

abilities. Student could perform basic addition and subtraction, identify greater or lesser than, and equal to, and calculate problems involving money. She could add, subtract, multiply, and divide positive and negative integers with the support of a visual model with the steps outlined. She needed support to complete problems involving subtraction with regrouping, finding measurements, solving multi-step word problems, multiplying and dividing large numbers, and memorizing multiplication facts with automaticity. Student also required support from the teacher to follow the order of operations and converting fractions into decimals and percentages.

141. Student could solve two-digit multiplication problems independently with the use of a multiplication chart. However, she was only 50 percent accurate when solving three-digit multiplication problems. She understood how to regroup, but became confused about the place value when regrouping. At hearing, Ms. Shaw testified that the baselines as to the proposed math goals accurately reflected Student's math skills at the time the IEP was developed.

#### Communication

142. Student's ability to interpret visual and written cues in social situations improved with the help of teacher prompts. Student could verbally explain how a person was feeling in reference to facial expressions, body language, and contextual cues with verbal prompting. Student could successfully analyze pictures, short video clips, and social thinking stories to answer the following questions: "What were they thinking?", "What do they mean?", and "Who said it?" When using only video clips, she was accurate 80 percent of the time.

143. She performed well using whole-body listening, asking people one to two questions on their topic of interest and experiences, and commenting on the topic in structured settings with the help of verbal prompts. Student needed additional prompting to start conversations, bridge to new topics, and to elaborate on her personal experiences.

144. Student developed independent thinking skills. When given structured tasks and choices, she could brainstorm possible situations to solve a problem and justify a logical solution. Student could do this with 60 percent accuracy with three to four prompts.

145. Student could enunciate and project her voice better. In one-to-one or small group situations, Student could ask and answer questions with improved mouth posture, enunciation, and loudness when given an initial verbal prompt and occasional visual prompt. This diminished the need for the listener to ask Student to repeat what she said. Student could do this with 60 percent accuracy in a small group and classroom setting with prompting.

146. Student could correctly sequence a short narrative, giving six to eight details when presented with a four to six sequenced picture card, and able to provide a personal narrative with verbal prompts. She required prompt cards of who, what, where, when, how, and why to verbalize a complete event in her personal narratives.

#### Gross and Fine Motor Skills

147. The IEP team had no concerns regarding Student's gross and fine motor skills. Student participated in horseback riding and tennis. She could run, jump, kick a moving ball, and catch a ball. Her penmanship was good. According to Prentice's occupational therapist, Student's typing improved.

#### Social/Emotional/Behavioral

148. At the IEP team meeting, Mr. Barnes shared that Student was a model citizen. He described her as kind to others, with no behavioral issues, and socially appropriate. She followed classroom rules. Mother shared that Student began seeing a psychiatrist outside of the school setting and it was going well. Student was also

attending a small group counseling session once a week for the past two months.

149. Student was respectful to adults and peers at school. Her frustration and anger with her family at home improved. She did not display frustration and anger while playing tennis or horseback riding.

#### Health, Vocational, and Adaptive/Daily Living Skills

150. The IEP team did not identify any concerns regarding Student's health, vocational skills, or daily living skills. She was in good health and could care for her own needs. She was organized and followed simple and multi-step directions.

#### Annual Goals

151. The IEP team identified the following areas of need: basic reading fluency, independent reading comprehension, math, writing, language processing, and expressive language pragmatics. The IEP proposed 12 annual goals: three in the area of social pragmatics, one in speaking, one in expressive language, three in reading, one in writing, and three in math. The social pragmatics, speaking, and expressive language goals offered two short-term objectives, the first to be met in May 2018 and the other in November 2018.

152. The first goal in the area of social pragmatics required Student to determine what a person may be thinking or feeling when analyzing characters in literature, longer video clips, or through discussing conflict situations. The annual goal called for Student to verbally explain how a person was feeling or what they were thinking by referencing facial expressions, body language, and contextual cues. This would occur in structured language tasks when shown a video clip of a social situation, or when reading a social story, or discussing a social conflict situation. To meet the annual goal, Student had to be 90 percent accurate over two trial days. The first short-term objective required 70 percent accuracy, with the second short-term objective

increasing to 80 percent accuracy. The speech-language pathologist was responsible for this goal, using clinician records and data collected to measure progress.

153. The second social pragmatics goal required Student to independently demonstrate whole body listening, start small talk, and provide an appropriate amount of information to the conversation during a 10 minute unstructured conversation. She could add to the conversation by providing on-topic comments, asking novel and reciprocal questions, and initiating new conversation topics using topic-bridging techniques on each conversational turn. Student's present level of performance was doing these things with 60 percent accuracy. To meet the annual goal, Student had to accomplish this task in eight out of 10 opportunities over two trial days. The first short-term objective required her to accomplish the task in seven out of 10 opportunities during a five minute unstructured conversation. The second short-term objective asked for eight out of 10 opportunities during a five minute unstructured conversation. The speech-language pathologist was responsible for this goal, using observations and work samples to measure progress.

154. The third social pragmatics goal aimed to improve Student's independent thinking skills by brainstorming possible solutions to a problem and justify with elaboration the logical, mutually beneficial solution based on more than one perspective using age/grade curriculum information. The annual goal required 80 percent accuracy with minimal (one to two) prompts from the teacher. The speech-language pathologist was responsible for this goal. The first short-term objective required 70 percent accuracy with three to four teacher prompts, and the second short-term objective asked for 80 percent accuracy with two to three teacher prompts. The goal was to be measured using clinician records, observations, and work samples.

155. The annual goal to improve Student's speech required Student to independently use open versus closed mouth production in relation to intelligibility,

enunciate all word parts, and use appropriate loudness and pausing, during reading, speaking, oral presentations, and class discussions. She had to accomplish this task with 90 percent accuracy given no more than one visual prompt over three consecutive sessions to meet the annual goal. The first short-term objective called for 70 percent accuracy, the second short-term objective required 80 percent accuracy to be met. The speech-language pathologist was responsible for this goal. The goal was to be measured using data collected through observations and work samples.

156. The expressive language goal asked Student to independently demonstrate increased expressive language skills by stating a topic, using specific core vocabulary on expressive language tasks, in a logical, sequential manner. She would be asked to do this when given a topic or using core eighth grade curriculum, re-telling current events, or when describing a personal narrative. To meet the annual goal, Student had to perform the task successfully in eight out of 10 opportunities. The first short-term objective required success in seven out of 10 opportunities, increasing to eight out of 10 opportunities for the second short-term objective. The goal was to be measured using clinician data and observations, as well as work samples.

157. The first reading goal required Student to independently read a passage, answer the comprehension questions, and cite evidence from the text with at least 80 percent accuracy. Student would be provided a seventh grade fiction reading passage. Progress would be measured through teacher observations and Student's work samples.

158. The second reading goal focused on improving Student's reading fluency. To meet the annual goal, Student had to improve her reading fluency using a Basic Reading Inventory assessment at a seventh grade level, improving a minimum of three words per month, with a goal of reading at least 140 correct words per minute. The special education and general education teachers were responsible for the goal. Progress was to be measured using data collected through teacher observations and Student's work samples.

159. The third reading goal asked Student to independently read a sixth grade non-fiction passage, answer the comprehension questions, and cite evidence from the text with at least 80 percent accuracy. The goal was to be measured using data collected by the teacher and Student's work samples.

160. The writing goal required Student to successfully fill out a graphic organizer and write a multi-paragraph essay, to include a topic sentence, supporting sentences, transition, and concluding sentences. She had to use correct capitalization and punctuation. To support Student, the teacher would provide a graphic organizer and instruct Student how to complete the organizer. To meet the annual goal, Student had to be 70 percent accurate in four out of five trials. The special education and general education teachers were responsible for the goal. The goal would be measured through Student's work samples, teacher observations, and curriculum-based assessments.

161. Student would be supported by visual models and a math notebook for the three math goals. The first of three math goals aimed to improve Student's ability to multiply and divide. The "math calculation" goal required Student to solve division problems of one to two divisors, with three digit dividends, using strategies based on place value, the properties of operations, and/or the relationship between multiplication and division. To meet this goal, Student had to be 80 percent accurate in four out of five opportunities. The special education and general education teachers were responsible for the goal. Progress would be measured by teacher records, Student's work samples, and teacher observations.

162. The second math goal, "applied problems," asked Student to solve two-step word problems involving all operations: addition, subtraction, multiplication, and division. To meet the goal, Student had to be 80 percent accurate in four out of five

trials. The annual goal was to be measured through teacher observations and work samples. The individuals responsible for the goal were not identified.

163. The third math goal addressed fractions. The annual goal called for Student to be 80 percent accurate in four out of five trials when asked to simplify fractions, make equivalent fractions, and solve fractions problems involving addition, subtraction, multiplication, and division. The goal would be measured through teacher observations and work samples. The individuals responsible for the goal were not identified.

164. Crystal Vu was a special education teacher who provided specialized academic instruction at River Springs' Flabob Airport Preparatory Academy. She had been at Flabob for four years. Prior to Flabob, Ms. Vu provided specialized academic instruction for students enrolled in River Springs' Homeschool program. She possessed a special education mild/moderate credential, with an autism certificate. Ms. Vu also possessed a general education multi-subject credential allowing her to teach grades kindergarten through eight. As part of obtaining a multi-subject teaching credential, Ms. Vu successfully completed the Reading Instruction Competency Assessment, demonstrating knowledge in effectively teaching reading. At hearing, Ms. Vu testified confidently throughout her examination. Her responses were measured and thoughtful, and her testimony was credible.

165. At hearing, Ms. Vu opined the goals as written were clear and measurable. She offered strategies she would utilize to implement the goals. For example, in implementing the math fraction goal, Ms. Vu would use tactile fraction circles or strips Student could manipulate, drawing pictures of fractions, then move to solving fraction problems abstractly. Ms. Vu opined that students with disabilities were proven to do well with manipulatives.

## Supplemental Aids, Services and Supports

166. The IEP team reconvened on March 2, 2018, to complete the development of the annual goals, and to determine the appropriate services, accommodations, and placement. Mother, Mr. Eisenberg, Ms. Clark, Dr. Cox, Ms. Kosmal, and Dr. Warren attended the meeting. Ms. Clark excused the other members from Prentice because she believed they would not be needed to address the remaining parts of the IEP.

167. The February 9, 2018 IEP offered Student the following accommodations and supports: access to instructional technology, the use of visuals, graphic organizers, multiplication tables, notes to support instruction, and demonstration of understanding of skills via multi-modalities, all available as needed. The following services were offered: collaboration between the specialized academic instruction teacher and the general education teacher 15 minutes each month, consultation between the specialized academic instructor and parent 15 minutes twice a month, and monthly consultation with an occupational therapist for staff and parent for 15 minutes.

168. At the IEP team meeting, Mother opined that Student no longer required occupational therapy services. However, Mother shared that Student still sought out self-regulation activities. The IEP team determined that the sensory regulation goal was no longer necessary, but agreed to provide some level of occupational therapy support through consultation.

## Special Education and Related Services

169. The IEP offered the following special education and related services from February 9, 2018, to March 29, 2018, to be provided by River Springs at one of its locations: 45 minutes twice a week of group speech and language services; group specialized academic instruction consisting of 210 minutes of pull-out services and 60 minutes of push-in services to be provided by a credentialed special education teacher; and individual counseling in an individual setting for 30 minutes once a week. Though

the IEP identified River Springs as the location for the services through March 29, 2018, as noted in the IEP's "Special Education and Related Services" section, the discussion at the meeting and as reflected in the IEP team meeting notes was for Student to remain at Prentice through March 29, 2018, and to begin at Flabob following Prentice's spring break to allow for a smoother transition.

170. From April 2, 2018, to February 2, 2019, the IEP offered the following services at a River Springs location: 45 minutes twice a week of group speech and language services; group specialized academic instruction consisting of 210 minutes of pull-out services and 60 minutes of push-in services to be provided by a credentialed special education teacher; and individual counseling in a group setting once a week for 30 minutes.

171. At the IEP team meeting, Prentice recommended that the 210 minutes of specialized academic instruction address only math, as Prentice could only provide specialized academic instruction in the area of English language arts on a consultative model. At the time, Prentice did not have a credentialed special education teacher to provide specialized academic instruction to Student. River Springs recommended an additional 60 minutes of specialized academic instruction in the area of English language arts to address the proposed reading and writing goals. Ms. Clark was not in agreement with the additional 60 minutes of specialized academic instruction in English language arts based on Prentice's view that Student was making progress through a consultative model.

172. At hearing, Ms. Kosmal testified that pull-out specialized academic instruction was needed in the areas of reading and writing to address the English language arts goals as proposed. She opined that it was very difficult to work on reading strategies in the general education classroom. When a student was more than two grade levels behind in reading, pull-out instruction was best to allow a special education

teacher to work closely with the student to learn reading strategies and skills. The pull-out model would allow Student to receive small group or one-to-one instruction to learn new skills Student could apply in the regular classroom. Ms. Kosmal also opined that a teacher credentialed in special education was crucial in working with Student on the reading goals, as they had the necessary training to teach specific reading strategies and techniques.

173. Crystal Vu testified at hearing. Ms. Vu shared the same opinion, that pull-out specialized academic instruction in reading, writing, and math would offer Student more intensive instruction in a small group or individual setting, which was necessary to achieve the proposed academic goals. She explained that the goals regarding fractions, applied problems, math calculation, and reading fluency would require pull-out instruction. Ms. Vu opined that the nature of the goals as written required specific instruction that would be difficult to do in a regular classroom.

174. At hearing, Dr. Passaro continued to recommend that Student receive one hour a day of instruction in each of the following areas: reading, writing, and math. He opined that ideally the instructor should be credentialed in special education, as they are familiar with appropriate and empirically based strategies. He recommended that the instruction be provided on a pull-out basis. In the area of reading, Dr. Passaro opined that a teacher trained in teaching reading was more important than whether the teacher was credentialed in general education or special education.

175. The February 9, 2018 IEP offered extended school year services from June 18, 2018, to July 20, 2018. The services consisted of 314 minutes a day of specialized academic instruction in a group setting and 30 minutes a week of individual counseling in an individual setting once a week.

#### Placement

176. Following the discussion of special education and related services, the IEP

team turned to placement, and for the first time during the annual IEP review, River Springs proposed that Student be placed at Flabob. At the meeting, Dr. Cox explained the offer of placement at Flabob was based on River Springs' belief that Prentice could not implement the proposed IEP. Specifically, Prentice could not provide the pull-out specialized academic instruction in the area of English language arts that the IEP required. Furthermore, River Springs did not believe Student required a nonpublic school placement. River Springs stated it would be terminating its funding of Prentice on March 29, 2018, and proposed Student begin attending Flabob on April 2, 2018, after the spring break. In the meantime, Student would remain in Prentice.

177. At hearing, Ms. Vu explained that Flabob had roughly 100 students, serving grades six to 12. It was an Academy program which meant direct instruction would be provided on campus by credentialed teachers. Classes were held on Tuesdays, Wednesdays, Thursdays, and Fridays. Mondays were home study days, where students could remain at home to work on assignments. However, on Mondays, students had the option of coming to campus for study hall. Ms. Vu, an aide, and Flabob's vice principal were present for study hall. Study hall was available for all students the entire school day. Flabob's middle school program consisted of core curriculum instruction on Tuesdays, Wednesdays, and Fridays. Elective classes were held on Thursdays. Flabob's special education program offered push-in specialized academic instruction as well as pull-out individual or small group instruction. Flabob served students with a wide variety of disabilities which included among others, autism spectrum disorder, specific learning disability, and attention deficit hyperactivity disorder.

178. At the IEP team meeting, Mother became upset and highly emotional when River Springs proposed to move Student to Flabob. Mother and Mr. Eisenberg stepped outside the meeting to gather themselves and when they returned, the team briefly discussed the proposed change in placement. The conversation became heated.

Mother questioned when the change would occur. Dr. Cox proposed Student begin at Flabob after the spring break. Mother, upset, questioned the appropriateness of the timing of the change, concerned that it would set Student back. Dr. Warren attempted to explain the transition to Flabob, but Mother interrupted. Mother requested contact information of Flabob and was provided a phone number. River Springs attempted to pull up Flabob's website on a laptop but could not access the website during the meeting. No further details of Flabob's middle school program were provided to Mother at the meeting.

179. At hearing, Mother testified that she felt blindsided by the proposed removal of Student from Prentice. She expected the IEP team to discuss and develop goals and services, but it did not dawn on her that River Springs would consider changing Student's placement from Prentice in light of the progress Student had made at Prentice. She understood the agreement made in August 2017, and memorialized in the August 4, 2017 IEP Amendment, was for Student to be placed at Prentice and should Student progress, Student would remain at Prentice for the remainder of the 2017-2018 school year. It upset her deeply for River Springs not to warn her of the possibility of a change in placement and to not offer her an opportunity to investigate Flabob prior to the IEP team meeting. River Springs' proposal to end funding on March 29, 2018, only solidified Mother's belief that River Springs had already made up its decision to remove Student from Prentice regardless of the concerns Parents may have had. At hearing, Mother explained that though she was upset, she did not walk away from the meeting or end the meeting abruptly; she testified that she was able to ask questions and engage River Springs.

180. At the IEP team meeting, River Springs reiterated its offer of FAPE, and, feeling the meeting had reached a standstill, Dr. Cox suggested the team review the IEP team meeting notes to draw the meeting to a close. Mother requested changes to the

notes to reflect her disagreement with the proposed placement at Flabob and her concern that changing placement in the middle of the school year would not be beneficial to Student. Those changes were made to the notes. At hearing, Mother opined that she believed she contributed and participated in the IEP process. No additional IEP team meeting was requested by either River Springs or Parents.

181. Ms. Kosmal testified that prior to the March 2, 2018 IEP team meeting, she researched potential placement options for the IEP team to explore. Ms. Kosmal reviewed various programs River Springs had to offer and arrived at Flabob as a viable option to present once the IEP team was prepared to discuss placement.

182. On March 2, 2018, Mother emailed River Springs requesting a copy of Student's "complete file." On March 7, 2018, Ms. Kosmal emailed Prentice requesting documents to update Student's pupil records in response to a records request River Springs was obligated to provide. On March 8, 2018, Ms. Clark emailed Student's fall report card and attendance dated January 18, 2018, to the present to Ms. Kosmal. On March 9, 2018, at 2:30 p.m., Ms. Riley emailed Mother informing her that the copy of the records were ready for pick up. On March 16, 2018, Father picked up the copies.

183. Mother testified that the records Parents sought through her records request was quite broad. At hearing, she explained that documents she referred to as "report cards" were expected to be produced. She described these "report cards" as forms that listed categories and grade level scores. She was familiar with these "report cards" through the records prepared for her other two children. Additional records she expected were specialized academic instruction service logs, progress updates, works samples collected by Ms. Gillette, any assessments conducted on Student, and work samples maintained by the specialized academic instruction teachers. Dr. Cox testified that Parents were provided with Student's progress reports after the first and second semesters, which were also made a part of an IEP.

## MARCH 21, 2018 PRIOR WRITTEN NOTICE

184. On March 21, 2018, River Springs, through its attorneys, mailed and emailed a prior written notice to Parents in response to Parents' request to maintain Student's placement at Prentice. The prior written notice reflected River Springs' understanding that the agreement to fund only the first semester of the 2017-2018 school year at Prentice was pursuant to a settlement agreement and according to the settlement agreement, Prentice was not stay put.

185. The prior written notice explained that River Springs was denying Parents' request to continue Student's placement at Prentice because Prentice was neither stay put nor could Prentice provide Student with a FAPE in the least restrictive environment. River Springs opined that Prentice could not offer Student the same general education exposure, both academically or socially, was not the least restrictive environment for Student, and could not implement Student's then-current and proposed IEPs, specifically the specialized academic instruction.

186. On March 22, 2018, Student filed a Motion for Stay Put seeking an order from OAH designating Prentice as Student's stay put placement. On April 11, 2018, OAH denied Student's request to designate Prentice as her stay put placement.

187. On April 3, 2018, Michelle Nelson, M.D. prepared a letter on Student's behalf that Parents provided to River Springs.<sup>8</sup> Dr. Nelson was a child and adolescent psychiatrist who was treating Student for attention deficit hyperactivity disorder, autism spectrum disorder, oppositional defiant disorder and unspecified anxiety disorder, unspecified depressive disorder, and generalized anxiety disorder. She opined Student was doing well at Prentice academically, psychologically, and socially. In her opinion, Student would suffer negative ramifications psychologically, socially, behaviorally, and

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<sup>8</sup> Dr. Nelson's April 3, 2018 letter was admitted for the purpose of remedies only.

academically if suddenly removed from her current placement.

188. On April 28, 2018, Dr. Passaro prepared a letter to Parents in response to Parent's request that he review Student's educational record, including River Springs' current offer of FAPE, to observe Student at Prentice, and to observe Flabob.

189. In his letter, Dr. Passaro opined that Student had regressed during the two years she attended River Springs. Dr. Passaro testified at hearing that this further supported his contention that 180 minutes a week of intensive intervention instruction was insufficient to close Student's academic gap. Dr. Passaro further opined that Student made significant progress while at Prentice. Dr. Passaro noted Student's improvements in the areas of reading comprehension, reading fluency, written expression, math calculation, and applied problems skills.

190. Dr. Jeremy Warren, River Springs lead school psychologist testified at hearing. Dr. Warren questioned the appropriateness of Dr. Passaro's assessment of Student's progress at Prentice, specifically Dr. Passaro's reliance on the February 9, 2018 IEP's baselines in comparison to Student's Woodcock-Johnson IV Tests of Achievement results in April 2017. Dr. Warren opined that it was not best practice to compare grade level equivalents as reflected in the baseline with standardized scores from the Woodcock-Johnson. However, neither Dr. Warren nor any other witness disputed that Student did make academic progress during her time at Prentice.

191. Dr. Passaro observed Student at Prentice for about an hour on April 12, 2018. He interviewed Mr. Barnes, who shared that Student had made significant progress academically, socially, and emotionally while attending Prentice. Student was happy and enjoyed coming to school. Student was observed in science class, where Dr. Passaro saw no signs of anxiety, aggression, withdrawal, or any other inappropriate behaviors.

192. At hearing, Dr. Passaro shared that Mr. Barnes reported to him that

Student had some difficulty transitioning into Prentice, but settled in quickly and was doing well. Dr. Passaro opined that Student's academic success helped her build her confidence and improve her self-esteem.

193. On Friday, April 27, 2018, Dr. Passaro toured Flabob for an hour. Flabob's principal Robin Davis escorted Dr. Passaro. Ms. Davis shared that Flabob was designed for either college entrance or vocational education. According to Dr. Passaro's letter, Ms. Davis reported that 84 students were then enrolled between grades seven and 12, with the eighth grade class having only eight students. Flabob did not have classes scheduled on Mondays, but students were allowed to come to school to complete assignments or seek remedial help from teachers.

194. Dr. Passaro described Flabob as having an open architecture, with no walls. Rather, large portable dividers separated the classrooms. According to Dr. Passaro, Ms. Davis explained the reading program that Student would receive was the i-Ready computer-aided instructional program, as well as the REWARDS program. Dr. Passaro opined Student required instruction from a trained staff and not a computer.

195. During his observation of Flabob, Dr. Passaro interviewed Ms. Vu. According to Dr. Passaro, Ms. Vu could not confirm whether any of the reading programs offered at Flabob were empirically validated, but Ms. Vu believed there was research to support their use and evidence to support its effectiveness for students with dyslexia. According to Dr. Passaro, Ms. Vu disclosed that she had no specialized training in the i-Ready, REWARDS, or Reading Plus programs and no specific training in any validated reading program. Dr. Passaro stated in his letter that Ms. Vu disclosed that students with the most intensive needs in her program received only three hours per week of pull-out services. Dr. Passaro opined this to be insufficient and inconsistent with the California Department of Education Guidelines.

196. In his April 28, 2018 letter, Dr. Passaro offered the same recommendations

as those in his April 2017 independent psychoeducational evaluation, adding that Student's reading intervention should be empirically based, such as the Orton Gillingham/Slingerland program used at Prentice. Dr. Passaro opined that Student should remain at Prentice in light of her significant progress. He opined that the current offer of FAPE at Flabob was not fundamentally different from her previous program at River Springs in which she regressed. Dr. Passaro opined that moving Student would likely result in a significant regression in the social, emotional, and behavioral progress she made at Prentice.

197. However, Dr. Passaro's conclusion regarding the required amount of specialized academic instruction Student required and the manner in which it should be delivered was inconsistent to what Prentice provided. Though Dr. Passaro recommended two hours of daily pull-out services in the area of English language arts, Prentice did not provide any pull-out specialized academic instruction to Student to address reading and writing. Furthermore, Dr. Passaro recommended one hour of daily pull-out services in the area of math, yet Prentice only provided three hours of pull-out instruction in math for the entire week. Student did make progress in reading and math while at Prentice despite not adhering to Dr. Passaro's recommendations. Dr. Passaro offered no explanation for the discrepancy between what he recommended, what Prentice offered, and the progress Student made. Accordingly, his opinion was not persuasive due to these inconsistencies.

198. Dr. Passaro prepared a declaration in support of Plaintiff's Ex Parte Application for a matter before the United States District Court, Central District of California, Eastern Division. It was signed by Dr. Passaro on May 10, 2018. In his declaration, Dr. Passaro stated that Flabob was not a nonpublic school placement, consisted mainly of home instruction, and was not equipped to address Student's extensive and complex needs resulting from her conditions. Dr. Passaro further declared

that Flabob did not employ credentialed teachers, did not provide the necessary specialized academic instruction or other services, including cognitive behavioral therapy or any treatment in Student's areas of need, and that Flabob's reading intervention was computer-based. Dr. Passaro also opined in his declaration that placement at Flabob would result in the elimination of Student's academic instruction, speech therapy, occupational therapy, counseling, and socialization opportunities.

199. At hearing, Ms. Vu persuasively challenged the accuracy of Dr. Passaro's accounts regarding Flabob, further diminishing the weight of Dr. Passaro's testimony and written opinions. When asked to review Dr. Passaro's declaration, Ms. Vu shared her disagreement to a number of his statements. Ms. Vu testified that Flabob did employ credentialed teachers, both in general education and special education. Ms. Vu also explained that Flabob did provide specialized academic instruction and other services, and utilized evidenced-based reading programs, such as the REWARDS Secondary program for the middle school grade levels. She taught the REWARDS reading program for five years. Furthermore, Ms. Vu explained that Flabob employed a licensed speech-language pathologist, a licensed occupational therapist, credentialed counselors, and offered socialization opportunities on campus. She indicated that Flabob's counselors were trained in cognitive behavior therapy.

200. Student appealed the OAH stay put order to the United States District Court, Central District of California, Eastern Division. River Springs stopped funding Student's placement at Prentice on March 29, 2018. Prentice sent Parents invoices for tuition for part of March, April, and 14 days of May 2018 seeking payment totaling \$4,291.98. At hearing Student presented invoices marked paid for the total amount. In addition, Parents paid Prentice \$265.00 for speech and language services for five sessions in the months of April and May 2018.

201. On April 25, 2018, Mother emailed Ms. Clarke and Prentice Director of

Enrollment Devon Green, informing them under the advice of Student's attorneys, Student would need to stop attending Prentice "to be successful in federal court getting the injunction against" River Springs that would require River Springs to continue funding Student's placement at Prentice until the due process hearing. Mother explained that Parents would be unsuccessful in District Court in obtaining the injunction if Student was attending Prentice under Parents' funding when they appeared in District Court later that week, thus Student needed to "be out of placement." Furthermore, Mother indicated that if Parents were unsuccessful in obtaining the injunction, they would notify River Springs that Parents would "privately pay and [Student] would immediately return to Prentice." If Parents succeeded in obtaining the injunction in District Court, Mother stated Student would immediately return to Prentice under River Springs' funding.

202. Though Student was permitted to attend Prentice at all times following March 29, 2018, Student did not attend on April 23, 24, and 25, 2018, due to illness. Parents chose to not have Student attend from April 26 through May 11, 2018. Her absences were marked excused and Student offered no credible evidence that Student could not attend Prentice during that period. Parents again did not have Student attend from May 16 through 18, 2018. Student's absences were marked unexcused for those days. She attended Prentice all day on April 19 and May 15, 2018, and half the day on May 14, 2018. On May 18, 2018, the District Court granted Student's Ex Parte Application for Temporary Restraining Order, designating Prentice as the school for stay-put purposes under title 20 United States Code section 1415. Student returned to Prentice on May 21, 2018, and has continued to attend Prentice since.

203. On September 7, 2018, Prentice administered an i-Ready diagnostic math

test.<sup>9</sup> Student's overall score was 463, placing her at a fourth grade level.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>10</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>11</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means 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

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<sup>9</sup> The September 7, 2018 i-Ready math results were admitted for remedies purposes only.

<sup>10</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>11</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an individualized education program 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 *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

4. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was

presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstances.” “[E]very child should have a chance to meet challenging objectives.” (*Ibid.*) *Endrew F.* explained that “[t]his standard is markedly more demanding than the ‘merely more than de minimis’ test . . . . [¶] . . . The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at pp. 1000-1001.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.*, as the Court was “[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court’s analysis in that case.” (*Id.* at p. 1001.) The Court noted that “[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” (*Id.* at p. 999 [italics in original].) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th 2018) 726 Fed.Appx. 535.)

6. 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).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student and River Springs requested the hearing in this matter, and therefore Student has the burden of proof related to her issues and River Springs has the burden of proof as to its sole issue.

ISSUE 1: DID RIVER SPRINGS FAIL TO PROVIDE APPROPRIATE PRESENT LEVELS OF PERFORMANCE, GOALS, AND SERVICES IN THE AREAS OF (A) OCCUPATIONAL THERAPY, (B) SPEECH, (C) SPECIALIZED ACADEMIC INSTRUCTION, (D) EDUCATIONALLY RELATED MENTAL HEALTH, (E) BEHAVIOR, AND (F) SOCIAL SKILLS FROM MARCH 21, 2016, TO AUGUST 2017?

7. Student contends the IEPs dated March 30, 2016, through May 12, 2017, did not adequately address all of Student's areas of need. Student argues that those IEPs failed to offer appropriate goals and services in the areas of academics, educationally related mental health, social skills, occupational therapy, speech, behavior, and attention.<sup>12</sup> Student claims that as early as December 2015, River Springs was aware of Student's deficits as reported in Drs. Britt's and Libert's neuropsychological reports, and River Springs failed to develop an educational program designed to address those deficits.

8. River Springs contends that Student's only deficits were in English

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<sup>12</sup> Alleged violations by River Springs to offer appropriate goals and services in the area of attention was not specifically pleaded as an issue for hearing and therefore, is not addressed in this Decision.

language arts and mathematics during the 2015-2016 and 2016-2017 school years, until the April 28, 2017 IEP team meeting. River Springs argues the amount and frequency of specialized academic instruction offered during that period was reasonably calculated to address her academic deficits. River Springs alleges that the information available at the time did not warrant IEP goals and services in the areas of occupational therapy, speech, educationally related mental health, behavior, and social skills prior to April 28, 2017. River Springs argues that the IEP was appropriately amended in light of the independent educational evaluations presented at the April 28, 2017 IEP team meeting and Student had no other areas of need that warranted additional goals and services not addressed in the May 12, 2017 IEP Amendment.

9. An IEP is a written document for each child with a disability that includes 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. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1).) 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 result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

10. The IEP must include 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)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) Annual goals operate as a mechanism for determining whether the totality of the services provided pursuant to the child's IEP is appropriate to the child's unique needs. (*Letter to Hayden*, OSEP October 3, 1994.) The development of measurable annual goals is a procedural requirement under the IDEA.

11. Additionally, the IEP must contain statements of how the child's goals will be measured and 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)(III), (IV); 34 C.F.R. § 300.320(a)(3), (4); Ed. Code, § 56345, subd. (a)(3), (4).) The IEP shall show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040.)

12. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (458 U.S. at pp 205-206.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the parent's child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).

13. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v.*

*Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*.) It must be assessed in terms of what was objectively reasonable when the IEP was developed. (*Fuhrmann v. East Hanover Bd. of Educ.*, (3d Cir. 1993) 993 F.2d 1031 (*Fuhrmann*.) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*.)

14. The statute of limitations in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (f); see also 20 U.S.C. § 1415(f)(3)(C).) Education Code section 56505, subdivision (f) provides as follows: "A request for due process hearing arising under subdivision (a) of Section 56501 shall 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. In accordance with Section 1415(f)(3)(D) of title 20 of the United States Code, the time period specified in this subdivision does not apply to a parent if the parent was prevented from requesting the due process hearing due to either of the following: (1) Specific misrepresentation by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or (2) The withholding of information by the local educational agency from the parent that was required under this part to be provided to the parent."

15. A claim under the IDEA accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action; that is, when the parent knows that the education provided is inadequate. (*M.D. v. Southington Bd. of Ed.* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that he or she has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1032, 1039.) In *Miller v. San Mateo-Foster City Unified School District* (N.D.Cal. 2004) 318 F.Supp.2d 851, 860, the court held the cause of action accrued when parents received

notice of their procedural rights in connection with a school district's assessment of their child, even if the assessment's findings were later found to be incorrect.

16. The Ninth Circuit in the case of *Avila v. Spokane School Dist.* 81 (9th Cir. 2017) 852 F.3d 986, interpreted the 2004 addition of a statute of limitations in the IDEA, and affirmed that the statute of limitations is governed by the "discovery rule." Common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*D.K. v. Abington School Dist.* (3d Cir. 2012) 696 F. 3d 233, 248.) In particular, the common law exception to the statute of limitations that applies when a violation is continuing is not applicable in IDEA cases. Thus, a party may not challenge the appropriateness of an IEP created outside of the statute of limitations period even though the IEP's provisions were in effect within the limitations period. (*K.P., etc., v. Salinas Union High School Dist.* (N.D. Cal. April 8, 2016, Case No.5:08-cv-03076-HRL) 2016 WL 1394377, which interpreted the California statute limitations, Ed. Code, § 56505, subd. (A) (*K.P.*).

17. In *K.P.*, the District Court upheld the ALJ's decision to exclude claims challenging the appropriateness of an IEP as time-barred by the two-year statute of limitations. (2016 WL 1394377 at \*10.) The student during the administrative hearing challenged an IEP that was developed and consented to prior to the two-year statute of limitations, based on alleged deficiencies in the IEP as written. (*Ibid.*) Specifically, the student claimed the IEP was not based on relevant information about her deficits, failed to give due weight to available information from prior assessments, failed to properly address all of her deficits, failed to address safety concerns, and did not have an appropriate transition plan. (*Ibid.*) The student further claimed at hearing that the IEP's offer of placement denied her a FAPE. (*Ibid.*) However, the parent signed her consent to that IEP and initialed the plan to indicate that she received a copy of a document advising her of the parents' and child's procedural due process rights and that these rights were explained to the parent. (*Ibid.*) ALJ properly concluded that the parent knew

or should have known about the deficiencies in the IEP as of that date. (*Ibid.*) The District Court held that the ALJ appropriately time-barred the student's claims challenging the IEP's placement offer as an attack on the IEP as written. (*Id.* at p. 11.)

18. Both federal statute and subsequent case law inform that continuing violations are not cognizable in due process proceedings. In its commentary on the 2006 version of the Code of Federal Regulations written in response to the reauthorized IDEA, the United States Department of Education directly addressed the issue of continuing violations. A commentator to the proposed 2006 regulations suggested that the regulations should allow extensions of the statute of limitations when a violation is continuing. The United States Department of Education rejected the suggestion, stating, "Section 615(f)(3)(D) of the Act [IDEA] provides explicit exceptions to the timeline for requesting a due process hearing. Section 300.511(f) [of the then-proposed regulations] incorporates these provisions. These exceptions do not include when a violation is continuing . . . . Therefore, we do not believe that the regulations should be changed." (71 Fed.Reg. 46697 (Aug. 13, 2006).)

#### Non-Academics

19. The December 4, 2015 IEP was consented to by Parents on December 17, 2015, more than two years before Student filed this case and rendering it outside the two-year statute of limitations. The initial IEP team meeting was held on December 4, 2015. Parents were provided a copy of their procedural safeguards and rights on that date. The December 4, 2015 IEP took into consideration input from Ms. Gillette and Mother, Dr. Britt's 2011 neuropsychological report, Dr. Libert's 2015 neuropsychological report, and River Springs' December 4, 2015 psychoeducational and academic assessment reports. The IEP team identified Student's areas of need and present levels of performance, developed annual goals, designed accommodations and services, and identified a placement.

20. Student's contention that River Springs should have offered goals and services in the areas occupational therapy, speech, educationally related mental health, behavior and social skills from March 21, 2016, through August 2017 based on the findings and recommendations of the neuropsychological reports by Drs. Britt and Libert is misplaced. The neuropsychological reports were already considered in developing the December 4, 2015 IEP, which Parents consented to on December 17, 2015. Student cannot now challenge the adequacy of the December 4, 2015 IEP as written, since Student failed to request a due process hearing within two years of that IEP. Furthermore, any allegations for failure to offer appropriate goals and services based solely on the inadequacy of the December 4, 2015 IEP as written cannot be sustained because the continuing violation doctrine does not apply in special education law.

21. At the start of the hearing, Student voluntarily withdrew any claims against River Springs alleging a failure of River Springs to assess Student in the areas of academics, occupational therapy, speech and language, mental health, behavior, and socialization from March 21, 2016, to August 2017. Accordingly, an analysis of the appropriateness of River Springs' offer of goals and services during that time period can only consider the information that was available at the time the IEPs were developed, and not information that could have been obtained through additional assessments.

22. Student did not offer any persuasive evidence that prior to the April 28, 2017 IEP Amendment team meeting, River Springs should have revised the December 4, 2015 and January 12, 2017 IEPs to offer goals and services in the areas occupational therapy, speech, educationally related mental health, behavior, and social skills. There were no concerns identified by Mother, Student's teachers, or any other professional or assessor following Mother's consent to the December 4, 2015 IEP that warranted a

revision to the IEP's non-academic goals and services.

23. Mother's accounts regarding the severity of Student's behaviors were inconsistent. Mother reported Student became more aggressive toward family members and friends and her behaviors at home were challenging. In addition, Mother shared at the January 12, 2017 IEP team meeting that Student was respectful to adults and peers as school, but disrespectful to her family at home. However, Mother's email to Prentice on May 31, 2017, painted a different picture. In that email, Mother indicated that Student "only exhibits minimal behavioral issues and those are ONLY present at home when she gets frustrated. Those have never been exhibited in public or at school."

24. The January 12, 2017 IEP also noted that Student was kind, polite, and interacted with her peers appropriately, was social in class, and followed classroom rules. Furthermore, despite the numerous communications exchanged between River Springs and Parents, through their advocate Paul Eisenberg, not once did Mr. Eisenberg raise any specific concerns in his communications regarding Student's occupational therapy, speech, educationally related mental health, behavior, and social skills needs apart from Parents' request for independent educational evaluations. Student did not present any persuasive evidence that she manifested any deficits in areas of occupational therapy, speech, educationally related mental health, behavior, and social skills, which gave reason to offer goals and services in those areas from March 21, 2016, to April 27, 2017.

25. During the April 28, 2017 IEP team meeting, Mother shared that Student participated socially outside of the home. She did not report any concerns about Student's social skills. Furthermore, River Springs considered the findings and recommendations of the independent educational evaluators and offered Student a nonpublic school placement, with occupational therapy, speech and language, and individual counseling services. The proposed goals in the areas of sensory integration and speech and language were memorialized in the May 12, 2017 IEP Amendment.

Though the Amendment failed to include baselines in the speech and language and sensory integration goals, Student offered no evidence as to how that procedural defect denied Student an educational benefit or impeded Parents from meaningfully participating in the IEP process, or that the goals themselves were not adequate to meet her unique needs. By January 2018, Student had met her sensory integration goal and no longer required school-based occupational therapy services. Furthermore, the IEP team determined during the February 9, 2018 IEP team meeting that Student had met all her speech and language goals. Therefore, Student failed to meet her burden of proving that River Springs denied her a FAPE by failing to offer appropriate goals and services in the areas of occupational therapy, speech, mental health, behavior, and social skills from March 21, 2016, to August 2017.

#### Academics

26. The operative IEPs offered 180 minutes a week of specialized academic instruction to address reading, writing, and math goals from March 21, 2016, through April 28, 2017. For the 2016-2017 school year and extended school year, Student did not establish the academic goals and specialized academic instruction offered to address Student's reading and writing deficits were inadequate. Student's writing improved. By June 2017, she could use a graphic organizer to write a coherent paragraph. In addition, by June 2017, Student had improved in reading comprehension and reading fluency. Furthermore, her overall i-Ready scores increased by 32 points from September 2016 to August 2017. Hence, despite the limited specialized academic instruction she received that school year, Student did benefit in the area of reading and writing. The lack of further progress was attributable to River Springs' failure to provide the specialized academic instruction called for in her IEP, not in the inadequacy of the goals and specialized academic instruction offered to address her English language arts deficits.

27. Student offered no credible evidence to give reason for amending the

December 4, 2015 IEP between March 21, 2016, through the 2016 extended school year to add or tweak the academic goals or to modify the amount and frequency of the specialized academic instruction. In the April 26, 2016 IEP Amendment, River Springs offered 60 minutes a week, for four weeks, of specialized academic instruction to address math during the 2016 extended school year. At the time the 2016 extended school year offer was made and consented to, there was no persuasive evidence to demonstrate that River Springs should have known that 60 minutes weekly was insufficient.

28. However, it became apparent following the 2016 extended school year that the specialized academic instruction offered to address Student's math deficits was inadequate. Student regressed significantly in the area of math. A comparison of Student's September 2015 and September 2016 i-Ready diagnostic math scores revealed that Student declined two grade levels. Furthermore, by January 12, 2017, Student had not met any of her annual math goals. Student's math deficits worsened, and at the start of her sixth grade year, she was four grade levels behind in math.

29. Moreover, Mother reported to River Springs her frustration from the lack of an appropriate math curriculum for Student. Student was introduced to five different math curriculums during the 2016-2017 school year. Mother advised River Springs she did not feel she was equipped to teach Student at home. Mother requested from River Springs a math curriculum that had structure, consistency, and offered her more guidance as an instructor. Mother needed guidance and support from River Springs in selecting a math curriculum as she did not feel qualified to make that selection. The significant regression in math, the inability to identify an appropriate math curriculum, and Mother's frustration and sense of inadequacy to provide instruction to Student were further reasons for River Springs to revisit the appropriateness of the December 4, 2015 IEP's offer of math goals, specialized academic instruction, and placement in the

Homeschool program soon after the September 2016 i-Ready math scores were received.

30. Furthermore, River Springs failed to increase its offer of specialized academic instruction in the January 12, 2017 IEP to address Student's worsening math deficit. The January 12, 2017 IEP continued to offer an inadequate amount of specialized academic instruction to address Student's math deficit. Though the May 12, 2017 IEP Amendment did offer increased specialized academic instruction for 314 minutes daily at a nonpublic school, it was not expected to begin until the 2017 extended school year. River Springs did not offer to increase the specialized academic instruction for math for the remainder of the 2016-2017 school year, ending on June 13, 2017. Therefore, the weight of the evidence established that River Springs failed to offer an adequate level of specialized academic instruction in the area of math from October 1, 2016, to June 13, 2017. The failure to offer an adequate amount of specialized academic instruction to address the area of math from October 1, 2016, to June 13, 2017, denied Student an educational benefit, in violation of the IDEA.

**ISSUE 2(A): DID RIVER SPRINGS FAIL TO PROVIDE STUDENT THE SPECIALIZED ACADEMIC INSTRUCTION PURSUANT TO THE MARCH 30, 2016, APRIL 26, 2016, JANUARY 12, 2017, MARCH 23, 2017, APRIL 28, 2017, AND MAY 12, 2017 IEPs?**

31. Student contends River Springs failed to implement the specialized academic instruction as called for by the IEPs during the 2015-2016 and 2016-2017 school years. Student not only argues she was denied a significant amount of specialized academic instruction, but the instruction she received did not comply with the IEP. Student claims she received specialized academic instruction from an instructional aide who lacked the qualifications to provide such instruction. In its closing brief, River Springs did not offer an argument as to this issue.

32. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822.) However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*)

33. The evidence established that River Springs failed to provide the specialized academic instruction as required in the IEPs between March 30, 2016 and May 12, 2017. Student was entitled to 180 minutes of specialized academic instruction each week. In the month of September 2016, student received only five, 60-minute sessions of instruction. River Springs failed to provide Student a substantial amount of specialized academic instruction in the months of October, November, December, January, and February of the 2016-2017 school year. In addition, River Springs could not verify the instruction Ms. Owens had supposedly provided. However, River Springs did offer an adequate amount of specialized academic instruction for the 2017 extended school year, which Parents did not accept.

34. Ms. Moran, along with her instructional aide Ms. Croom, began providing Student specialized academic instruction on March 6, 2017. There were periods of time that Student received instruction solely from Ms. Croom and though the amount of instruction Ms. Croom provided was not clearly established at hearing, the evidence suggested the amount of instruction she provided was not substantial. Therefore, Student did not meet her burden in proving the instruction Mr. Croom provided was a material failure to implement the specialized academic instruction provided by the December 4, 2015 IEP, as amended on April 26, 2016.<sup>13</sup>

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<sup>13</sup> Parents did not consent to the January 12, 2017 Annual IEP, as reviewed on

35. The December 4, 2015 IEP, as amended on April 26, 2016, and consented to by Parents on May 4, 2016, called for 180 minutes of weekly specialized academic instruction during the regular school year. Failing to provide the weekly specialized instruction for over five months during the 2016-2017 school year was more than a minor discrepancy from what the December 4, 2015 IEP required. Thus, Student proved by a preponderance of the evidence that River Springs denied her the benefits of specialized academic instruction by failing to implement the December 4, 2015 IEP, in violation of the IDEA.

ISSUE 2(B): DID RIVER SPRINGS FAIL TO PROVIDE THE SPECIALIZED ACADEMIC INSTRUCTION AND RELATED SERVICES PURSUANT TO THE AUGUST 4, 2017 IEP FROM APRIL 19, 2018, THROUGH MAY 21, 2018?

36. Student contends River Springs denied her the instruction and services she was entitled to from April 19, 2018, to May 21, 2018. Student alleges River Springs was obligated to continue funding Prentice to allow Student to access the special education and related services as called for in the August 4, 2017 IEP Amendment as Student's stay put. River Springs offered no arguments on this issue in closing.

37. Student filed her initial due process hearing request on March 22, 2018, and concurrently filed a motion for stay put with OAH. On April 11, 2018, OAH found Prentice not to be Student's stay put educational program. In reliance of OAH's finding, River Springs continued to deny funding for Prentice until the United States District Court, Central District of California determined on May 18, 2018, that Student's stay put placement was Prentice. The District Court found Student entitled to the instruction and services as called for in the January 12, 2017 IEP, as amended in the August 4, 2017 IEP Amendment. River Springs immediately resumed funding for Prentice, and Student

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March 23, 2017, until April 5, 2017.

returned to Prentice on May 21, 2018. The failure to fund Prentice, equating to a failure to implement the August 4, 2017 IEP Amendment for 22 school days, from April 19, 2018, through May 21, 2018, was material. (See *Alexis R. v. High Tech Middle Media Arts School* (S.D. Cal. Aug. 3, 2009, No. 07cv830 BTM (WMC)) 2009 WL 2382429, \*6 [Failure to provide stay put is a FAPE violation for which a school district may be ordered to provide compensatory education] (*Alexis R.*)) Therefore, Student met her burden in proving by a preponderance of the evidence that River Springs violated the IDEA by failing to implement the January 12, 2017 IEP, as amended in the August 4, 2017 IEP Amendment, from April 19, 2018, through May 21, 2018.

ISSUE 3: DID RIVER SPRINGS IMPEDE PARENTS FROM MEANINGFULLY PARTICIPATING IN THE DEVELOPMENT OF STUDENT'S IEP BY FAILING TO PROVIDE THE RECORDS PARENTS REQUESTED?

38. Student contends River Springs failed to provide Parents the records they requested, impeding Parents' ability to participate in the decisionmaking process regarding the provision of a FAPE for Student. Student claims River Springs failed to provide records related to the specialized academic instruction, data regarding behavioral observations, progress reports, transcripts, or any documentation related to general or special education Student received. Student claims Parents were denied documentation regarding Student's specialized academic instruction that described the times, dates, services providers, curriculum, subject matter, frequency, duration, delivery model, location, or progress. River Springs contends it timely provided Parents the records they requested and the absence of any records Parents expected to receive did not deny Parents the opportunity to meaningfully participate in the IEP process.

39. Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044 (*Doug C.*))

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 a free appropriate public education to the child. (34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a).)

40. A school district is required to conduct not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d at p. 1485; *Fuhrmann, supra*, 993 F.2d at p. 1036.) The IEP team shall consider the concerns of the parent for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) & (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) 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 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, supra*, 960 F.2d at p. 1036 [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].)

41. California Education Code section 56504 states in relevant part, "The parent shall have the right and opportunity to examine all school records of his or her child and to receive copies . . . within five business days after the request is made by the parent, either orally or in writing."

42. Pupil records are "any information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm, or other means." (Ed. Code, § 49061, subd. (b).) "Pupil records does not include informal notes related to a pupil compiled by a school officer or employee that remain in the sole possession of the maker and are not

accessible or revealed to any other person except a substitute." (*Ibid.*) A substitute is a person who performs the duties of the individual who made the notes on a temporary basis, and does not refer to a person who permanently succeeds the maker of the notes in his or her position. (*Ibid.*)

43. Certain pupil records must be permanently maintained by a school district. (Cal. Code Regs., tit. 5, § 432, subd. (b)(1).) These records include the pupil's legal name, date of birth, method of verification of birth date, sex of pupil, place of birth, names and address of a parent of a minor pupil, the dates of each school year and summer session when the pupil leaves and enters, subjects taken during each year, half-year, summer session, or quarter; marks or credits given; verification or exemption for required immunizations; and date of high school graduation or equivalent. (*Ibid.*)

44. Mandatory interim pupil records are those records which schools are required to compile and maintain for stipulated periods of time and are then destroyed in accordance with California statute or regulations. (Cal. Code Regs., tit. 5, § 42, subd. (b)(2).) Such records include a log or record identifying those persons or organizations requesting or receiving information from the record; health information; participation in special education programs including required tests, case studies, authorizations, and actions necessary to establish eligibility for admission or discharge; language training records; progress slips and/or notes required under Education Code sections 49066 and 49067;<sup>14</sup> parental restrictions regarding access to directory information or related

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<sup>14</sup> California Education Code section 49066 refers to grades given as determined by the teacher of the course. Section 49067 discusses the evaluation of each pupil's achievement for each marking period and requires a conference with, or a written report to, the parent of each pupil whenever it becomes evident to the teacher that the pupil is in danger of failing a course.

stipulations; parent or adult pupil rejoinders to challenged records and to disciplinary action; parental authorizations or prohibitions of pupil participation in specific programs; and results of standardized tests administered within the preceding three years. (*Ibid.*)

#### 2016-2017 School Year

45. The weight of the evidence did not demonstrate that River Springs impeded Parents' ability to meaningfully participate in the development of the January 12, 2017 Annual IEP by failing to provide Parents with records regarding Terry Owen's specialized academic instruction. The evidence did not establish that the service logs Parents sought were records Ms. Owens, or any other specialized academic instruction teacher was required to create and River Springs was required to maintain as part of Student's school records. Therefore, Student did not prove by a preponderance of the evidence that River Springs denied Student a FAPE by failing to provide Parents with service logs.

#### 2017-2018 School Year

46. Student failed to establish that the records Parents were expecting, but did not receive pursuant to a March 2, 2018 records request, were records required to be collected and maintained by River Springs, either permanently or in the interim. Parents made a broad request for a copy of Student's "complete file." On March 9, 2018, River Springs provided Parents copies of Student's records it did maintain, along with the records Prentice provided to River Springs on March 8, 2018. Student did not establish at hearing that the records Parents did not receive were proper "pupil records" that would be maintained in Student's file. Furthermore, Student did not demonstrate how any of the records Parents sought and not provided, impeded their ability to meaningfully participate in the IEP process. Accordingly, Student did not meet her

burden to prove River Springs failed to provide Parents Student's records pursuant to their March 2, 2018 request, resulting in a denial of a FAPE.

ISSUES 4 AND 6: DID THE FEBRUARY 9, 2018 IEP, WITH PLACEMENT AT FLABOB AND RELATED SERVICES, CONSTITUTE A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

47. Student contends she required continuous placement at Prentice to make appropriate progress. Student argues that placement at Flabob was more restrictive than Prentice. Student claims Flabob could not offer Student daily access to typical peers and the general education classroom due to the required home study day and pull-out specialized academic instruction, and thus Flabob was not the least restrictive environment.

48. River Springs contends it complied with all procedural and substantive requirements of the IDEA in developing the February 9, 2018 IEP. River Springs argues the February 9, 2018 IEP's offer of FAPE, with placement at Flabob, was designed to address Student's unique needs, reasonably calculated to allow Student to meaningfully benefit from her education, and offered placement in the least restrictive environment.

49. When a school district seeks to demonstrate that it offered a FAPE, there are two parts to the legal analysis. First, the tribunal must determine whether the district 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. (*Ibid.*) Whether a school district offered a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann, supra*, 993 F.2d at p. 1041.)

## Procedural Compliance

50. The IEP team is required to include as part of the team 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).)

51. The Annual IEP review team meetings held on February 9 and March 2, 2018, were attended by all required team members, including Mother on both days, and Father on February 9, 2018. River Springs offered Parents a copy of their procedural safeguards and rights, but Parents declined a copy and an explanation. Parents were active and welcomed participants at the meeting. Mother opined that the small setting of Prentice allowed Student to make friends and gain confidence. Furthermore, Mother shared that Student's behaviors at home had improved and Student had recently seen a psychiatrist twice. Mother expressed her concerns regarding the offer of placement at Flabob and vigorously engaged River Springs on the issue of placement. The IEP team considered her input and concerns. At hearing, Mother testified she participated and contributed to the IEP process. Parents were afforded an opportunity to meaningfully participate in the development of Student's IEP. Hence, the IEP team meeting was conducted in accordance with the IDEA's procedural requirements.

## CONTENTS OF THE IEP

52. The IEP is the “centerpiece of the [IDEA’s] education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) It is the “modus operandi” of the IDEA, “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” (*School Comm. of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996] (*Burlington*).

53. 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 result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).) The “educational benefit” to be provided to a child requiring special education is not limited to addressing the child’s academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child’s unique needs are to be broadly construed to include the child’s academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S., supra*, 82 F.3d at p. 1500.)

54. An IEP is a written document for each child with a disability that includes 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. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must also include 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)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).)

55. Additionally, the IEP must contain statements of how the child's goals will be measured and 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)(III), (IV); 34 C.F.R. § 300.320(a)(3), (4); Ed. Code, § 56345, subd. (a)(3), (4).) It must also contain an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and activities, as well as a statement of any individual appropriate accommodations necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments. (20 U.S.C. § 1414(d)(1)(A)(i)(V), (VI); 34 C.F.R. § 300.320(a)(5), (6); Ed. Code, § 56345, subd. (a)(5), (6).) Furthermore, the IEP must contain the 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).)

56. River Springs' written IEP offer was comprehensive and contained all required information. The IEP team considered Student's strengths and identified areas of concerns. Student's areas of strength were in vocabulary and literature comprehension. She was successful in retaining the information when passages were read to her, but struggled to do so otherwise. She was more social, made new friends at Prentice, and her overall confidence had grown. She had a good attitude and did not back down from challenging assignments. Student had met her previous sensory integration goal and no longer needed school-based occupational therapy services.

However, Student was still performing below grade level in the areas of reading, writing, and math and required support in social pragmatics and speech.

57. The IEP properly identified Student's areas of need to be basic reading fluency, independent reading comprehension, math, writing, language processing, and expressive language pragmatics. Student's present levels of performance in each of those areas were clearly explained in the IEP. Student could read and decode at a sixth grade level, and could successfully explain a plot and conflict within a story. However, she required support to answer who, what, where, when, and how questions, to restate facts and details, and to independently predict the next event. As for reading fluency, she could read sixth grade level material at a speed of 87 words per minute as of December 2017.

58. Student wrote complete sentences and punctuated her sentences correctly. With support she could write a paragraph, but required visual and teacher support to write multi-paragraph essays. She needed the help of graphic organizers to provide details to her sentences. In mathematics, Student needed support to complete problems involving subtraction with regrouping, finding measurements, solving multi-step word problems, multiplying and dividing large numbers, and memorizing multiplication facts with automaticity. Student also required support from the teacher to follow the order of operations and converting fractions into decimals and percentages.

59. Student required support to start conversations, transition to new topics, and elaborate on her personal experiences. Student needed prompting to accurately explain a person's feelings when asked to examine a person's facial expressions, body language, and contextual cues. Student still needed help speaking. She continued to need verbal and visual prompting to use an open mouth posture, improve enunciation, and increase her volume.

## MEASURABLE ANNUAL GOALS

60. The IEP also provided appropriate, measurable annual goals in the areas of reading, writing, math, speaking, and social pragmatics, and such goals were appropriately challenging based on Student's abilities. Academically, Student's annual goals sought to strengthen her reading comprehension skills by asking Student to read seventh grade fiction and sixth grade nonfiction passages independently. Her reading fluency was expected to improve to 140 words per minute. The annual goals aimed to improve Student's ability to solve two-step mathematical word problems, her understanding of fractions, and to calculate more complicated multiplication and division problems involving larger digits. Her writing goal aimed to improve Student's ability to write multi-paragraph essays.

61. The IEP provided these academic goals would be measured through teacher observations, collected data, and Student's work samples. They were measurable in that Student was expected to improve her reading comprehension by successfully answering comprehension questions and citing evidence with at least 80 percent accuracy. Her reading fluency was measured using the Basic Reading Inventory assessment, tracking the words per minute Student was able to read. To measure her writing progress, Student had to write a multi-paragraph essay correctly as called for in the goal, with 70 percent accuracy. The math goals required Student to successfully achieve the tasks with 80 percent accuracy in four out of five trials. The goals were an appropriate means of tracking progress in Student's academic areas of need.

62. The goals for social pragmatics aimed to increase Student's ability to better understand another person's thoughts and feelings, to improve her conversational skills, and to think independently. They were measurable in that Student had to complete the task successfully in eight out of 10 opportunities. The goals were an appropriate means of measuring her progress in social pragmatics, and could be

appropriately measured through clinician records, observation, and work samples.

63. The speaking goal was an appropriate means of tracking progress and designed to improve Student's speech. The goal could be appropriately measured by asking Student to accomplish the task with 90 percent accuracy with no more than one visual prompt in three consecutive sessions. The goal could be accurately measured using data collected through observations and work samples.

64. Though a number of the goals did not specify the responsible persons, a fair reading of the entire IEP provides an understanding of who would be responsible. The IEP was sufficiently clear in that the teachers would be responsible for the reading, math, and writing goals, and the speech-language pathologist for the social pragmatics, speech, and expressive language goals, and Student did not establish that Parents did not understand who would be responsible to implement Student's goals.

#### APPROPRIATENESS OF RELATED SERVICES AND ACCOMMODATIONS

65. California law defines special education as instruction designed to meet the unique needs of the pupil coupled with related services as needed to enable the pupil to benefit from instruction. (Ed. Code, § 56031.) "Related services" include transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401.) In California, related services are called designated instruction and services, and must be provided "as may be required to assist an individual with exceptional needs to benefit from special education . . . ." (Ed. Code, § 56363, subd. (a).)

66. The February 9, 2018 IEP's proposed instruction, related services and supports were appropriate in light of Student unique needs and reasonably calculated to enable Student to make progress appropriate in light of her circumstances. The IEP described the academic instruction, related services and supports; setting forth the projected start date, length, frequency, and duration of instruction, services, and

supports. The IEP provided an appropriate level of specialized academic instruction of 210 minutes of pull-out instruction and 60 minutes of push-in instruction to be provided by a credentialed special education teacher; 45 minutes twice a week of group speech and language services; and individual counseling in a group setting for 30 minutes a week. Ms. Vu and Ms. Kosmal persuasively testified that the appropriate means of addressing the proposed academic goals was through a pull-out model, with instruction from a credentialed special education teacher. Student made up substantial ground in math while at Prentice, improving two grade levels in about five months. She continued to be three grade levels behind, but the weekly 270 minutes of specialized academic instruction was reasonable to address her academic deficits.

67. Furthermore, the IEP offered adequate supports and accommodations that consisted of access to instructional technology, the use of visuals, graphic organizers, multiplication tables, notes to support instruction, demonstration of understanding of skills via multi-modalities, collaboration between the teachers, and consultation by the specialized academic instructor and occupational therapist with Parents.

#### Placement in the Least Restrictive Environment

68. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with 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); Ed. Code, § 56040.1.) The IDEA also requires, to the maximum extent appropriate, that a child with a disability must be educated with children who are not disabled. (*Ibid.*)

69. School districts, as part of a special education local plan area, must have available a continuum of program options to meet the needs of individuals with

exceptional needs for special education and related services as required by the IDEA and related federal regulations. (34 C.F.R. § 300.115; Ed. Code, § 56360.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication in the home, hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.) A nonpublic, nonsectarian school is a private, nonsectarian school that enrolls individuals with exceptional needs pursuant to an IEP and certified by the California Department of Education. (Ed. Code, § 56034.)

70. The Ninth Circuit has stated a four factor evaluation to determine whether a placement is the least restrictive environment. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*)) The four factors are: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect the child will have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. (*Ibid.*)

71. The weight of the evidence established that Student's needs could have been met in a less restrictive setting such as Flabob. While at Prentice, Student spent a majority of her day in the general education classroom, and received only three hours a week of instruction outside the regular classroom. Though Student needed time to adjust to Prentice, she quickly came out of her shell, and transitioned fairly easily. As of March 2018, Student no longer required a nonpublic school placement to meet her needs.

72. Student would have access to a regular class with non-disabled peers for most of her time at Flabob. Flabob's middle school program allowed Student to receive

instruction and support on campus five days a week. Though one day a week was dedicated for home study, Student could receive support during study hall on campus for the entire school day. Ms. Vu was available onsite on those days. In addition, no credible evidence was offered to indicate Student would regress, or in any way not receive any educational benefit if she did not receive direct academic instruction five days a week. Furthermore, no credible evidence was offered that Student could not work on assignments successfully in study hall.

73. Furthermore, Flabob also offered opportunities for Student to interact and socialize with non-disabled peers. In addition, she was social and outgoing, with no behavioral issues that would impede her or her peers' ability to access their education. Student did not require prompting to remain on task or accommodations to help her maintain attention to tasks. If Student needed guidance and support, Ms. Vu was available, along with an instructional aide and Flabob's vice-principal.

74. Ms. Vu and Ms. Kosmal offered credible testimony as to Flabob's ability to meet Student's needs as identified in the February 9, 2018 IEP. Ms. Vu possessed the credentials, training, and experience to implement the academic goals as offered. She was qualified to teach Student reading using an evidence-based reading program, REWARDS Secondary. At hearing, she offered specific strategies to address each of the academic goals. She could provide the pull-out specialized academic instruction in the areas of English language arts and math. Furthermore, Flabob employed a licensed speech-language pathologist who could address the IEP's proposed goals in the areas of social pragmatics, speech, and expressive language.

75. River Springs complied with the IDEA's procedural requirements in developing the February 9, 2018 IEP and the IEP itself was designed to meet Student's unique needs. It was reasonably calculated to enable Student to receive an educational benefit appropriate in light of her circumstances. Therefore, River Springs proved by a

preponderance of the evidence that the February 9, 2018 IEP offered Student a FAPE in the least restrictive environment. Accordingly, Student did not meet her burden in proving the offer of placement at Flabob denied Student a FAPE.

#### ISSUE 5: DID RIVER SPRINGS PREDETERMINE ITS OFFER OF PLACEMENT AT FLABOB?

76. Student contends River Springs came into the March 2, 2018 IEP team meeting with a predetermined offer of placement at Flabob. Student claims that no other placement options were explored by the IEP team and the lack of information provided to Parents as to Flabob's programs and services denied Mother meaningful participation in the IEP process. Student alleges that River Springs' proposal for placement at Flabob was a "take it or leave it" offer. River Springs contends it did not predetermine its offer of placement at Flabob and determined the appropriateness of placement only after the IEP discussed the IEP's proposed goals and services. River Springs claims that it was during the March 2, 2018 IEP team meeting, after River Springs determined Prentice was unable to implement the goals developed and instructional models recommended by the IEP team that River Springs offered Flabob as a placement.

77. Predetermination is a procedural violation of the IDEA that occurs in connection with an IEP team meeting, when a district has decided on its offer prior to the meeting, such as when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345.) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.) However, district staff do not have to arrive at an IEP meeting with a blank mind; they "can, and should, have given some thought" to placement before the meeting. (*Doyle v. Arlington County School Board* (E.D.Va. 1992) 806 F.Supp. 1253, 1262; see *K.D. v. Department of Education* (9th Cir. 2011) 665 F.3d 1110, 1123.) They do not

predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP team meeting. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693, fn. 3.)

78. District team members also may form opinions prior to IEP meetings. However, if the district goes beyond forming opinions and becomes "impermissibly and deeply wedded to a single course of action," this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, Jan. 17, 2013, No. 1:11- CV-398) 2013 WL 209478, \*7.) Staff may bring a draft of the IEP to the meeting as long as parents are provided an opportunity to discuss their questions, concerns, and recommendations, before the IEP is finalized. (*Fuhrmann, supra*, 993 F.2d at p. 1036.) Developing an IEP that does not fully conform to a parent's wishes does not mean the district engaged in predetermination. (*Gregory K., supra*, 811 F.2d at p. 1314.)

79. Predetermination causes a deprivation of educational benefits where, absent the predetermination, there is a strong likelihood that alternative educational possibilities for the student would have been better considered. (*M.S. v. Los Angeles Unified School Dist.* (C.D. Cal. September 12, 2016, Case No. 2:15-cv-05819-CAS-MRW) 2016 WL 4925910, \*12 (citing *Doug C., supra*, 720 F.3d at p. 1047).) A student is not required to prove that his placement or services would have been different but for the predetermination. (*Ibid.*)

80. Predetermination is an automatic violation of a parent's right of participation under the IDEA. Where predetermination has occurred, "regardless of the discussions that may occur at the meeting, the school district's actions would violate the IDEA's procedural requirement that parents have the opportunity 'to participate in meetings with respect to the identification, evaluation, and educational placement of the child.'" (*H.B. v. Las Virgenes, supra*, 239 Fed.Appx. at p. 344, quoting 20 U.S.C. § 1415(b)(1).)

81. River Springs did not predetermine its proposed placement offer at Flabob. Ms. Kosmal's research into possible River Springs programs and her determination of Flabob as a viable placement option to propose at the IEP team meeting was reasonable. Only after the IEP team discussed special education services on March 2, 2018, did River Springs realize that Prentice could not implement the proposed goals and specialized academic instruction services. Prentice at that time could not provide the pull-out specialized academic instruction required by the reading and writing goals. Ms. Kosmal and Ms. Vu persuasively opined that pull-out instruction to be provided by a credentialed special education teacher was the appropriate method of instruction, especially one who was trained in teaching reading. Dr. Passaro also opined that was an ideal approach. Accordingly, River Springs ruled out Prentice and offered placement at Flabob.

82. The weight of the evidence demonstrated that River Springs did not arrive at the March 2, 2018 IEP team meeting with one offer of placement in mind. The question as to whether Prentice could implement the IEP as proposed, specifically the specialized academic instruction to address the proposed English language arts (reading fluency, reading comprehension, and writing) goals, was debated by the team. When River Springs concluded Prentice could not, it offered Flabob as a placement. Therefore, Student did not meet her burden of proving River Springs denied Student a FAPE by predetermining its offer to place her at Flabob.

## REMEDIES

1. Student did not prevail on Issues 1(a), 1(b), 1(d), 1(e), 1(f), 3, 4, or 5. Student did not prove by a preponderance of the evidence that River Springs denied her a FAPE by failing to offer her appropriate goals and services in the areas of occupational therapy, speech, educationally related mental health, behavior, and social skills. In addition, Student failed to prove she was denied a FAPE by River Springs' inability to

provide the records Parents sought pursuant to their records request. Furthermore, Student failed to meet her burden of proving River Springs denied her a FAPE by offering placement at Flabob in the February 9, 2018 IEP or predetermining the placement offer of Flabob.

2. Student prevailed on Issues 1(c), 2(a), and 2(b). River Springs' failure to offer an appropriate amount of specialized academic instruction to address Student's math deficits and its failure to provide the specialized academic instruction for a majority of the 2016-2017 school year deprived Student of an educational benefit. Moreover, River Springs committed a violation of the IDEA by failing to implement the August 4, 2017 IEP Amendment from April 19, 2018, to May 21, 2018, pursuant to stay put.

3. River Springs prevailed on its sole issue, Issue 6. The February 9, 2018 IEP offered Student a FAPE in the least restrictive environment.

4. As a remedy, Student requests compensatory academic services, and reimbursement for tuition and related expenses associated with Student's attendance at Prentice from March 30 to May 21, 2018. Student also seeks reimbursement for costs associated with the Stowell Learning Center's November 14, 2016 Functional Academic and Learning Skills Assessment report. In addition, Student requests that River Springs be ordered to provide 50 hours of training to its staff to better familiarize the staff regarding their duties and obligations to provide a FAPE. Student further requests that River Springs provide Student's entire educational file to Parents. Lastly, Student seeks an order that Student continue to be placed at Prentice for the remainder of the 2018-2019 school year.

5. River Springs contends that Student should not be placed at Prentice as Prentice is unable to implement the February 9, 2018 IEP. In addition, River Springs argues that Student is not entitled to any compensatory education services beyond the

72 hours River Springs offered to provide. As a remedy for prevailing on its issue, River Springs requests an order that River Springs may implement the February 9, 2018 IEP without parental consent.

6. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. §1415(i); see *Burlington, supra*, 471 U.S. 359, 369.) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A* (2009) 557 U.S. 230, 243-244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) When a school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. 359, 369-370.) Remedies under the IDEA are based on equitable considerations and the evidence established at the hearing. (*Id.* at p. 374.)

7. Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Burlington, supra*, 471 U.S. at p. 374; *Parents of Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and that the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington, supra*, 471 U.S. at pp. 369-370 [reimbursement for unilateral placement may be awarded under the IDEA where the district’s proposed placement does not provide a FAPE].) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not

holding IEP team meetings, unilateral placement found to be reimbursable where it had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade, and where expert testimony showed that the student had made substantial progress[.])

8. The IDEA does not require that a private school placement provide all services that a disabled student needs as a condition to full reimbursement. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction. (*C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155, 1158-1159; see also, *S.L. v. Upland Unified Sch. Dist.* (9th Cir. 2014) 747 F.3d 1155, 1159; *Doug C., supra*, 720 F.3d at p. 1048.)

9. An ALJ can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist., supra*, 464 F.3d at p. 1033.) Compensatory education is a prospective award of educational services designed to catch up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. Bd. of Educ.* (D.Conn. 2008) 531 F.Supp.2d 245, 265.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) Compensatory education awards depend upon the needs of the disabled child, and can take different forms. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1126.) Typically, an award of compensatory education involves extra schooling, in which case "generalized awards" are not appropriate. (*Puyallup, supra*, 31 F.3d at p.

1497.) "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Ibid.*) Compensatory education may be a remedy for a violation of a stay put provision. (See *Alexis R., supra*, 2009 WL 2382429, \*6.)

#### COMPENSATORY EDUCATION AND REIMBURSEMENT

10. Student received only five of the specialized academic instruction hours to which she was entitled from the start of the 2016-2017 school year through the time Ms. Moran began providing it on March 6, 2017. In addition, the offer of specialized academic instruction to address Student's significant math deficits during the 2016-2017 school year was inadequate as Student was only receiving one hour a week of specialized math instruction when it was provided. Student lost out on significant instruction time to address her reading and writings deficits, and even more instruction time in the area of math.

11. The evidence established that one hour a week of specialized academic instruction to address Student's math deficit was inadequate, which became apparent at the start of the 2016-2017 school year. The weight of the evidence demonstrated that approximately three hours a week was a sufficient amount of specialized math instruction. Student received three hours a week of pull-out specialized academic instruction in math at Prentice from Ms. Shaw, which resulted in marked improvement in just a span of about five months. Accordingly, Student should have been provided additional specialized academic instruction in the area of math for the 2016-2017 school year. Three hours per week is a fair estimation of what should have been offered to address her significant regression and ongoing math delays. Student was not provided approximately 22 hours of specialized academic instruction in math for about 22 weeks

as called for in the December 4, 2015 IEP.<sup>15</sup> Furthermore, Ms. Moran provided only one hour each week of math instruction for the remainder of the 2016-2017 school year.

12. As of January 2018, Student was only reading at a fourth grade level. Furthermore, as of the September 7, 2018 IEP, in her eighth grade year, Student remained at fourth grade-level math based on her i-Ready diagnostic test. Student continued to require specialized academic instruction and is entitled to compensatory educational services. Accordingly, Student is awarded 45 hours to compensate her for lost English language arts instruction and 83 hours to compensate her for math instruction that should have been offered to address River Springs' failure to provide Student appropriate specialized academic instruction during the 2016-2017 school year.<sup>16</sup>

13. However, Parents did not request River Springs to assess Student in the area of academics during the 2016-2017 school year. In addition, Parents did not inform

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<sup>15</sup> Student was entitled to approximately 72 hours of specialized academic instruction from the start of the 2016-2017 school year to March 6, 2017, the date Ms. Moran began providing instruction. Student received five hours of instruction from Ms. Mason, resulting in 67 hours of lost instruction time. One third of instruction time was allocated for math, which amounts to approximately 22 hours. The remaining 45 hours of lost specialized academic instruction was in English language arts.

<sup>16</sup> Student should have received additional specialized math instruction from October 1, 2016, to June 13, 2017, of approximately three hours a week, totaling 96 hours. Ms. Moran and Ms. Croom provided math instruction starting March 6, 2017, through June 13, 2017, for a total of approximately 13 hours, resulting in a loss of 83 hours that should have been provided.

River Springs they would be seeking reimbursement for an independent educational evaluation in the area of academics. Accordingly, Student is not entitled to reimbursement for costs associated with the Stowell Learning Center's November 14, 2016 Functional Academic and Learning Skills Assessment report.

14. Furthermore, though compensatory education may be a remedy for a violation of a stay put provision, a balancing of the equities in this case does not support compensatory education services and reimbursement of tuition and related costs for lost instruction and services at Prentice. River Springs relied in good faith on OAH's April 11, 2018 Order determining that Prentice was not Student's stay put educational program. River Springs continued to deny funding for Prentice in reliance on OAH's determination, and resumed funding once the District Court determined on May 18, 2018, Prentice to be Student's stay put placement. Furthermore, River Springs' February 9, 2018 IEP offer of FAPE was reasonably calculated to enable Student to make progress appropriate in light of the her circumstances.

15. More importantly, Student's claim for failure to implement the August 4, 2017 IEP Amendment was limited to April 19, 2018, through May 21, 2018, not the entire stay put period. From April 19, 2018, to May 21, 2018, Student attended Prentice for 3 1/2 days, and Parents chose for Student not to attend Prentice for the remaining 18 1/2 days of the 22 school days during that period, for the primary purpose of gaining an advantage in District Court to obtain an injunction as to stay put. The loss of instruction and related services for Student from April 19, 2018, through May 21, 2018, was attributable to Parents' strategic decision, not River Springs failure to implement the January 12, 2017 IEP, as amended on August 4, 2017. Accordingly, it would be inequitable for Student to receive compensatory education services or reimbursement of tuition and related costs for lost instruction and services at Prentice from April 19, 2018, to May 21, 2018, due to the calculated choices made by Parents to gain a strategic legal advantage in District Court.

## PLACEMENT

16. River Springs met its burden of proving the February 9, 2018 IEP, with placement at Flabob, offered Student a FAPE in the least restrictive environment. Accordingly, River Springs is not obligated to continue funding placement at Prentice and may implement the February 9, 2018 IEP without parental consent if Student seeks to receive special education and related services from River Springs.

## ORDER

1. River Springs shall provide Student with compensatory academic services in the amount of 45 hours in the area of English language arts and 83 hours in the area of mathematics, to be used by June 30, 2020, or the services will be deemed forfeited. The services will be provided by a certified nonpublic agency or certified nonpublic school of Parents' choice. Within 30 days of Parents providing River Springs with the name and contact information of a certified nonpublic agency or certified nonpublic school, River Springs shall contract with the identified provider, at a rate not to exceed \$75 per hour. The timing and delivery of the services shall be coordinated between Parents and the provider. River Springs shall reimburse Parents at the rate of \$.545 per mile for one round trip per session.

2. All other claims for relief by Student are denied.

3. River Springs may implement the February 9, 2018 IEP without parental consent if Student seeks to receive special education and related services from River Springs.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing

decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issues 1(c), 2(a), and 2(b). River Springs prevailed on Issues 1(a), 1(b), 1(d), 1(e), 1(f), 3, 4, 5, and 6.

## RIGHT TO APPEAL

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

DATED: January 14, 2019

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*/s/*

ROMMEL P. CRUZ

Administrative Law Judge

Office of Administrative Hearings