

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA
IN THE MATTER OF
PARENT ON BEHALF OF STUDENT,
V.
SOUTHERN KERN UNIFIED SCHOOL DISTRICT.
OAH CASE NO. 2018090934

DECISION

Student filed a Due Process Hearing Request on September 25, 2018, with the Office of Administrative Hearings, State of California, naming Southern Kern Unified School District. Southern Kern filed its response on November 7, 2018.

Administrative Law Judge Clifford H. Woosley heard this matter in Rosamond, California, on March 19, 20, 25, April 9, 10, 11, 17, and 18, 2019.

Mother represented Student. Attorney Darren J. Bogié represented Southern Kern. Director of Education, Sheryl Taylor, attended on behalf of Southern Kern.

The parties presented evidence during the first three days of hearing to determine if any of Student's claims were barred by the statute of limitations. The statute of limitations is two years. (Ed. Code, § 56505, subd. (l); 20 U.S.C. § 1415(f)(3)(C)). On March 26, 2019, the Administrative Law Judge ruled some of Student's claims were barred by the statute of limitations. The hearing proceeded on the issues that were not barred by the statute of limitations.

At the parties' request, OAH granted a continuance to May 13, 2019, for the filing of written closing arguments. On May 8, 2019, OAH found good cause to grant Southern Kern's request for a continuance to submit written closing argument to June 10, 2019. On June 7, 2019, OAH found good cause to grant Southern Kern's second request for a continuance to submit written closing briefs to June 24, 2019. On June 24, 2019, the parties submitted their final written closing briefs, the record was closed, and

the matter was submitted for decision.

Throughout this Decision, the Office of Administrative Hearings is referred to as OAH. Administrative Law Judge is referred to as ALJ. A free appropriate public education is referred to as FAPE and an individualized education program is referred to as an IEP.

ISSUES

The issues set forth below have been clarified in accordance with *J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 431, 442-443. No substantive changes have been made.

1. Did Southern Kern deny Student a FAPE by failing to meet its child find obligation and find Student eligible for special education prior to September 22, 2008?
2. Did Southern Kern deny Student a FAPE during the 2013-2014 school year by:
 - a. Failing to provide Student with a safe learning environment free from bullying;
 - b. Failing to conduct assessments of Student in all areas of suspected disability;
 - c. Constantly changing Student's placement;
 - d. Failing to offer appropriate special education and related services in the least restrictive environment, specifically: appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, wrap around services; and placement in general education;
 - e. Failing to consider the continuum of placements at the February 27, 2013, August 28, 2013, December 5, 2013, February 13, 2014 and March 17, 2014 IEP team meetings; and
 - f. Failing to implement general and special education instruction in the February 27, 2013, August 28, 2013, December 5, 2013, February 13, 2014 and March 17, 2014 IEPs; and

g. Failing to implement accommodations included in the February 27, 2013, August 28, 2013, December 5, 2013, February 13, 2014 and March 17, 2014 IEPs?

3. Did Southern Kern deny Student a FAPE during the 2014-2015 school year

by:

- a. Failing to provide Student with a safe learning environment free from bullying;
- b. Failing to conduct assessments of Student in all areas of suspected disability;
- c. Failing to review or revise Student's behavior intervention plan, or to recommend an updated functional behavior analysis;
- d. Constantly changing Student's placement;
- e. Failing to offer appropriate special education and related services in the least restrictive environment, specifically: appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, and wrap around services; and placement in general education;
- f. Failing to consider the continuum of placements at the August 5, 2014 IEP team meeting;
- g. Failing to provide Parent with prior written notice when refusing her requests for assistance, specifically: independent study, evaluations, and home instruction;
- h. Failing to provide appropriate regular and special education instruction in accordance with the March 17, 2014 and August 5, 2014 IEPs; and
- i. Failing to implement the accommodations in the March 17, 2014 and August 5, 2014 IEPs?

4. Did Southern Kern deny Student a FAPE during the 2015-2016 school year

by:

- a. Failing to offer an appropriate placement in the least restrictive environment, specifically: appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, wrap around services, and placement at Student's home school;
 - b. Failing to consider the continuum of placements at the September 2, 2015 and February 22, 2016 IEP team meetings;
 - c. Failing to conduct a timely and appropriate functional behavior analysis and develop an appropriate behavior intervention plan; and
 - d. Failing to provide appropriate regular and special education instruction in accordance with the September 2, 2015 and February 22, 2016 IEPs?
5. Did Southern Kern deny Student a FAPE during the 2016-2017 school year

by:

- a. Failing to offer appropriate special education and related services in the least restrictive environment, specifically: appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, wrap around services, and placement at Student's home school;
- b. Failing to consider the continuum of placements at the March 17, 2017 and May 31, 2017 IEP team meetings;
- c. Failing to provide Parent with prior written notice when refusing her request for a referral to a psychologist;
- d. Failing to conduct a timely and appropriate functional behavior analysis and develop an appropriate behavior intervention plan;
- e. Failing to provide appropriate regular and special education instruction in accordance with the March 17, 2017 and May 31, 2017 IEPs;
- f. Failing to provide a safe learning environment free from bullying; and
- g. Failing to timely implement instruction and accommodations in the February

22, 2016, March 17, 2017 and May 31, 2017 IEPs?

6. Did Southern Kern deny Student a FAPE during the 2017-2018 school year by:

- a. Failing to offer appropriate special education and related services in the least restrictive environment, specifically: appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, and wrap around services;
- b. Failing to consider the continuum of placements at the August 15, 2017 and May 16, 2018 IEP team meetings;
- c. Failing to conduct a timely and appropriate functional behavior analysis and develop an appropriate behavior intervention plan;
- d. Failing to provide appropriate regular and special education instruction in accordance with the August 15, 2017 and May 16, 2018 IEPs;
- e. Failing to timely implement accommodations in the August 15, 2017 and May 16, 2018 IEPs?

7. Did Southern Kern deny Student a FAPE during the 2018-2019 school year by failing to offer appropriate special education and related services in the least restrictive environment, specifically: appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, wrap around services, and extended school year?

SUMMARY OF DECISION

In Issues 1 through 5, Student did not prove she was entitled to pursue claims that predated the two-year statute of limitations. The evidence demonstrated that Mother was contemporaneously aware of the facts that formed the basis of the claims since before 2008, that Student was aware of all facts supporting her claims when she retained an attorney and filed a prior due process claim in July 2014, and that Student

entered into a settlement waiving all claims through July 2014. No exception to the two-year statute of limitations applied because Student did not prove Southern Kern prevented Mother from timely pursuing Student's claims. Claims made before September 25, 2016 were barred by the two-year statute of limitations.

In Issues 5a and 6a, Student proved Southern Kern denied Student a FAPE for the full two years not barred by the statute of limitations. Southern Kern improperly delayed assessment for speech and language services, for which Student qualified. Student also proved that Southern Kern failed to timely and properly assess Student's educationally related mental health over years of multiple placements and programs, despite events that should have triggered assessment and services. These procedural violations amounted to a denial of FAPE because Student required the services to benefit from her special education. Student prevailed on Issue 5c because Southern Kern failed to provide prior written notice of its denial of Mother's request that Student be referred to a psychologist, which denied Student a FAPE by significantly impeding Mother's opportunity to participate in the decision-making process.

In Issues 5d and 6c, Student proved that Southern Kern denied her a FAPE because it did not properly monitor the behavior intervention plan with further functional behavioral assessments or other tactics designed to gather relevant data. Student's behaviors inhibited her education and required effective intervention, but Southern Kern did little to evaluate and assure the plan's effectiveness, compromising Student's ability to benefit from her special education.

In Issues 5b and 6b, Student did not prove Southern Kern failed to consider the continuum of placements at IEP team meetings. The testimonial and documentary evidence indicated that the IEP teams discussed a continuum of placements at IEP meetings where placement was an issue. In Issues 5e and 6d, Student did not present persuasive evidence that Southern Kern did not provide special and general education

instruction in accordance with the IEP's. In Issue 5f, Student did not prove that she was bullied during the 2016-2017 school year. Student's claim of bullying was not supported by evidence. Similarly, in Issues 5g and 6e, Student did not prove that Southern Kern failed to implement the instruction and accommodations in the IEPs.

For Issue 7, Student failed to demonstrate that Southern Kern failed to offer FAPE for the 2018-2019 school year because Student failed to present any evidence of the offer, or any alleged deficiencies.

FACTUAL FINDINGS

Student was 17 years old at the time of the hearing, attending Southern Kern's Abraham Lincoln Independent Study Program for 12th grade, and on track to graduate with a regular high school diploma within a few months. Student lived with her maternal Grandmother, who had legal custody, and Mother, who held educational rights. Student qualified for special education since first grade and, at the time of hearing, received special education services under the eligibility of emotional disturbance. Student lived within the boundaries of Southern Kern from kindergarten to the time of hearing.

2006-2012: KINDERGARTEN AND ELEMENTARY SCHOOL

Student attended kindergarten in 2006-2007. Student struggled with academics and relationships and was referred to a student study team. The team reported that Student had very poor social skills and was often in trouble both on the playground and in class. Southern Kern assessed Student for special education, at Mother's request, in October 2006. Student was not found eligible for special education. Instead, Student received general education support services, commonly referred to as a Section 504 plan.

Student's performance in first grade during the 2007-2008 school year was below average. The student study team referred Student for another special education

assessment. Student was found eligible for special education in March 2008 as a student with a specific learning disability, due to discrepancy between her average cognitive ability and below average academic skills. Student made some academic progress, but did not achieve grade-level standards. Student had difficulties with self-control, staying focused, and rushing through work. Southern Kern, with Mother's consent, referred Student to the Kern County Mental Health Department for a mental health assessment. The county mental health department declined to assess Student because Southern Kern had not yet used a behavior intervention plan to address behaviors interfering with learning. With Mother's permission, Student was retained and repeated first grade.

Student attended a second year of first grade at a different elementary school in the 2008-2009 school year. Though her academics somewhat improved, Student had poor behavior, did not follow directions, had low test scores, and did not make good use of her time. Student struggled with self-control and staying focused.

Student attended second grade in the 2009-2010 school year and received specialized academic instruction for core academic classes. Her grades were initially strong but by February 2010, her academic skills declined. Student continued to struggle with self-control, class behaviors, and interpersonal relationships.

School psychologist Michael Goldberg provided counseling services to Student. Mr. Goldberg testified at the hearing. He worked for Southern Kern as a school psychologist for 11 years until he retired at the end of the 2016-2017 school year. He had a master's in psychology and held a pupil personnel credential. He averaged 80 to 90 psychoeducational evaluations a year and completed approximately 1000 while at Southern Kern. About five to 10 percent of those he evaluated had special education eligibility of emotional disturbance and another five to 10 percent were special education eligible because of intellectual disability.

Mr. Goldberg worked with Student from second grade until his retirement in

2017. In addition to counseling Student, Mr. Goldberg reevaluated Student for her triennial IEPs of 2011, 2014, and 2017, attended her annual, addendum, and triennial IEPs, regularly consulted and talked with Mother. Mr. Goldberg had worked with Student more than any other Southern Kern personnel, and consistently made himself available to Mother to discuss her concerns.

In February 2010, Mr. Goldberg, with Mother's consent, referred Student for a county department of mental health services evaluation for intensive educationally related mental health services. In the referral, Mr. Goldberg said that Student was unable to control her behavior in the social environment. Student was defiant, profane, physically and verbally aggressive toward other pupils, and disrespectful, resulting in multiple suspensions, over the prior two years. He reported that Student had diagnoses of acute stress disorder, attention and hyperactivity disorder, and a specific learning disability.

Student attended third grade in the 2010-2011 school year and received specialized academic instruction for core academic classes. She made satisfactory progress, but her reading and poor test scores were areas of concern. She had outstanding marks for science, history, penmanship, art, music, spelling and physical education by the end of that year.

Student's maternal grandmother testified at hearing. Student and her siblings lived with Grandmother from 2010. In 2011, a dependency court awarded guardianship to Grandmother. Mother retained the children's educational rights.

Mr. Goldberg reevaluated Student for her February 2011 triennial IEP. Student was nine years, five months old. On the Wechsler Intelligence Scale for Children, Fourth Edition, Student scored 75 on verbal comprehension and 77 on working memory which were both below average, 84 for perceptual reasoning which was low average, and 94 on processing speed which was average. Student's full-scale intelligence quotient was

77, which was borderline. On the Woodcock-Johnson Tests of Achievement, Third Edition, Student's composite scores for broad reading was 84 and broad written language was 83, which were low average, and broad math was average. Mr. Goldberg found that Student met eligibility criteria for emotional disturbance and the IEP team agreed.

Mr. Goldberg did not recommend that Student be evaluated for speech and language services. Student never had a problem understanding him. None of Student's teachers reported expressive or receptive language difficulties. Mr. Goldberg did not see anything that caused him to suspect Student needed speech and language assessment.

Student started fourth grade in the 2011-2012 school year and received specialized academic instruction for core academic classes. At a January 18, 2012 IEP team meeting, Mother and Southern Kern team members agreed to move Student from fourth to fifth grade, to be with same-aged peers in an attempt to improve Student's self-esteem and behaviors. The IEP team met again on March 9, 2012, to discuss Student's behavior and recent suspension. Mother transparently shared her concern that the adults in Student's life had struggled with alcoholism, which had caused Student to act out, getting wanted attention for her bad behavior. Mr. Goldberg recommended a functional behavior assessment to develop a behavior intervention plan.

Student finished the year with grades of C in reading, writing, spelling, science, social studies, and penmanship, D in math, B in art, music, and physical education, and F in work habits and citizenship. She was absent 22 days, including 10 days of suspensions.

2012-2015: MIDDLE SCHOOL

Student attended sixth grade during the 2012-2013 school year and received specialized academic instruction for core academic classes. She continued to struggle with her maladaptive behaviors, and she was regularly removed from the classroom.

Southern Kern conducted a functional behavior assessment and, at the March 2013 annual IEP, added a behavior intervention plan targeting Student's behaviors.

For 2013-2014, Student attended seventh grade. Student earned C grades in English, math, social studies and science and received B grades in physical education and literature. Student's grades declined in the fourth quarter because of Student's poor attendance and refusal to complete work. Student had at least 27 assertive discipline incidents, including profanity, fighting, and aggression, for the school year. There was no evidence presented at hearing that Student was bullied.

Mr. Goldberg reevaluated Student for her triennial IEP, producing a February 26, 2014 multidisciplinary team report. Student was 12 years, five months old. On the Wechsler Intelligence Scale, Student had a low score of 69 on verbal comprehension, low average score of 84 for perceptual reasoning, 83 on working memory, and 83 on processing speed. Student's full-scale intelligence quotient was a borderline 73. Student's verbal composite score meant her verbal reasoning, comprehension, and conceptualization were in the low range. On the Wechsler Individual Achievement Tests, Third Edition, Student's composite scores were low average for basic reading with an 84 and borderline for mathematics with a 71 and written language with a 75.

Mr. Goldberg evaluated Student's social and emotional status, using Student's and Mother's interviews, his observations, and behavior rating scales. He administered the Behavior Assessment System for Children, Second Edition (including Mother's form and Student's self-report scale form). The teacher rating scales had Student in the clinically significant range for conduct problems, and in the at-risk range for externalizing problems, school problems, and study skills. On the Behavior Evaluation Scale, Third Edition, Student's overall behavior quotient indicated she had a serious behavior problem. Student's processing abilities were within the low to average range.

Generally, Student experienced difficulty in the areas of learning, interpersonal

difficulties, and inappropriate behaviors. Mr. Goldberg found Student met the eligibility criteria for special education under the category of emotional disturbance, specific learning disability, and other health impairment. Mr. Goldberg presented his report at the triennial IEP, which Mother attended.

STUDENT'S JULY 2014 REQUEST FOR DUE PROCESS

Mother retained an attorney and filed a request for due process on behalf of Student and against Southern Kern on July 14, 2014. A few months later, Mother would be sentenced to up to 16 months in county jail for multiple California vehicle code violations.

Mother told Sheryl Taylor, director of special education and student services, that she expected to go to jail. Therefore, Mother and Grandmother met with Ms. Taylor, on November 6, 2014. Mother signed an Appointment of Educational Representative, which was a form to be used when the parent retained education rights and chose to delegate responsibility for educational decisions to an educational representative. Mother identified Grandmother as the educational representative and Grandmother signed and accepted the appointment. Ms. Taylor signed on behalf of Southern Kern. Though Grandmother initially did not recall signing the appointment, she later acknowledged her signature when presented with a copy. Grandmother was authorized to sign Student's IEPs and any documents related to the then-pending due process proceeding, until Mother returned.

Ms. Inman sent Student's attorney the terms of a proposed settlement on October 30, 2014. On November 5, 2014, Student's attorney sent a letter to Ms. Inman, stating that Mother accepted the offer. Ms. Inman sent the written settlement agreement to Ms. Howard; Ms. Howard returned the agreement with signature pages signed by Grandmother on November 12, 2014. Southern Kern's Board of Trustees approved and signed the agreement at its December 3, 2014 meeting. The agreement

included Student's release and discharge of all educational claims, known and unknown, through and including the 2013-2014 school year and the 2014 extended school year, which concluded in mid-July 2014.

Grandmother signed two settlement signature pages. She signed Mother's name and her name beneath, on one. On the other, Grandmother just signed Mother's name. Grandmother confirmed her handwriting and signatures on both. Grandmother initially testified that she signed the signature pages of the settlement agreement with Mr. Goldberg, who allegedly instructed her to sign. Though he was aware of its filing, Mr. Goldberg was not involved in Student's prior due process matter. The documentary and testimonial evidence established that the settlement negotiations, settlement acceptance, written agreement, and exchange of executed signature pages was accomplished with a standard, professional process between the parties' attorneys. Grandmother's testimony was not persuasive in this regard.

For the 2014-2015 school year, Student attended eighth grade. Though Student showed some improvement, she was working below her ability and had disruptive behavior. Her grade point average was 2.67. Student had more than 20 reported discipline incidents, including assault, taking others' property, profanity, screaming, and disruptive behavior. Student was classified as a truant because she was tardy for first period more than 19 days.

2015-2019: HIGH SCHOOL

9th Grade: 2015-2016

Student begin her freshman year at Rosamond High School for the 2015-2016 school year. She received specialized academic instruction in her core academic classes. Student had a B average for the first semester. Student's maladaptive behaviors of profanity, verbal and physical aggression, disruptiveness, truancy and tardiness

continued. She accumulated 23 reported discipline incidents by May 2016.

Student's February 2016 annual IEP meeting was reconvened on April 19, 2016. Attendees included Mr. Goldberg, Mother, Student, and Joshua Johansson who was Student's case manager that year and one of her Rare Earth special education teacher. He had been a resource specialist teacher with Southern Kern for three years and was to complete his special education master's degree in June 2019. Mr. Johansson testified at the hearing.

The IEP team reviewed present levels of academic and functional performance. Student's willingness to complete class work had improved but her behaviors increasingly prevented her from performing consistent with her capabilities as the year progressed. The team drafted four academic goals in reading, listening comprehension, writing, and math and four social-emotional goals addressing Student's maladaptive behaviors. Student received accommodations associated with her attention deficit hyperactivity disorder and specific learning disability, but the behaviors occurred despite Student's teachers implementing those accommodations.

Student's behavior intervention plan identified Student's targeted behavior as verbal and physical aggression. Student used profanity, argued and threatened others, threw items, ignored staff requests, and disrupted the classroom. Student used profanity toward Mr. Johansson in the classroom, but Mr. Johansson did not refer her for discipline. These behaviors were impulsive and, sometimes, Student was later regretful and would apologize. The intervention plan identified various behavioral triggers and replacement behaviors, with strategies to teach Student self-monitoring techniques to diminish her impulsivity. Mr. Goldberg would be contacted whenever Student had a reportable disciplinary incident. The identified behaviors were essentially the same behaviors Student had been exhibiting since elementary school. The IEP team did not

review any data or evaluate the plan's effectiveness, or modify and update the intervention plan.

The team discussed placement. Student would spend 44 percent of her typical day in the general education environment, including lunch, recess, passing periods, school activities and available electives. Student would receive 228 minutes a day of specialized academic instruction including algebra, English, and study skills, and 80 minutes a month, or one 20-minute session a week, of individual counseling with Mr. Goldberg.

Student told the IEP team she did not want to attend Rosamond anymore and, instead, desired to transfer to Rare Earth High School. Rare Earth was a continuation high school with shorter days and a more flexible schedule. Student said she was unhappy and did not have any friends at Rosamond. Mother did not want Student making an emotional decision and the other team members encouraged Student to remain at Rosamond's comprehensive campus. The IEP team chose to continue with Student's placement at Rosamond.

In early May 2016, Student was suspended for following and harassing a male student. The suspension meant that Student would have been suspended for more than 10 days during the school year. Southern Kern held a manifestation determination meeting on May 5, 2016 to determine if Student's conduct, which resulted in suspension, was a manifestation of her disability. Mother, Ms. Taylor, an administrator, and Mr. Goldberg participated. Student was regularly leaving her classrooms to go to other classrooms to talk to a particular boy. The team generally discussed the nature of Student's conduct, determined it was impulsive, and found that the conduct was a manifestation of Student's disability. The team made no changes to the behavior intervention plan. The team did not refer Student for further assessment.

Mother suggested that Student be transferred to Rare Earth for the remainder of the school year. Mr. Goldberg noted that Student was becoming a young woman, had not learned to navigate her relationship with male pupils, and was following her impulses. The team agreed to place Student at Rare Earth. Mr. Goldberg would address appropriate relationship behaviors in counseling, but the counseling remained at 80 minutes a month. Student could return to Rosemond the following school year.

Student transferred to Rare Earth. Rare Earth had about 60 to 65 students, smaller classes, and more individualized instruction in general and special education classes. Rare Earth served students who were credit deficient, had behavioral issues, or could not complete high school in a timely manner at a traditional high school. Student's second semester grades lowered. She received three additional disciplinary incident reports before the school year ended on June 2, 2016.

10th Grade: 2016-2017

The IEP team met on August 9, 2016 to discuss Student's placement for the 2016-2017 school year. All necessary team members attended, including Mother and Student. Student said she wanted to return to Rosamond to play sports. Mother stated that the prior year's placement at Rare Earth was to be temporary. The team agreed and Student started the school year at Rosamond.

The IEP team met again on August 18, 2016 to discuss a change of placement from Rosamond to Rare Earth, at Mother's request. Mother did not attend but asked that the IEP be sent to her for signature. Student attended the meeting. The IEP team decided Student was having difficulty functioning at Rosamond, and Rare Earth was the proper placement. The IEP did not identify the difficulties Student was having at Rosamond or why Rare Earth was now the appropriate placement. The team determined Student's new schedule and special education classes. Mother consented to the IEP and Student returned to Rare Earth.

Patrick Holmes was the assistant principal for Rare Earth and Abraham Lincoln for two years. He taught high school for nine years before becoming an administrator at Southern Kern in 2014. He had a single subject teaching credential and an administrative service credential. Mr. Holmes testified at the hearing. He believed Rare Earth was a productive and accommodating educational environment.

Mr. Holmes saw Student daily and frequently talked to Mother, with whom he had a good relationship. He regularly talked to Student's teachers during the 2016-2017 school year, who were generally positive about Student's performance. However, Student had frequent emotional, verbal, and physical altercations during the fall semester. Student could socialize with others like any teenager, communicating clearly with little tension. But certain social interactions triggered Student's anger and inappropriate conduct.

Ms. Taylor testified at the hearing. She had been director of special education and student services for Southern Kern since December 2012. Her duties included monitoring and developing special education programs, reviewing IEPs for compliance and implementation, evaluating staff performance, monitor suspension and expulsions, and oversee the WorkAbility and Workforce Innovation Opportunity Act programs, which provide students with employment within the community. Ms. Taylor had been a special education teacher for more than nine years at Southern Kern before becoming director. She had a bachelor's degree in psychology, a master's degree in clinical health and neuropsychology, an education specialist teaching credential, and an administrative service credential.

In her administrative position, Ms. Taylor was not directly involved with most special education students and IEPs. However, she had been very involved with Student since middle school, attending IEPs, talking with Student, and having many meetings with Mother. Both school staff and Mother felt more comfortable at Student's IEP

meetings when Ms. Taylor attended. Ms. Taylor's education, credentials, experience, and extensive professional interaction with Student and Mother equipped Ms. Taylor to knowledgeably discuss Student's abilities, capabilities, temperament, and qualifications. Mother said Ms. Taylor was a friend, with whom she had "hundreds of meetings."

The IEP team met on December 13, 2016 and developed Student's individual post-secondary transition plan. Student identified preferences for military service and government work after high school. Ms. Taylor opined that Student honestly evaluated herself in the transition inventory, demonstrating a realistic sense of what she could do. Student viewed her work ethic as a strength and thought herself knowledgeable about obtaining employment, making friends, and keeping a house (washing cooking, etc.). Student saw her biggest weakness as budgeting and paying bills. Student rated herself lower on interpersonal relationships, indicating thoughtful self-awareness. Her teacher's inventory was similar, but gave Student lower scores in interpersonal relationships. Mother's inventory was very discrepant from Student's responses. The IEP team added two monthly transition classes in vocational guidance and career awareness to Student's IEP, scheduled transition assessments, and developed an IEP goal in transition training.

Mom testified that Student was not really learning because Student was using a smartphone application called Socratic, which supplied answers to math and homework questions. Mr. Johansson had observed Student access the application, which was also used by other pupils. Other teachers were similarly aware. He tested the application, finding it about 75 to 80 percent accurate. However, he did not believe its use meant Student did not learn her material. He monitored the classroom to assure it was not used during class. And Student's mastery of each lesson's material was measured by testing and an assessment where no phones were allowed. Student's grades accurately reflected her knowledge and work in each of her classes.

Edward K. Shevlin taught Student's general education classes during Student's ninth and 10th grade. He had a California teaching certificate, a cross-cultural, language and academic development certificate, and a preliminary administrative credential. He testified at the hearing. Mr. Shevlin knew of and implemented Student's IEP accommodations. If there had been any difficulty in implementing an accommodation, Mr. Shevlin would have talked to Student's case manager. All of Student's accommodations were implemented in his classes. Mr. Shevlin believed that Student had some friends, with whom she had normal social interactions. Student had a tough time relating to female students; she was better with males. He never observed Student being bullied by others.

Student accumulated more than 10 assertive discipline incidents by the end of January 2017, including threats to fight a female student. On February 3, 2017, Student told Mr. Shevlin that another female student, Pupil A, threw a soccer ball and tried to strike Student in the head. Student also said Pupil A was "giving her dirty looks and making rude comments." Student told Mr. Shevlin that if Pupil A did not stop, Student was going to punch her. Mr. Shevlin and Student told assistant principal Mr. Holmes and a campus security officer, who counseled Student to avoid Pupil A and let campus security take care of the issue. Student had previously told Mr. Goldberg of other issues with Pupil A. On Wednesday, February 8, 2017, Mr. Holmes observed Student have a profane verbal altercation with Pupil A. Student hit Pupil A. Student was suspended for three days.

On Monday, February 13, 2017, Student returned to school following her suspension. She attended her fourth, fifth, and sixth periods in Mr. Johansson's classroom. Mr. Johansson did not notice anything unusual about Student, with whom he conversed throughout much of the day. In sixth period, Student sat in her normal seat in the back with two female pupils. Mr. Johansson and others saw that Student had

braided her long hair. Looking out from Mr. Johansson's classroom door, the Rare Earth parking lot was to the left and classrooms were to the right.

When the bell rang at the end of sixth period, Student walked out of the classroom door and turned right. If Student intended to leave campus, she would have turned left toward the parking lot where Mother and Grandmother were waiting. Student walked toward Pupil A's sixth period classroom, confronted Pupil A, and started to fight. Two campus safety officers and Mr. Shevlin ran to the fighting students. Mr. Shevlin grabbed Pupil A and pulled her into the school offices. Student followed them, cursing and trying to continue the physical fight. Both of the female students yelled provocative obscenities. A female campus safety officer sternly directed Student out of the office and escorted her to the media center, so Student could calm down. Pupil A was moved into the principal's office. Mother then burst into the school office and screamed obscenities at the principal. Mother was asked to leave and wait in the media room with Student. Mother and Student remained in the media center while Pupil A and her grandmother were in the school office.

After about 20 minutes, Pupil A and her grandmother were escorted by security to the parking lot. Student's Grandmother was sitting in the front passenger seat of Mother's car. The grandmothers started verbally snapping at each other and were soon physically fighting. Student's Grandmother could not get out of the car, and was bleeding from the face. Student and Mother were leaving campus and heard Grandmother yelling. They both ran to Grandmother and began fighting with Pupil A and her grandmother. The combatants were eventually separated. Pupil A and her grandmother were driven away. The local police authorities came and took a report. At hearing, Mother and Grandmother provided substantial testimony of their account of the fight in the school parking lot.

Student was suspended because of the fight on campus and placed on in-home independent study as an interim alternative education setting, pending expulsion proceedings. Southern Kern convened a manifestation determination meeting on February 17, 2017. Attending were Ms. Taylor, Ms. Johansson, the principal, Mr. Holmes, Mother, Grandmother and Mr. Goldberg, who participated by phone. The Southern Kern members of the IEP team agreed that Student's conduct – the February 13, 2017 fight on the school campus – was not a manifestation of Student's disability. Student's eligibility was for emotional disturbance and specific learning disability. Student's IEPs and behavior intervention plan addressed Student's impulsive behaviors, which the IEP team previously determined was the consequence of her emotional disturbance. Therefore, much of the manifestation determination discussion addressed whether Student's conduct was impulsive.

Student had told Mr. Shelvin that she was going to punch Pupil A, braided her hair in apparent preparation for a fight, and turned right when leaving Mr. Shelvin's class to accost Pupil A at her classroom, rather than left towards the parking lot where Mother and Grandmother were waiting to drive Student home. The Southern Kern members concluded that Student's conduct in assaulting Pupil A was not impulsive, and so was not caused by, or have a direct and substantial relationship to, Student's disability.

Mother asserted that Southern Kern had failed to implement Student's IEP and behavior intervention plan because the school did nothing to prevent the fight. The team discussed whether Student's conduct was the direct result of the school district's failure to implement the IEP. Mr. Goldberg had been regularly notified when Student had a reportable behavior incident. All accommodations and behavior intervention plan strategies had been implemented. The Southern Kern team members found that Student's conduct was not the direct result of Southern Kern's failure to implement the

IEP. Student was placed in Abraham Lincoln, with two hours of specialized academic instruction per week and counseling with Mr. Goldberg, pending expulsion proceedings.

Student had a triennial IEP due by March 17, 2017. Mother was going out of town and Mr. Goldberg had not yet completed the triennial assessments. With Mother's consent, Southern Kern delayed the triennial IEP until Mother was available and the assessments were completed. Mr. Weinstein unilaterally increased Student's independent study hours to one hour a day, pending the completion of Student's triennial IEP.

Mr. Goldberg submitted a Suspected Child Abuse Report to Kern County Child Protective Services on April 3, 2017. Mother had told Mr. Goldberg that Student had been sexually molested when visiting an older family member on March 12, 2017. Los Angeles County Sheriff's Department took an incident report. Neither party submitted additional evidence of any subsequent investigation or outcome. In April 2017, Student's Parents unsuccessfully tried to reunite with each other in Colorado for 12 days.

Expulsion Proceedings

The Southern Kern Board of Trustees convened Student's expulsion hearing on April 26, 2017. The Board's decision was to expel Student, but suspend the expulsion for the remainder of the semester and the first semester of the following school year. As a condition of suspended expulsion, Student was prohibited from attending any school or district activities, and was not allowed on any school district property without written permission of the superintendent. Student was required to attend 95 percent or more of assigned classes, unless excused by a doctor. Student was also to write an essay regarding her choice of military service. Student could petition for reinstatement one month before the end of suspended expulsion and submit written verification of all conditions. If Student was involved in any further offenses that warranted suspension,

the expulsion order would be automatically reinstated. Mother's subsequent appeal of the expulsion to the Kern County Board of Education was unsuccessful.

May 2017 Multidisciplinary Team Report

Mr. Goldberg started assessment of Student in March 2017. Mr. Goldberg and other qualified colleagues conducted the assessments and prepared a Multidisciplinary Team Report for Student's rescheduled triennial IEP team meeting of May 31, 2017. Mr. Goldberg's education, credentials, and experience qualified him to conduct Student's assessments and prepare the report.

Mr. Goldberg reviewed Student's academic records, prior assessments, and IEP's. He interviewed Mother and summarized Student's developmental and medical history. Mother reported Student reached language milestones, such as speaking first words and sentences, at the typical appropriate ages. Student had diagnoses of mood disorder, anxiety disorder, post-traumatic stress disorder, and attention deficit hyperactivity disorder. Student was not taking any prescribed medications at the time of assessment. Student was 15 years, eight months old. Student was in independent study for one hour a day, where her attendance was improving.

Mr. Goldberg administered the Wechsler Intelligence Scale for Children, Fifth Edition. Student scored: 68 on verbal comprehension which was extremely low; 73 for visual spatial and 76 on working memory, which was very low; 69 on fluid reasoning which was extremely low; and an average 98 on processing speed. Student's full-scale intelligence quotient was 75 which was very low. In academic achievement, Student scored in the low average range in reading and written language, with a very low score in math, and an extremely low composite language score.

Mr. Goldberg evaluated Student's social and emotional status using a standardized behavior assessment system. The behavior assessment system's three validity composites indicated that Mr. Johansson's teacher rating scale responses were

valid. He scored Student in the clinically significant range for hyperactivity, aggression and conduct problems, and in the at-risk range for school problems. The behavior assessment system also assessed adaptive skills, consisting of prosocial, organizational, study and other adaptive skills. Mr. Johansson scored Student's adaptive skills to be in the average range.

Mother completed the behavior assessment's parent rating form. The behavior assessment system's validity composites indicated that Mother's responses should be viewed with extreme caution. Mother rated Student in the clinically significant range for hyperactivity, conduct problems anxiety, depressions, somatization, withdrawal, and attention problems. She scored Student in the at-risk range for leadership and functional communication. Mother scored Student's adaptive skills in the average range.

Student completed the behavior assessment system's self-report, which was best practice. The self-report provided crucial insight on how Student viewed her conduct, relationships, functionality, and emotional health. The self-report was a reliable standardized instrument for evaluating Student's self-awareness, which was a necessary component of a proper social-emotional evaluation. The assessment validity index indicated that Student responses should be viewed with caution. Student scored herself in the clinically significant range on the personal adjustment composite, which was comprised of relations with parents, interpersonal relations, self-esteem, and self-reliance scales.

Mr. Johansson and Mother completed another standardized behavior scale. Mr. Johansson's responses addressed Student's school environment and identified learning problems and inappropriate behaviors as areas of concern and interpersonal difficulties as an area of serious concern. Unhappiness, depression, physical symptoms, and fears were not areas of concern. Mother's responses addressed Student's home environment and identified learning problems, physical symptoms and fears as areas of concern.

Interpersonal difficulties, inappropriate behavior, unhappiness, and depression were areas of serious concern. Mr. Johansson's and Mother's overall behavior quotients rated Student's ability to be successful in the educational environment to be in the low range. On a related scale evaluating attention, Student's overall results were in the low range.

Mr. Goldberg also administered standardized cognitive processing tests. Student scored in the very low range on a test of visual motor integration. On a measure of auditory processing of information pertaining to cognitive and communicative aspects of language, Student scored in the very low range. Student also had low higher-order linguistic skills that required her to infer, deduce, and abstract from what was said to gain a passage's proper meaning. Overall, Student scored in the low average range for auditory processing.

Mr. Goldberg summarized the results and considered special education eligibilities. Student continued to qualify for emotional disturbance eligibility. She had an emotional condition characterized by learning problems, interpersonal difficulties, and inappropriate behavior, which was not caused by intellectual, sensory, or other health factors. The frequency, intensity, and duration of these characteristics existed to a marked degree, were observed for an extended period of time, and adversely affected educational performance. Inexplicably, Mr. Goldberg did not evaluate or mention recent significant events that affected Student's emotional health, such as the sexual molestation, her Parents' reunification failure, or her expulsion and placement in independent study.

Student met other health impaired eligibility criteria. Her attention deficit hyperactivity disorder adversely affected her educational performance. Student also qualified for specific learning disability eligibility because Student exhibited a severe discrepancy between her predicted and actual achievement.

The multidisciplinary report did not analyze whether Student met the criteria for

intellectual disability eligibility. At hearing, Mr. Goldberg stated that Student was not intellectually disabled. Intellectual disability was shown by significantly limited cognitive functioning and adaptive behavior. On the Wechsler cognitive tests, Student's full-scale score was 73 in February 2014 and May 2017. Southern Kern's use of the same cognitive assessment instrument provided consistency, enabling stable and informative comparison of Student's performance over time. Though Student's full-scale score was in the very low range, Student's cognitive subtests were scattered. Her verbal comprehension index was consistently her lowest score amongst the four Wechsler indexes. Cognitive instruments that primarily emphasized verbal comprehension would not provide a balanced measure of Student's cognitive abilities. Finding Student intellectually disabled would have been inconsistent with Student's processing speed, which was in the low to average range.

Mr. Goldberg also noted that Student's adaptive behavior – conceptual, social and practical skills -- were much more advanced than an intellectually disabled Student. Student expressed her needs, interacted with other students and adults, had friendships, asked questions when she did not understand, academically performed, and voiced her feelings. Student primarily struggled with impulsive behaviors, related to verbal and physical aggression, for which she had behavior goals with accommodations and supports. Mr. Goldberg persuasively showed how Student's assessments, adaptive skills, social interactions, and academic performance demonstrated that Student was not a candidate for intellectual disability eligibility.

Mr. Goldberg did not recommend further assessment of Student for speech and language. He did not believe Student had a speech and language disability, based upon his years of counseling and assessing Student and his regular discussions with Student's teachers. No one reported any difficulty with Student's communication or understanding of others.

Mother testified at the hearing that she had a good relationship with Mr. Goldberg over the years. She often confided in Mr. Goldberg about many issues regarding Student and her family. Mother appreciated his years of professional and personal support of Student, and did not identify any information or facts that Mr. Goldberg withheld from Mother. If Mr. Goldberg ever had any intellectual disability concern regarding Student, he would have discussed them with Mother.

Mr. Goldberg's multidisciplinary report recommended the IEP team consider the eligibilities and that the school psychologist be made available to Student's caregivers, as needed. Mr. Goldberg did not review behavioral data, evaluate whether Student's behavior intervention plan was addressing Student's needs, or recommend changes to the intervention plan or increased school counseling. He did not recommend assessments to evaluate Student's need for more intensive mental health services or placement.

May 2017 Reconvened Triennial IEP

The IEP team reconvened on May 31, 2017, upon completion of the triennial assessment. Mother, Ms. Taylor, Mr. Holmes, and Mr. Goldberg attended; Mr. Lewis participated by telephone. Mother provided written excusal of the general education teacher. Mother said she was very pleased with Student's new case manager Mr. Lewis, noting he had been very patient with Student and communicated with Mother. The team discussed Student's future counseling, since Mr. Goldberg was retiring. Mother requested that Student be referred to a psychologist for evaluation or therapy. She was told a new therapist would be assigned for the coming school year and the therapist would draft a new emotional/counseling goal once the therapist became familiar with Student.

Mr. Goldberg reviewed the triennial multidisciplinary assessment report. The IEP team designated emotional disturbance as Student's primary eligibility and other health

impairment as a secondary eligibility. It also designated specific learning disability as another eligibility. Student's present levels of performance considered Student's recent triennial cognitive, academic achievement, and emotional/behavior assessments, as well as Mother's input, grades, and teachers' input. Student met three of her prior annual IEP goals in listening comprehension, on-task work completion, and decreased incidents of verbal aggression. She made progress, but did not meet six goals in reading comprehension, use of emotional control strategies, use of self-monitoring strategies, writing, math, and transition training. The team reviewed Student's transition plan and grades, and affirmed that she was on track to earn a regular diploma.

The team did not modify Student's behavior intervention plan. Student's targeted behaviors continued to be verbal and physical aggression. Other than the change of dates on the plan's first page, the May 2017 behavior intervention plan was word-for-word the same as the February 2016 plan. Although Student's behavior had resulted in a suspended expulsion and independent study, the IEP team did not review behavioral data, discuss whether the behavior plan was addressing Student's needs, consider or refer Student for additional assessments for more intensive mental health services, provide additional counseling, or discuss more therapeutic strategies.

The team approved goals for reading, functional academics, math, transition training, and anger management, as described in the behavior intervention plan. The goals were understandable and measurable, and based on Student's identified needs and updated levels of performance except for the behavior goals. The behavior goals were the same as prior IEP's. The team also affirmed Student's accommodations, associated with her attention deficit hyperactivity disorder and specific learning disability. The accommodations could be implemented in the independent study program.

Student's placement would continue in the independent study program as she

completed her suspended expulsion requirements. Abraham Lincoln pupils typically received one hour a week of study guidance. However, the IEP team recognized Student required more academic support. Therefore, Southern Kern offered Student four hours a week of one-to-one specialized academic instruction from a special education teacher and one hour a week of general education instruction. She was also able to attend additional tutoring hours and to remain at school to do her work at an independent study station. Counseling remained the same, 80 minutes a month. The IEP document states the team considered various placements in the least restrictive placement. Mother signed and accepted the IEP offer.

Student completed her Sophomore year in Abraham Lincoln independent study program. Her final grades were C's in world history, life science, and current events, a D in algebra readiness, and an A in physical education.

11th Grade: 2017-2018

Southern Kern convened an addendum IEP team meeting on August 15, 2017, at Mother's request. Mother asked that Student have a program that enabled her to be in school more than five hours per week. Mother suggested that Student continue to have her five hours in the independent study program and time at Ascend Academy, Southern Kern's behavioral program. Ascend was based around positive behavior intervention strategies and a self-regulation, serving pupils from elementary through high school.

The IEP team agreed and changed Student's placement. Student would attend an hour a day in a one-to-one session with her independent study special education teacher, four days a week. One day a week, she would have a one-hour session with her independent study general education teacher. For two hours a day, five days a week, Student would attend Ascend, as a teacher's aide, tutoring younger students, and taking a 45 minute math class. She was also permitted to have lunch with the Ascend high

school students. The team did not discuss the adequacy of the behavior intervention plan or Student's emotional supports in the new placement setting.

Student participated in the WorkAbility program. Workability was a grant-based program that placed students in community-based jobs. WorkAbility students learned how to apply for jobs, prepare for interviews, appropriately dress for work, and interact with an employer. Student applied, interviewed and was placed at Rite-Aid, where she worked throughout the school year. Rite-Aid completed progress reports and gave Student maximum scores of 5 in all areas, but for one 4, which indicated Student could be more self-motivated. Student was a good employee and understood her job at Rite-Aid.

Student completed her essay and petitioned for reinstatement according to the terms of her suspended expulsion. The school board denied Student's petition because Student had been attending some of her brother's sporting events on a school campus, and at one of the games, Student came to the attention of campus security. The school board considered this a violation that prohibited reinstatement.

Student's grades for the fall 2017-2018 school year at Abraham Lincoln were: B- in English 11, A's in math and physical education, C+ in vocational education, C- in personal finance, and a D+ in world history.

January 2018 Change of Placement IEP

Southern Kern convened an IEP meeting on January 25, 2018, at Mother's request, to discuss possible change of placement. Mother was ill and could not attend. The IEP team reconvened on February 12, 2018. Attending were Mother, Ms. Taylor, vice principal Katie Notterman, school psychologist Gus Piangerelli, school-based mental health therapist Heather Conklin, Mr. Shevlin, and Mr. Lewis.

Mother reported that Student had been hospitalized at Bakersfield Behavioral Healthcare Hospital the previous week. Mother testified that Student twice attempted

suicide. Student was taking Zoloft for anxiety and depression. Mother forcefully told the IEP team that she was frustrated by Student's lack of progress for 12 years, including behavior and accountability. Mother acknowledged that there were issues in Student's home life that caused stress, but stated there were contributing school issues. Mother asked the IEP team that the school take the lead in the IEP and "put their money where their mouth is."

The IEP team discussed a tailored program consisting of a morning schedule beginning at 8:00 AM and running through third period and lunch at Rare Earth. Student would then attend Ascend Academy as a teacher's assistant for the fourth and fifth periods. Some team members noted that Mr. Weinstein had already authorized Student to transfer to Rare Earth, but Mother had not been informed.

The IEP team discussed Student's school counseling services. Since Mr. Goldberg's retirement, another school psychologist had been assigned to Student. Student claimed to have observed inappropriate conduct on the psychologist's part, although Southern Kern employed an outside investigator who did not find supporting evidence. Regardless, Student's relationship with the school psychologist was damaged. Mother requested a therapist to help Student with sexual abuse trauma. Ms. Taylor assigned Ms. Conklin, a licensed marriage and family therapist. Ms. Conklin stated she had extensive training and experience in working with sexual trauma. Student's individualized counseling services was increased from 80 to 120 minutes per month.

The meeting was tabled to reconvene at a later date to discuss goals and accommodations. Ms. Taylor acknowledged at hearing that the IEP did not have a signature page, but testified that Mother emailed her permission to implement the new placement schedule. Student started attending Rare Earth and Ascend in the 2017-2018 spring semester.

March 2018 Independent Psychoeducational Evaluation

Southern Kern granted Mother's request for an independent psychoeducational evaluation and functional behavior analysis. Theresa Ede assessed Student and provided a March 28, 2018 independent psychoeducational evaluation report. Ms. Ede testified at the hearing. Ms. Ede received a bachelor's degree in psychology in 1995 and a master's degree in counseling in 1998. She had over 20 years' experience as a school psychologist and was also a board-certified behavior analyst. She reviewed all available school records, assessments, and IEPs, interviewed Mother, Student and Student's teachers, and used a variety of assessment tools and strategies to gather functional, developmental, and academic information. She thought Student had early language delays according to a baby book and other developmental delays, causing her to suspect intellectual disability. Ms. Ede concluded that Student had a significant cognitive disability that had not been adequately assessed and brought to the IEP team for consideration.

Ms. Ede used two cognitive instruments. Student's quotient score on the Comprehensive Test of Nonverbal Intelligence, Second Edition, was in the very poor range. Ms. Ede noted that Student's scores on two of the composite scales were statistically significant and possibly caused by lower verbal abilities. The results were generally commensurate with Student's previous cognitive assessments. Ms. Ede's primary cognitive measure was the Cognitive Assessment System, Second Edition. Here, Student earned a full-scale intelligence quotient of 66, which was within the very poor range. Ms. Ede did not fully discuss why this quotient score differed from Student's prior full-scale scores on the Wechsler cognitive tests.

Student scores on a test of oral language and auditory processing skills demonstrated deficits in auditory cohesion skills, low average memory skills, average phonological skills, and low average to average visual-motor processes. On tests of

academic achievement, Student's cluster scores for reading, broad math, and mathematics were in the low range. Her broad reading, math calculations, broad written language, and written expression cluster scores were in the low average range. Her oral language skills were significantly below average.

Ms. Ede administered the Behavior Assessment System for Children, Second Edition. Mother and teachers Mr. Johansson and Kristina Hillman completed scale forms. Though Student was more than 16-and-a-half-years-old at the time of testing, Ms. Ede did not have Student complete the behavior assessment system's self-report. Student completed the self-report for her 2014 and 2017 triennial assessments. Best practice would have been to include Student's self-report.

Ms. Ede did not report on the assessment system's three validity determination indexes before interpreting the composite scale responses. Validity indexes should be reported. Here, Mother's responses indicated that Student had elevated levels in all measured areas and that Student's adaptive skills were also of significant concern. These responses were similar to those Mother gave in 2017. At that time, the validity indexes indicated Mother's scale responses were to be interpreted with extreme caution.

The teachers' scales showed that Student demonstrated elevated levels in aggression, conduct problems, and withdrawal. Areas of concern were social and leadership skills. Ms. Hillman thought Student's adaptability was an area of need. In her testimony, Ms. Ede said that the teachers' reports were not reliable measures because they worked with Student only one hour a week in independent study, which was not sufficient contact to give informed responses. Also, she thought that the teachers had become desensitized to Student's behaviors, minimizing their severity. She was unaware that Mr. Johansson had been Student's case manager and special education teacher when Student was full-time at Rare Earth.

Mother completed the Vineland Adaptive Behavior Scales, Second Edition, to evaluate Student's adaptive behavior. Ms. Ede did not administer the adaptive behavior scales to Student's teachers. Ms. Ede testified that she already knew that Student had a communication deficit, the teachers did not report a significant communication problem on the behavior scales, and that the teachers would therefore not provide accurate information on the Vineland. Mother's responses indicated that adaptive behavior, communication, and socialization were Student's weaknesses, with daily living skills as a strength.

Student had a low to very low average concept of herself on a self-esteem and anxiety measure. This measure showed Student was experiencing levels of behaviors, thoughts, and feelings associated with depression overall. Ms. Ede testified that Student was not experiencing significant levels of depression. Her report did not discuss how the scores related to Student's diagnoses of depression and anxiety, for which she was taking Zoloft at the time of testing. On an anxiety scale, Student exhibited elevated levels of behaviors, thoughts, and feelings associated with worry, oversensitivity, social concerns, and concentration. Ms. Ede also had Student do some drawings, which were included in her report. Ms. Ede opined that the drawings seemed pretty immature, like a seven or eight-year-old, which correlated with Ms. Ede's contention that Student was intellectually disabled.

Ms. Ede concluded that Student was not eligible under the eligibility categories of emotional disturbance or other health impairment but, instead, met the criteria for intellectual disability. She believed that Student's long history of defiant and aggressive behaviors were because Student did not have the intellectual capacity to understand social and communicative interactions. Ms. Ede made recommendations, many of which were already part of Student's IEP accommodations, and suggested a speech and language assessment. Ms. Ede was also retained to conduct an independent functional

behavior assessment, but she did not see any behaviors that warranted a behavior assessment and did not conduct the behavior assessment.

March 2018 Annual IEP Team Meetings

Southern Kern scheduled Student's annual IEP team meeting for March 15, 2018, but agreed to Mother's telephoned request that the meeting be "tabled" until Ms. Ede completed her independent educational evaluation and could present her findings. The IEP team reconvened on May 16, 2018. Attending were Ms. Taylor, Ms. Conklin, school psychologist Luka Yang, Mr. Lewis, Mrs. Johansson, Ms. Hillman, Mother, Student's attorney, a parent advocate, and Ms. Ede.

The meeting started contentiously, with Student's attorney stating that Student had been buried in nonsense that reminded him of third century bloodlettings. Multiple team members reacted that such comments were inappropriate, and the team needed to focus on documented assessments. Ms. Ede presented her report, which was not provided to Southern Kern members before the meeting.

Ms. Ede stated that Student may have been diagnosed with emotional disturbance, but she was actually intellectually disabled. Mr. Yang asked if Ms. Ede could discuss the assessment data on a particular page of the report and questioned some of the findings. Mr. Yang stated that speech and language issues needed to be ruled out before the team could decide whether Student met the criteria for intellectual disability eligibility. Ms. Ede said Student had very low adaptive skills and discussed Student's drawings. The team noted Ms. Ede had not fully evaluated Student's adaptive skills. For example, her report did not discuss Student's success in the Workability program. The meeting ended. Southern Kern subsequently arranged for a speech and language assessment of Student with Mother.

Student's Spring 2018 Semester Grades

Student's grades for the spring 2017-2018 school year at Rare Earth were C+ in English 11, C in her English elective, B- in United States geography, A- in United States history, and A in teacher's aide.

September 2018 Reconvened Meeting for March 2018 Annual IEP

The IEP team meeting reconvened on September 10, 2018. Ms. Ede did not attend. All requisite team members were present, including Southern Kern speech pathologist Ana Rodriguez. Student's attorney attended by telephone and Ms. Inman attended as counsel for Southern Kern.

Ms. Rodriguez presented her speech and language assessment of Student, which she started in June and completed in late August 2018. She found Student to have a moderate to severe language disorder as evidenced by formal language tests. Student had significant difficulties in vocabulary, word knowledge, grammar, and syntax. Her expressive language was stronger than her receptive language, with no speech articulation errors. Voice and fluency were typical for her age. Ms. Rodriguez determined that Student met the criteria for speech and language disorder. She recommended two sessions a week of direct services from a speech therapist, totaling one hour a week. She recommended three goals. The speech and language listening comprehension goal was intended to increase Student's academic functioning.

Student's attorney questioned how Student could graduate in December 2018 in light of the recent assessments. Ms. Taylor informed him that Student was not graduating in December, but was on track to graduate at the end of the 2018-2019 school year.

The team members were asked to give their opinion regarding eligibility. Mr. Yang stated that Student was not intellectually disabled, explaining his reasons. Ms. Taylor agreed and recited a number of reasons. At this point, Student's attorney stated

that this was unacceptable because the independent educational evaluation established that Student was intellectually disabled. Ms. Inman said that Ms. Ede's assessment was a recommendation and the IEP team was charged with making the eligibility determination. Student's attorney said he was canceling the meeting and hung up. Mother left.

The Southern Kern IEP team members briefly remained to state their eligibility views. Mr. Yang opined that the independent educational assessment inappropriately found Student to be intellectually disabled. He testified at the hearing. Mr. Yang worked for Southern Kern since 2017 but had never worked with or assessed Student. He possessed a bachelor's degree in chemistry, a master's degree in school psychology and counseling, and was completing a doctorate in education pending review of his dissertation. He had worked as a school psychologist since earning his credentials in 2001. Mr. Yang had assessed well over 100 students for emotional disturbance, over a 100 for intellectual disability, and more than 150 for other health impairment eligibilities. He demonstrated a keen understanding of assessment instruments. Mr. Yang's testimony was thoughtful and persuasive.

Mr. Yang explained that Ms. Ede inappropriately used a number of instruments. The independent evaluation had a different cognitive test that yielded a full-scale intelligence quotient of 66, which was substantively lower than Student's prior three assessments that had a full-scale score of 73 to 75. Though the instrument used by Ms. Ede, the Cognitive Assessment System, was norm referenced, the instrument emphasized verbal intelligence. Student had always scored lowest (borderline or extremely low) on the verbal portion of the Wechsler cognitive tests, but other cognitive scores were in the very low to average range, such as average processing speed. Mr. Yang said the Cognitive Assessment System relied on Student's verbal comprehension and discounted her average processing. The cognitive measures previously used by

Southern Kern more appropriately measured Student's cognitive capabilities, which could also be compared to the prior test results. Mr. Yang opined that the Cognitive Assessment System score could not be deemed a reliable measure of Student's cognitive capabilities if Student had a speech and language impairment. He testified that Southern Kern's May 2017 triennial's Wechsler cognitive verbal score should have triggered a speech and language assessment because the score was lower than the February 2014 triennial score. Mr. Rodriguez later found Student to have a language impairment. Therefore, the independent evaluation's cognitive testing did not support intellectual disability eligibility.

Mr. Yang noted that Ms. Ede did not administer behavior assessment system's self-report. Ms. Ede minimized the teacher scale responses, erroneously concluding they did not have sufficient experience to provide reliable information. Student's teachers did not complete the Vineland adaptive skills instrument. Reliance on Mother's responses alone was improper. Intellectual disability eligibility required consideration of Student's adaptive skills in multiple venues and from different perspectives. Ms. Ede's use of drawings to bolster her intellectual disability findings was untrustworthy. The drawings were non-standardized and projective. Finally, Mr. Yang believed the independent evaluation's recommendations were inappropriate because an intellectually disabled child would not be able to do the recommended activities. The recommendations were suited for students with auditory, visual, or attention deficits. Ms. Conklin shared similar criticism of the educational evaluation's instruments and tests, opining that Student was not intellectually disabled.

Ms. Taylor echoed Mr. Yang's and Ms. Conklin's viewpoints. She was dismayed at the independent educational evaluation's characterization of Student's adaptive and functional skills. Ms. Taylor worked with Student for years and never suspected Student might be intellectually disabled. Student gained and maintained employment, with high

marks from her employer, in the Workability program. Student demonstrated self-awareness regarding her strengths and weaknesses in the transition plan's self-assessments. Student participated in guided tours of Antelope Valley Community College and trade school. She viewed Student as having mild to moderate needs, not intellectually disabled. Ms. Rodriguez noted that Student scored in the average range on many of the language measures, indicating that Student was not intellectually disabled.

Mr. Bartell and Mr. Johansson cited Student's performance in their classes as evidence of Student's cognitive capabilities. Mr. Johansson confidently concluded that Student performed and earned her grades and graduation credits. The Southern Kern IEP team members agreed that Student's primary eligibility continued to be emotional disturbance. She was also eligible under speech or language impairment, other health impairment, and specific learning disability. The March 2018 annual IEP document stated the team considered various placements in the least restrictive placement.

The IEP team could not complete the March 2018 annual IEP because Mother and her attorney refused to participate. The IEP document contained proposed present levels of performance, goals, a transition plan, accommodations, and a behavior intervention plan. Two academic goals were for reading and math and one goal addressed listening comprehension. Three goals addressed Student's newly recognized speech and language needs, identifying the speech and language pathologist as the sole service provider.

Ms. Taylor said the behavior intervention plan was the same one contained in the previous two IEP's, with no proposed amendments, because the plan had been successful in modifying Student's behaviors. She stated that the frequency of Student's assertive discipline incidents had improved since middle school and during high school. Ms. Taylor's analysis was unconvincing, and did not appear to take into account Student attending four different schools, including the independent study program and Ascend,

since starting high school. Discipline reports were not appropriate data for evaluating the intervention plan's success in addressing targeted behaviors. She did not refer to any other data to support Southern Kern's contention that Student's intervention plan was effective.

Neither party submitted evidence of whether the March 2018 annual IEP was reconvened or what Southern Kern offered as a FAPE for the 2018-2019 school year.

Student's 2018-2019 Semester

Student was still on track to graduate at the end of the 2018-2019 academic year. Shortly before hearing, Mother put Student back into the independent study program. Mother said Student had become disillusioned with school and did not want to attend.

The Southern Kern IEP team members strongly disagreed with any suggestion that Student should not graduate high school at the end of the 2018-2019 school year, and Mother testified that she did not oppose Student graduating from high school. However, Mother stated that Student was ill-prepared to enter community college and post-secondary life. She contended that Student's academic achievement was far below typical graduating students, that Student was not equipped to deal with college level classes, such as math, and Student did not have the study skills to be successful. Student wanted to attend Antelope Valley Community College's vocational nursing certificate program. The college offered some supports for Student, but she would no longer receive special education services. Mother testified that she had regularly sought additional services for Student, especially related to her behaviors and emotional status, such as her request at the May 2017 IEP meeting for a referral to a psychologist for evaluation or therapy. Everyone agreed that Student's behaviors seriously affected Student's ability to benefit from school. However, Mother testified that she felt Southern Kern had failed to provide services that addressed Student's emotional difficulties, even though Student's behaviors did not improve and her emotional status deteriorated.

Student had not accessed the school-based counseling in her IEP for some time. Mother cited the unchanged behavior assessment plan and long delayed speech and language assessment as further examples of Southern Kern's disinterest in addressing Student's social emotional needs.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. §1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The Individuals with Disabilities Education Act is often referred to as the "IDEA." The main purposes of the IDEA are:

1. to ensure that all children with disabilities have available to them a free appropriate public education 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).)

A free, appropriate public education, often called 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 Individualized Education Program, commonly called an IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective or supportive services that are required to assist the child in benefiting from special education. (20

U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

In general, an IEP is a written statement that is developed by parents and school personnel using the IDEA's procedures. The IEP describes the child's present levels of performance, needs, and academic and functional goals related to those needs. It also provides a statement of the special education; related services, which include transportation and other supportive services; and program modifications and accommodations that will be provided for the child to work towards the stated goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14) and (26), 1414(d)(1)(A); Ed. Code, §§ 56031, 56032, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.17, 300.34, 300.39 Cal. Code Regs., tit. 5, § 3001, subd. (p).)

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 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.)

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." "Every child should have a chance to meet challenging objectives." (*Ibid.*) *Endrew F.* explained that "this 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.) The Court noted that "any 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.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.* The Court acknowledged that Congress had not materially changed the statutory definition of a FAPE since *Rowley* was decided and so declined to change the definition itself. The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

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, assessment, 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).) Generally, a party is limited to filing a request for due process two years from the date the person knew or should have known of the facts which form the basis for the request for a due process hearing.

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] (*Schaffer*); see 20 U.S.C. §1415(i)(2)(C)(iii).) Here, [FILING PARTY] requested the hearing, and therefore has the burden of proof on the issues.

ISSUES 1 AND 2: WAIVER OF CLAIMS

Grandmother signed a settlement agreement on November 12, 2014, that included Student's release and discharge of all educational claims, known and unknown,

through and including the 2013-2014 school year and the 2014 extended school year. Grandmother was the designated representative of Mother, Student's educational rights holder, and authorized to execute the settlement agreement. Therefore, Student has waived all claims through mid-July 2014, when the extended school year finished.

ISSUES 1 THROUGH 5: STATUTE OF LIMITATIONS

Student contends that she was entitled to seek relief for Southern Kern's failure to provide a FAPE more than two years prior to the filing of her complaint, relating back to September 2008 in Issues 1 through 4. Southern Kern contends that Mother knew or should have known Student had claims no later than November 2014, if not earlier, when Student was represented by counsel and entered into a due process settlement agreement that waived all claim against Southern Kern. Southern Kern argues no statutory exception applied and Student should have filed her claims within the statutory two years.

The statute of limitations for special education due process claims in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) The statute of limitations operates to bar claims based upon facts outside of the two-year period. (*J.W. v. Fresno, supra*, 626 F.3d 431, 444-445; *Breanne C. v. Southern York County School Dist.* (M.D. Pa. 2009) 665 F.Supp.2d 504, 511-512; *E.J. v. San Carlos Elementary School Dist.* (N.D.Cal. 2011) 803 F.Supp.2d 1024, 1026, fn. 1.) Title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (l), establish two exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or by the local educational agency's withholding of information that was required to be provided to the parent.

A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221; *M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012 Nos. CV 09-4624, 10-04223 SI) 2012 WL 398773, ** 17 - 19.) 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 it has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039; see also *M.M. V. Lafayette School District* (9th Cir. 2014) 767 F.3d 842, 858-59.)

As to Issue 1, in addition to the waiver of claims, Mother offered no credible or persuasive testimony that she was not informed and aware of issues regarding Student's performance and assessment prior to September 22, 2008. To the contrary, District assessed Student for special education in October 2006, at Mother's request. Student was not found special education eligible, but she received academic interventions. In first grade, Southern Kern assessed Student and found her eligible for special education at a March 10, 2008 IEP team meeting. Mother also consented to Mr. Goldberg's referral of Student to the Kern County Mental Health Department for a mental health assessment at that meeting. The evidence demonstrated that Mother knew or should have known the facts upon which she contends Student should have been found eligible for special education prior to September 2008.

In Issue 2, Student offered no credible or persuasive testimony that Mother was not informed and aware of issues regarding Student's performance, assessments, IEP's, accommodations, and behaviors in seventh grade during the 2013-2014 school year. There was no evidence that Student was bullied at school. Student offered no credible or persuasive testimony that Mother was not informed and aware of issues regarding Student's performance, assessments, IEP's, accommodations, and behaviors. Mr.

Goldberg conducted Student's February 2014 triennial assessment, which included interviewing Mother and having Mother complete assessment scales. Mother attended the triennial IEP. Mother frequently talked with Mr. Goldberg and Ms. Taylor regarding Student's performance, especially since Student had multiple disciplinary incidents. The evidence demonstrated that Mother knew or should have known the facts upon which Issue 2 claims were based as of the 2013-2014 school year.

Mother retained an attorney who filed a request for due process against Southern Kern on July 14, 2014. The complaint summarized facts and made claims very similar to those asserted in the present action. Therefore, considering that Mother consulted with counsel to review Student's educational history and records, Mother was aware of the facts upon which her claims as to Issue 2 were made as of the time she filed the July 2014 complaint.

In Issue 3, Student claimed that District denied her a FAPE in eighth grade during the 2014-2015 school year by failing to recommend an updated functional behavior assessment, revise Student's behavior intervention plan, provide prior written notice regarding Mother's requests for independent study, evaluations, and home instruction, and for the same reasons listed in Issue 2. Student was in eighth grade, finishing middle school. Student had numerous discipline reports throughout the school year. Southern Kern contacted Mother (or Grandmother if Mother was not yet available) for each incident, evidencing Mother's awareness of Student's behavior issues. Student offered no persuasive evidence that Mother did not know, or reasonably should have known, the facts upon which Student's claims were based as of the 2014-2015 school year.

In Issue 4, Student claimed that District denied her a FAPE in ninth grade during the 2015-2016 school year by failing to provide placement in the least restrictive environment, not considering the continuum of placements at IEP team meetings, failing to timely conduct a functional behavior assessment and develop an appropriate

behavior intervention plan, and not implementing the IEP's accommodations. Mother was aware during the 2015-2016 school year that Southern Kern did not conduct a behavior assessment or develop/revise the behavior plan. Student started high school at Rosamond and had 26 reportable discipline incidents, many with suspension, during her freshman year. Southern Kern contacted Mother for each disciplinary incident and suspension. Mother participated in the April 19, 2016 IEP team meeting, where present levels of performance, goals and objectives, the behavior intervention plan, and placement was discussed. Mother participated in the May 5, 2016 manifestation determination meeting following Student's most recent disciplinary incident with a suspension that exceeded 10 days for the school year. After the IEP team found Student's conduct to be a manifestation of her disability, the team agreed to Mother's suggestion that Student be transferred to Rare Earth for the remainder of the school year. The evidence demonstrated that Mother was fully aware of the facts upon which her claims in Issue 4 were based as of the 2015-2016 school year.

In Issue 5, Student claims were for the 2016-2017 school year. Mother participated in IEP team meetings on August 9, 2016, at which the IEP team granted Mother's and Student's request that Student return to Rosamond for her sophomore year. The IEP team met again on August 18, 2016, at Mother's request. The IEP team discussed and agreed to Mother's and Student's request to return Student to Rare Earth. Mother signed and agreed to both IEPs. The evidence demonstrated that Mother knew, or reasonably should have known, the facts upon which her claims were based as of the 2016-2015 school year, up to September 25, 2016.

Student's primary contention regarding the statute of limitations was that Mother did not know that Student was intellectually disabled, as found in the May 2018 independent evaluation. Student argues if Mother had known about Student's intellectual disability, she could have advocated for services and placements that met

Student's unique needs. Yet, Mother was aware of the facts that support Student's claims since before 2008. Ms. Ede suspected intellectual disability after viewing Student's baby book, interviewing Mother, and reviewing Student's school records, assessments, and IEP's. This information was contemporaneously available to Mother. And, as discussed below, Student did not prove that she was intellectually disabled or should have been found eligible under that eligibility criteria. Student did not demonstrate that Mother did not know, or should reasonably have known, the facts upon which the claims are based, at any time before the commencement of the two-year limitations on September 25, 2016.

Student argued that even if Mother knew the facts, she did not know they meant that Student might be intellectually disabled. After all, Mother was not an educator or psychologist, and relied on Southern Kern to fully and properly advise her as to what the facts could mean. However, the "knowledge of facts" requirement means the party must have known or reasonably should have known the facts underlying the supposed disability and their IDEA rights. (*Miller v. San Mateo-Foster City Unified School Dist.* (N.D. Cal. 2004) 318 F.Supp.2d 851, 861[citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111]). In *Miller, supra*, 318 F.Supp.2d at p. 86, the child's parents became aware that the child may have a specific learning disability, but that the school district assessed him otherwise. The Court concluded the parents knew or should have known the facts that would have given rise to a claim.

Here, the preponderance of evidence demonstrated that Mother had knowledge of the same facts as Southern Kern. Mr. Goldberg, Ms. Taylor, and Student's teachers did not believe that these facts supported a finding of intellectual disability. Ms. Ede's opinion finding that Student was intellectually disabled was unpersuasive for the many reasons discussed in the next issue. Yet, even if Ms. Ede's finding was appropriate, this

did not mean Mother was unaware of the facts. Like *Miller*, Mother knew the same information as Southern Kern.

Neither exception to the two-year statute of limitations (20 U.S.C. § 1415(f)(3)(C)(D)) applied from the times Mother knew, or had reason to know, the facts upon which her legal claims were based or from the July 2014 release of claims. Student did not present persuasive evidence that Southern Kern made a specific misrepresentation that it had resolved the problem forming the basis of Student's complaint nor that Southern Kern withheld information that was required to be provided to Parent. Instead, the evidence convincingly demonstrated Mother's active participation in IEP team meetings, many of which were called by Mother, and Mother's frequent disagreement with Southern Kern IEP team members. Mother also participated in the 2011 and 2014 triennial assessments, and was present when the assessments were presented and discussed by the IEP teams. Mother had consistent communications with Mr. Goldberg, Ms. Tyler, Student's case manager, and teachers through and beyond September 25, 2016, two years prior to the filing of her complaint. Student did not demonstrate by the preponderance of evidence that Southern Kern misrepresented that it solved Student's issues nor that it withheld information.

Ms. Ede's report does not support a finding that a statutory exception applies. Ms. Ede's report represented a different opinion by another professional. The report did not indicate that Southern Kern misrepresented that it solved Student's problem forming the basis of the complaint's issues nor that it withheld information. This was not the type of culpable conduct contemplated by the statutory exceptions for tolling the limitation statute.

Mother was contemporaneously aware of the facts which formed the bases of the complaint's issues. In addition, Mother was aware of such facts when she retained an attorney who filed Student's due process, which Student settled in November 2014, with

a waiver up to mid-July 2014. Student offered no evidence of any procedural violations or misrepresentations by Southern Kern up to September 25, 2016, that would trigger either exception to the statute of limitations. Student did not prove Southern Kern prevented Mother from timely pursuing Student's claims. Claims made in Issues 1, 2, 3, 4, and 5, before September 25, 2016, were time-barred by the two-year statute of limitations.

ISSUES 5A, 5D, 6A, AND 6C: FAILURE TO OFFER APPROPRIATE SERVICES, APPROPRIATE FUNCTIONAL BEHAVIOR ASSESSMENT, AND APPROPRIATE BEHAVIOR INTERVENTION FOR THE 2016-2017 AND 2017-2018 SCHOOL YEARS

Student contended that Southern Kern denied her a FAPE during her sophomore and junior school years because it did not provide appropriate special education related services for counseling, mental health, social work, social skills training, parent training, and wrap around services as stated in Issues 5a and 6a. She also contended that Southern Kern did not conduct a timely and proper functional behavior analysis assessment, or provide an appropriate behavior intervention plan as stated in Issues 5d and 6c. Southern Kern asserted that it had regularly assessed and evaluated Student's educational and behavioral needs, frequently held IEP team meetings to address Mother's concerns, affirmed the success of Student's behavior intervention plan, and consistently implemented Student's IEP. Thus, Southern Kern argues it provided Student a FAPE since September 2016. These issues involve common areas of law and fact and are analyzed together.

For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment

adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills[.]) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) The assessments used must: not be discriminatory on a racial or cultural basis; be in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; used for purposes for which the assessments are valid and reliable; administered by trained and knowledgeable personnel; and administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

The personnel who assess the student shall prepare a written report that shall include the following: whether the student may need special education and related services; the basis for making that determination; the relevant behavior noted during observation of the student in an appropriate setting; the relationship of that behavior to the student's academic and social functioning; the educationally relevant health, development and medical findings, if any; a determination of the effects of environmental, cultural, or economic disadvantage; and consistent with superintendent guidelines for low incidence disabilities, the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) A procedural violation results in liability for denial of a FAPE only if the violation: impeded the child's right to a FAPE;. significantly impeded the parent's opportunity to participate in the decision-making process; or caused 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.)

An IEP is a written document describing a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subd. (a)(1), (2); 34 C.F.R. § 300.320(a) (2006).) The IEP must also contain: a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3) (2006)); a statement of the special education and related services and supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4) (2006)); an explanation of the extent, if any, that the pupil will not participate with nondisabled pupils in the regular class or activities (Ed. Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5) (2006)); and a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and district-wide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)

The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) A district must also convene an IEP team meeting when a parent requests a meeting to develop, review, or revise the IEP. (Ed. Code, § 56343, subd. (c).)

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to a student to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*)

A pupil shall not "be determined to be an individual with exceptional needs" if they do not meet the eligibility criteria under federal and California law. (Ed. Code, § 56329, subd. (a)(2).) The law defines an individual with exceptional needs as one who, because of a disability, "requires instruction and services which cannot be provided with modification of the regular school program" in order to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd. (b).)

A child with a disability who is removed from the child's current placement under title 20 United States Code section 1415(k)(1)(C) shall continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set

out in the child's IEP; and, as appropriate, a functional behavioral assessment, behavioral intervention services, and modifications designed to address the behavior violation so that it does not recur. (20 U.S.C. § 1415k(1)(D); 34 C.F.R. § 300.530(d).)

The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight ... an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann, supra*, 993 F.2d 1031, 1041.)

Intellectual Disability Eligibility

Student generally contended that her related services, accommodations, and placement did not provide her a FAPE because Southern Kern failed to properly assess and find Student eligible under the category of intellectual disability. Student cited Ms. Ede's March 26, 2018 independent psychoeducational evaluation as evidence. Southern Kern asserted Student's IEP teams had properly designated Student's eligibilities based upon appropriate assessments.

California Code of Regulations, title 5, section 3030, subdivision (b)(6), describes the criteria for determining whether a child qualifies for special education under the category of intellectual disability. Intellectual disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance. The federal definition is the same. (34 C.F.R. § 300.8(c)(6).)

The independent psychoeducational evaluation did not properly use, report, and interpret previous standardized assessments. For example, on the Wechsler cognitive tests, Student's full-scale score was 73 in February 2014 and 75 in May 2017. The use of the same cognitive instrument provided consistency, enabling stable and informative comparison of Student's intellectual ability over time. However, Ms. Ede used the

Cognitive Assessment System, Second Edition, which emphasized Student's verbal comprehension and yielded a full-scale score of 65. Student always scored lowest, in the borderline or extremely low range, on the verbal portion of the Wechsler cognitive tests, but scored in the very low to average range in other cognitive areas such as processing speed. The Cognitive Assessment System did not provide a balanced measure of Student's cognitive abilities. Also, the Cognitive Assessment System score could not be deemed a reliable measure of Student's cognitive capabilities if Student had a speech and language impairment. Ms. Rodriguez subsequently found Student to have a language impairment, noting that intellectual disability was inconsistent with Student's performance on many of the speech and language assessments. Therefore, the independent evaluation's cognitive testing did not clearly support a finding of intellectual disability eligibility.

The independent evaluation's assessments of Student's adaptive behaviors were also suspect. Unlike Southern Kern's assessments, Ms. Ede did not adhere to best practices and administer the behavior assessment system's self-report to Student. Ms. Ede incorrectly minimized the teacher behavior scale responses, wrongly assuming they did not recognize Student's communication deficits and did not have sufficient experience to provide reliable information. Had she inquired, she would have known that Mr. Johansson was Student's former case manager and had been her teacher since 2016, and had regularly interacted with Student and observed Student's interactions with other adults and peers for two years prior to the independent assessment.

Ms. Ede's evaluation failed to comply with the standard practice of reporting the behavior assessment system's validity composites for Mother's rating scale responses. Mother's responses were very similar to those she gave in the 2017 triennial assessment, which were flagged to be interpreted with extreme caution. The independent evaluation did not include Student's teachers on the adaptive skills instrument, and reliance on

Mother's responses alone could not have provided sufficient information to determine Student's adaptive skills in the educational environment.

Intellectual disability eligibility required consideration of Student's adaptive skills in multiple venues and from different perspectives. Ms. Ede stated she observed Student in both general and special education classes. She does not report when, how long, or what she observed. Ms. Ede did not interview any teachers involved in Student's schooling. She did not consider other school relationships and activities, such as Student's participation in the WorkAbility program, where Student interviewed and obtained a job at Rite-Aid, and received high marks from her employer.

The May 2018 independent evaluation did not support a finding that Student met the criteria for intellectual disability eligibility. Here, Student has failed to prove that Student was intellectually disabled and, thus, a basis for finding Southern Kern denied her a FAPE.

Speech and Language

Student claimed Southern Kern denied her a FAPE by not timely assessing and providing related services for speech and language impairment. Southern Kern asserted that it timely assessed Student as Ms. Ede and Mr. Yang recommended in May 2018 and found Student to be speech and language impairment eligible at the September 2018 IEP meeting. Student has proved by a preponderance of evidence that she was denied a FAPE because of Southern Kern's delay in assessing and providing related service for speech and language impairment.

Mr. Yang stated that Southern Kern's May 2017 triennial evaluation's Wechsler cognitive scores should have triggered a speech and language assessment because the verbal comprehension score was lower than the February 2014 Wechsler verbal comprehension index score of 69. Student's Wechsler cognitive scores were scattered, and her full-scale quotient was depressed because of her low verbal comprehension

scores. Student's teachers, Ms. Taylor and Mr. Goldberg said they never suspected Student had a speech or language impairment based upon their communicative exchanges. But Mr. Yang never met or worked with Student. His professional opinion was based upon interpretation of cognitive assessments and was persuasive.

Southern Kern argued that Mr. Yang's testimony meant that Student should have been referred for the speech and language assessment at the May 2018 triennial IEP. However, Student's Wechsler verbal comprehension score had steadily declined between 2011 and 2014. If a decline in scores between 2014 and 2017 was sufficient to trigger speech and language assessment, so was a decline between 2011 and 2014. Student scored 75 on the February 2011 triennial evaluation, but her score declined to 69 by 2014. Southern Kern should have conducted a speech and language assessment as of the 2014 triennial evaluation and IEP.

Southern Kern's delay in assessing Student for speech and language impairment was a procedural failure to assess in all areas of suspected disability, which does not rise to a denial of FAPE unless it deprived Student of a FAPE, significantly impeded Mother's opportunity to participate in the decision making process, or caused a loss of educational benefit. Ms. Rodriguez found Student to have a moderate to severe language disorder as evidenced by formal language tests. Student had significant difficulties in vocabulary, word knowledge, grammar, and syntax. Her receptive language was weaker than her expressive language. The proposed speech and language listening comprehension goal was intended to increase Student's academic functioning. On this evidence, Student required language services to benefit from her special education. Therefore, the failure of Southern Kern to assess Student for language impairment, to identify her language deficits, and provide services to address her language needs, deprived her of educational benefit and was a procedural violation that amounted to a denial of FAPE.

Student proved that Southern Kern denied her a FAPE by not timely assessing for speech and language impairment, thus denying her related services that would have better enabled her to benefit from her special education since before September 2016. Student prevailed on Issues 5a and 6a.

Functional Behavior Assessment and Behavior Intervention Plan

Student contended that Southern Kern did not properly assess and evaluate her behaviors, update her behavior intervention plan, and provide effective intervention. Southern Kern asserts that the behavior intervention plan was successful and not in need of revision. Student proved that she was denied a FAPE because her learning was seriously impeded by Southern Kern's failure to update or modify her behavior intervention plan using appropriate data and assessments.

Southern Kern conducted a functional behavior assessment and, at the March 2013 annual IEP, added a behavior intervention plan, targeting Student's behaviors. This plan remained unchanged through the filing of Student's complaint. Student started high school at Rosamond for the 2015-2016 school year with a behavior intervention plan that identified Student's targeted behavior as verbal and physical aggression. Despite implementation of the plan, Student used profanity, argued and threatened others, threw items, ignored staff requests, disrupted the classroom, and accumulated more than 20 disciplinary incidents by the time of the April 19, 2016 reconvened annual IEP meeting. These behaviors were impulsive and essentially the same behaviors Student exhibited since elementary school, but the IEP team did not review any data or evaluate the plan's effectiveness. The team's failure to modify and update a clearly ineffective behavior intervention plan was a procedural violation.

In early May 2016, Student was suspended for following and harassing a male student, accumulating more than 10 suspension days. Southern Kern held a legally mandated manifestation determination meeting on May 5, 2016 and determined

Student's conduct was a manifestation of her disability. The IDEA therefore required the IEP team to review Student's intervention plan, conduct a functional behavior assessment if appropriate, and modify the behavior plan as necessary to address the behavior. Southern Kern did not review behavioral data, request further assessment, nor modify Student's behavior intervention plan. Notably, the IEP team still changed Student's placement to Rare Earth because the interventions then in place were not expected to successfully control her impulses at Rosamond.

At the August 9, 2016 addendum IEP, the team returned Student to her previous placement at Rosamond for the 2016-2017 sophomore year with the same intervention plan and no additional behavioral supports. By August 18, 2016, at an addendum IEP team meeting, the team moved Student back to Rare Earth. The IEP addendum documented that the other placement was unsuitable, but the IEP team did not document what had happened, recommend additional assessment, or update the behavior intervention plan.

Though Student's freshman year and the first month of her sophomore year predate the commencement of the two-year statute of limitations on September 25, 2016, Southern Kern's conduct reflected a continuing indifference to effectively evaluating Student's intervention plan by gathering and reviewing reliable, meaningful behavioral data. Therefore, as of the commencement of the statute of limitations in September 2016, Student's ineffective behavior intervention plan remained unchanged, without any identifiable process for gathering data as to the plan's effectiveness.

Southern Kern team members found Student's February 13, 2017 physical fight not to be a manifestation of her disability because Student's actions were planned, not impulsive. However, the February 17, 2017 manifestation determination team, the May 2017 multidisciplinary assessors, and the May 2017 triennial IEP team did not review behavioral data or evaluate whether Student's behavior intervention plan was

addressing Student's behavioral needs. Though Student was removed from her placement because of a disciplinary proceeding, Student was entitled to continue to receive education services, including a functional behavioral assessment, behavioral intervention services, and modifications designed to address her behavior violation so that it did not recur. (20 U.S.C. § 1415k(1)(D); 34 C.F.R. § 300.530(d)). Southern Kern did nothing regarding Student's behaviors.

Student's August 15, 2017 IEP team placed Student at Ascend Academy at Mother's request, without discussion of whether the intervention plan would address Student's behaviors. Mother called an addendum IEP meeting on February 12, 2018 and informed the team that Student had twice tried to commit suicide, was hospitalized for eight days in a behavior healthcare facility the prior week, and was taking Zoloft for anxiety and depression. Although the IEP team increased Student's counseling from 80 minutes, behavioral supports were not discussed. This failure to review behavioral data or supports continued into the IEP team meetings of May and September 2018.

Southern Kern contended that a steady decrease of Student's disciplinary incidents since middle school demonstrated the intervention plan's success. The argument is unpersuasive. Southern Kern generated the Student's intervention plan upon the findings and recommendations of a functional behavior assessment, which was the appropriate instrument. The functional behavior assessment identified targeted behaviors that seriously impeded Student's learning, and included data identifying antecedents which caused the targeted behavior. The intervention plan described strategies to address the verbal and physical aggression, including teaching Student self-monitoring techniques and functionally equivalent replacement behaviors. The intervention plan's success was to be measured by the strategies' effectiveness in decreasing targeted behaviors and increasing replacement behaviors. Yet, Student's multidisciplinary assessments and IEP's do not cite any data demonstrating the plan's

effectiveness. Disciplinary reports recorded Student's violation of a code of conduct, not data regarding the type, frequency or duration of targeted and replacement behaviors. For example, Mr. Johansson did not refer Student for discipline when she would profanely respond to requests, which were targeted behaviors not reflected in disciplinary records. The evidence convincingly demonstrated that Southern Kern did not properly monitor the behavior interventions by further functional behavioral assessment or other means designed to gather reliable, relevant data. Consequently, Student's evolving behavioral needs were not properly addressed by an intervention plan that remained unchanged since middle school.

Student required effective intervention because her behaviors continued to inhibit her education. Southern Kern's failure to properly assess and evaluate Student's behavioral intervention plan's effectiveness, over the years of multiple placements and programs, was a procedural failure to assess in all areas of suspected disability. IEPs must include accurate and reliable present levels of performance in order to build an individualized education program. Without updated reliable data, Southern Kern did not meet its legal obligation to evaluate the plan's effectiveness and make necessary adjustments, impeding Student's right to a FAPE and significantly impeding Mother's opportunity to participate in the decision-making process. Student's behaviors resulted in missed instructional time, as well as interfered with her learning as stated in the behavior plan itself, and the failure to assess and update the behavior plan also deprived Student of educational benefit. Student has demonstrated by a preponderance of the evidence that Southern Kern denied her a FAPE because of its continuing failure to properly assess and update Student's behavior intervention plan. Student prevailed on Issues 5a, 5d, 6a, and 6c.

Psychological Assessment, Counseling, and Services

Student contends that Southern Kern failed to evaluate and provide appropriate

psychological services and, thus, denied her a FAPE. Southern Kern asserts that Student had counseling and a behavior intervention plan that addressed her mental health needs. Student proved that Southern Kern denied her a FAPE because she was not comprehensively assessed for and provided appropriate educationally related mental health services.

Mr. Goldberg found Student met the emotional disturbance eligibility criteria (Ed. Code, § 3030, subd. (b)(4)) in the three triennial assessments of 2011, 2014, and 2017. In 2017, he concluded that Student had an emotional condition, which was characterized by learning problems, interpersonal difficulties, and inappropriate behavior. The frequency, intensity, and duration of these characteristics existed to a marked degree, were observed for an extended period of time, and adversely affected her educational performance. However, Mr. Goldberg did not substantively evaluate whether Student's emotional disturbance, or its effect on her educational performance, improved or diminished over the years. The IEPs continued to recommend the same interventions, which were a questionably effective behavioral intervention plan and 80 minutes a month of school counseling.

Student's emotional disturbance consistently interfered with learning. In June 2008, Southern Kern referred first-grader Student to the county department of mental health to be assessed for mental health services. The department declined, saying Southern Kern needed to first try increased special education services and a support plan. In February 2010, Mr. Goldberg again referred Student to the county department of mental health for evaluation. He reported that Student was unable to control her behavior in the social environment. She was defiant, profane, physically and verbally aggressive toward other pupils, and disrespectful, resulting in multiple suspensions, for the prior two years.

The behaviors and mental health concerns listed in Student's 2011, 2014, and

2017 triennial assessments and IEPs are the same concerns listed in the 2010 mental health referral. Student's 2010 emotional disturbance merited assessment for mental health services. But since the second grade, Southern Kern was generally indifferent to further examining Student's emotional health and did not initiate an educationally related mental health assessment.

Southern Kern's indifference to Student's mental health was apparent in Mr. Goldberg's 2017 triennial assessment. From the time Mr. Goldberg started the Student's triennial assessment in March 2017 to when he finished in May 2017, Student experienced a molestation, the unsuccessful reunification of her Parents, suspended expulsion from Rare Earth forbidding any involvement in school activities, and a change of placement to independent study. Mr. Goldberg failed to examine how these events affected Student's emotional status and schooling though the triennial was required to evaluate Student's social emotional condition. At the May 2017 triennial IEP team meeting, Mother requested that Student be referred to a psychologist, but was told that since Mr. Goldberg was retiring, a new "therapist" would draft a new emotional and counseling goal and counsel Student the following year. At the August 15, 2017 IEP team meeting, Mother said that Student should be in school more than five hours a week. Mother, not Southern Kern, asked that Student be scheduled to attend the behavioral program at Ascend Academy. Southern Kern agreed to the placement but did not examine the adequacy of the behavior intervention plan or Student's emotional supports in the new placement setting.

Student did not receive her school counseling during the spring 2017 semester because of a breakdown in her relationship with the newly appointed school psychologist. Mother requested a January 25, 2018 addendum IEP team meeting and explained that Student had twice attempted suicide, was hospitalized the prior week in a behavioral healthcare facility, and was now taking Zoloft for anxiety and depression.

Mother forcefully told the IEP team that she was frustrated by Student's lack of progress for 12 years, including behavior and accountability. She acknowledged that there were issues in Student's home life, but stated there were contributing issues related to school. Mother asked that the school take the lead in addressing Student's emotional needs, but Southern Kern responded with a small increase in counseling minutes without further assessment.

Ms. Conklin's presence at this meeting was the first time a school-based mental health therapist attended Student's IEP team meeting. Inexplicably, the IEP team did not initiate a mental health evaluation despite the suicide attempts, hospitalization, diagnoses, and Zoloft. Southern Kern did not ask Mother for a release so Ms. Conklin or another district mental health professional could review Student's discharge summary and talk with Student's doctor. Southern Kern did not further examine or assess Student's mental health, as of the time of hearing.

Student's home life had been difficult and contributed to her emotional difficulties. Mother's communications could be intrusive, volatile, profane, and challenging to Southern Kern personnel. Sometimes it was simpler to grant Mother's demands, such as a Student's return to Rare Earth, without further scrutiny of Student's emotional health. However, the IDEA charges Southern Kern with unilateral obligations to regularly appraise Student's emotional disturbance, comprehensively assess and identify the Student's related services' needs, and provide appropriate related services to meet Student's educationally related mental health needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Here, Southern Kern did not meet its legal obligation to comprehensively evaluate Student's mental health, often disregarding or discounting significant events that should have triggered further inquiry.

Southern Kern's failure to properly assess and evaluate Student's educationally related mental health, over the years of multiple placements and programs, was a

procedural failure to assess in all areas of suspected disability, and reassess as warranted by Student's educational and related services' needs, that amounted to a denial of FAPE. IEPs must include accurate and reliable present levels of performance in order to build an individualized education program. Student's educationally related mental health needs increasingly caused her to be unavailable for her education, resulting in loss of educational benefit. The lack of current and complete mental health information also significantly impeded Mother's opportunity to participate in the decision-making process and impeded her right to a FAPE. Student proved Southern Kern denied her a FAPE because of its continuing failure to properly comprehensively assess Student's emotional disturbance and provide related services to address Student educationally related mental health needs. Student prevailed on Issues 5a and 6a.

ISSUES 5B AND 6B: FAILURE TO CONSIDER CONTINUUM OF PLACEMENTS AT IEP TEAM MEETINGS

Student contended in Issues 5b and 6b that Southern Kern denied her a FAPE during her sophomore and junior school years because it did not discuss a continuum of special education placements at the IEP team meetings of March 17, 2017, May 31, 2017, August 15, 2017, and May 16, 2018. Southern Kern asserted that a continuum of placement options was discussed at each IEP where Student's placement was considered.

A special education placement is a unique combination of facilities, personnel, location or equipment necessary to provide instructional services to a Student with exceptional needs. (Cal. Code Regs., tit 5, § 3001, subd. (t), and § 3042.). School districts are required to provide each special education student with a program in the least restrictive environment. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) 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, instruction in the home or instruction in hospitals or institutions. (Ed. Code, § 56361.)

Here, Student did not meet her burden of proof regarding consideration of the continuum of placements at the specified IEP team meetings. The March 17, 2017 triennial IEP team meeting was continued to when the assessment was completed. The reconvened May 31, 2017 IEP team meeting addressed Student's placement and provided Student with additional independent study hours and tutoring opportunities during the suspended expulsion. The IEP document states the team considered various placements in the least restrictive placement and Student offered no evidence indicating otherwise. The August 15, 2017 IEP team meeting was called at Mother's request to add hours to Student's program, which the IEP team offered. The May 16, 2018 IEP team meeting was a reconvene of the March 15, 2018 meeting, which had been delayed to review Ms. Ede's report. The meeting was again reconvened on September 10, 2018, but not completed because Mother and Student's attorney refused to further participate. The March 2018 annual IEP document states the team considered various placements in the least restrictive placement and Student offered no evidence indicating otherwise.

Student did not prove that the continuum of placement options was not discussed at the designated IEP team meetings. Southern Kern prevailed on Issues 5b and 6b.

ISSUE 5C: FAILURE TO PROVIDE MOTHER WITH PRIOR WRITTEN NOTICE OF SOUTHERN KERN'S DENIAL OF HER REQUEST FOR REFERRAL TO A PSYCHOLOGIST

Student contended that Southern Kern was required to provide prior written notice in response to Mother's request that Student be referred to a psychologist at the May 31, 2017 IEP reconvened team meeting. Southern Kern asserted that it was not

obligated to provide a written notice, that Ms. Conklin was a licensed psychologist and assigned to Student, and that, even if such notice was required, the failure did not amount to a denial of FAPE.

A district is required to give parents of a child with exceptional needs prior written notice a reasonable time before the district proposes to initiate or change, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child. (Ed. Code, § 56500.4, subd. (a).) The prior written notice must contain a description of the action refused, explanation for the action and a description of the assessment procedure or report which is the basis of the action. (Ed. Code, § 56500.4, subd. (b).)

Mother requested that Student be referred to a psychologist at the May 31, 2017 IEP team meeting when discussing Mr. Goldberg's retirement. She was told a new therapist would be assigned the next school year to do Student's counseling and the therapist would work up a new emotional/counseling goal after becoming familiar with Student. Southern Kern did not otherwise respond to Mother's request.

Southern Kern's statements at the IEP team meeting were not responsive. Mother was asking for a referral for evaluation or therapy. She knew another school psychologist would be assigned to do the counseling after Mr. Goldberg left. Southern Kern's reply was consistent with the above findings that Southern Kern did not properly assess and evaluate Student's mental health needs. Here, Southern Kern should have provided Mother with a prior written notice, explaining why Southern Kern would not refer Student to a psychologist, and describing the basis for the refusal.

Southern Kern's failure to provide a prior written notice was a procedural error that amounted to a denial of FAPE because Mother's opportunity to participate in the decision-making process was significantly impeded by the nonresponsive reply to her request. Knowing the reasons why Southern Kern refused to refer Student to a

psychologist for evaluation would have enabled Mother to informatively advocate for better educationally related mental health services. Student was denied a FAPE because Southern Kern did not provide prior written notice in response to Mother's request that Student be referred to a psychologist. Student prevailed on Issue 5c.

ISSUES 5E AND 6D: FAILURE TO PROVIDE REGULAR AND SPECIAL EDUCATION INSTRUCTION IN ACCORDANCE WITH THE MARCH 17, 2017, MAY 31, 2017, AUGUST 15, 2017 AND MAY 16, 2018 IEPs

Student contended Southern Kern denied her a FAPE by not providing regular and special education instruction in accordance with her March 17, 2017, May 31, 2017, August 15, 2017 and May 16, 2018 IEPs. Southern Kern asserted that Student received instruction in accordance with her IEP's.

A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 822.) A minor discrepancy between the services provided and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Ibid.*)

Student did not present persuasive evidence that Southern Kern did not provide special and general education instruction in accordance with the IEP's. The March 17, 2017 triennial IEP team meeting reconvened on May 31, 2017, when the team added additional independent study hours and tutoring during her suspended expulsion. The August 15, 2017 addendum IEP provided additional hours to Student's program, including at Ascend Academy. Mother agreed to these IEP's.

The May 16, 2018 IEP team meeting reviewed Ms. Ede's report, and did not

change the offer of instruction. That meeting was reconvened on September 10, 2018, but not completed because Mother and Student's attorney left. Mother never agreed to a March 2018 annual IEP program because the annual meeting was never completed. Therefore, Southern Kern was obliged to implement the last agreed to IEP, which was the March 2017 triennial IEP, as amended by the addendums of August 2017 and January 2018. Student did not present persuasive evidence that Southern Kern did not do so.

Student did not prove Southern Kern failed to implement instruction in accordance with the IEP's. Southern Kern prevailed on Issues 5e and 6d.

ISSUE 5F: FAILURE TO PROVIDE A SAFE LEARNING ENVIRONMENT, FREE FROM BULLYING, IN THE 2016-2017 SCHOOL YEAR

Student contended in Issue 5f that Southern Kern failed to provide Student with a safe learning environment, free from bullying, during the 2017-2018 school year. Southern Kern asserted Student was not the object of bullying.

The bullying of a student with a disability that causes a student not to receive meaningful educational benefit may constitute a denial of a FAPE under the IDEA. (*Dear Colleague Letter*, OSERS (August 20, 2013) 113 LRP 33753 (*Dear Colleague 2013*)). This applies whether or not the bullying is related to the student's disability. (*Id.*, at p. 2.) Therefore, a determination of whether bullying has denied a student a FAPE requires a two-step analysis: (i) whether the bullying occurred, and (ii) whether the bullying resulted in the student not receiving educational benefit within the meaning of *Rowley*.

Bullying is characterized by aggression within a relationship where the aggressor has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. (*Dear Colleague 2013*, at p. 2.). Implicit in the duty of a school district to respond to acts of bullying is the requirement that the district received notice of those acts. (See *Dear Colleague Letter*, OCR (October 26, 2010) 55

IDELR 174, 110 LRP 62318 at p. 3.)

Here, Student's claim of bullying was simply not supported by evidence. Student had negative peer interactions with other pupils, especially female, but there was no evidence that these were the result of bullying. Student's own behaviors included verbal and physical aggression that was challenging for teachers and fellow students. Also, Student was not well-equipped to address disagreements with others at school and in social media. Her February 13, 2017 physical fight with Pupil A was an example of her tendency to use aggression to solve relational differences. Student reported her disputes to Mr. Goldberg, Mr. Shevlin and others, but she never stated that she felt that another student was acting aggressively towards her in a relationship where the aggressor had more real or perceived power than Student, or that the aggression was repeated, or had the potential to be repeated, over time. The fight with Pupil A was initiated by Student. No Southern Kern staff saw Student being bullied. Student did not prove she was bullied during the 2016-2017 school year. Southern Kern prevailed on Issue 5f.

ISSUES 5G AND 6E: FAILURE TO TIMELY IMPLEMENT INSTRUCTION AND ACCOMMODATIONS IN THE FEBRUARY 22, 2016, MARCH 17, 2017, MAY 31, 2017, AUGUST 15, 2017 AND MAY 16, 2018 IEPs

Student contended in Issues 5g and 6e that Southern Kern denied her a FAPE by failing to timely implement instruction and accommodations in the February 22, 2016, March 17, 2017, May 31, 2017, August 15, 2017 and May 16, 2018 IEPs. Southern Kern asserted that Student received her instruction and accommodations in accordance with her IEP's.

These issues were substantively similar to Issues 5g and 6e. The February 22, 2016 IEP was an annual which reconvened on April 19, 2016; Mother agreed to the IEP and placement at Rosamond. However, the May 5, 2016 manifestation determination IEP

team placed Student at Rare Earth for the remainder of the school year. Student returned to Rosamond at the beginning of the 2016-2017 school year, but the August 18, 2016 addendum IEP team placed Student back at Rare Earth, designating Student's new schedule and special education classes. Student's instruction and accommodations contained in the February 22, 2016 annual IEP, as amended by the August 18, 2016 addendum IEP set forth the instruction and accommodations to be implemented as of the commencement of the statutory time limitation on September 25, 2016. However, Student presented no persuasive evidence that Southern Kern failed to implement the instruction or accommodations.

The March 17, 2017 triennial IEP team meeting reconvened and concluded on May 31, 2017. and was amended by the August 15, 2017 addendum IEP. At hearing, Student did not present persuasive evidence that Southern Kern failed to implement the instruction and accommodations set forth in the March 2017 annual or the August 2017 addendum IEP's.

The March 15, 2018 annual meeting reconvened at May 16, 2018 and September 10, 2018, team meetings, but was not completed. Southern Kern was not legally obligated to implement a reconvened May 16, 2018 IEP. Southern Kern was obliged to implement the instruction and accommodations of the last agreed to IEP and Student did not present persuasive evidence that Southern Kern did not do so.

Student did not prove Southern Kern failed to implement the instruction and accommodations in the IEP's. Southern Kern prevailed on Issues 5g and 6e.

ISSUE 7: FAILURE TO OFFER APPROPRIATE SPECIAL EDUCATION AND RELATED SERVICES IN THE LEAST RESTRICTIVE ENVIRONMENT FOR THE 2018-2019 SCHOOL YEAR

Student contended Southern Kern denied her a FAPE because it did not offer appropriate special education and related services in the least restrictive environment,

specifically: appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, wrap around services, and extended school year. Southern Kern asserted it was obliged to implement the last agreed-to IEP, which was the March 2017 triennial IEP, as amended by the addendums of August 2017 and January 2018.

The IEP in effect at the beginning of the 2018-2019 school year was the March 2017 triennial IEP, as amended by the addendums of August 2017 and January 2018. Southern Kern convened an IEP team meeting to conduct an annual review of Student's IEP and make an offer that would be in effect for the 2018-2019 school year on March 15, 2018. However, at Mother's request, that meeting was adjourned and reconvened on May 16, 2018 for the team to have the benefit of Ms. Ede's independent psychoeducational evaluation. That meeting was also adjourned and continued to September 10, 2018. The September 10, 2018 IEP team meeting was not completed, because Mother left the meeting at Student's attorney's direction and the attorney hung up. Student filed this due process proceeding on September 25, 2018. Student failed to present evidence of an offer of FAPE for the 2018-2019 school year.

Student was the petitioning party and carried the burden of proof by a preponderance of the evidence. Without evidence of Southern Kern's offer for the 2018-2019 school year, the offer cannot be evaluated. Student did not meet her burden of proof and Southern Kern prevailed on Issue 7.

REMEDY

Student met her burden of proof and prevailed on Issues 5a, 5c, 5d, 6a, and 6c. The remedies are limited to compensatory services. Student was expected to have graduated high school with a regular diploma before the issuance of this decision and, consequently, will no longer be in special education and entitled to placement and related services from Southern Kern. However, Student is entitled to remedies awarded

by this decision even if she did not receive her high school diploma by this decision's issuance date.

Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11.) Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington* at p. 374.)

When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) A school district may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F. 3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

SPEECH AND LANGUAGE SERVICES

Student prevailed on Issues 5a and 5b because Southern Kern failed to timely assess for and provide speech and language services. Southern Kern assessed Student and found Student to be speech and language impairment eligible at the September 2018 IEP meeting. Ms. Rodriguez recommended direct services from a speech and language pathologist in two weekly sessions, totaling an hour a week.

Southern Kern's obligation to assess was triggered before the two-year statute of

limitations. Each school year has about 38 weeks. Therefore, for a denial of FAPE over a two-year period, Student is entitled to compensatory speech and language services of 76 hours. Such services shall be provided by a nonpublic agency or a credentialed speech therapist chosen by Student, and who meets the criteria of Southern Kern's special education local plan area, or SELPA, including the speech therapist's hourly fee. If the SELPA does not have hourly fee guidelines for a credentialed speech therapist, the therapist's hourly fee must be in accordance with the community standard. The chosen speech therapist shall use Ms. Rodriguez's assessment to identify Student's needs and appropriate speech and language services, and work on the goals proposed by Ms. Rodriguez. Southern Kern shall pay the agency or speech therapist directly. If Student chooses an agency or therapist who will not accept direct payment from Southern Kern, Student may pay for services actually performed and be reimbursed by Southern Kern. Student shall comply with Southern Kern's standard reimbursement process. Student must access and use the compensatory hours by June 30, 2021, at which time the right to any remaining compensatory hours is extinguished.

MENTAL HEALTH SERVICES, BEHAVIOR INTERVENTION, AND PRIOR WRITTEN NOTICE

Southern Kern failed to assess and provide appropriate educationally related mental health services and, therefore, denied Student a FAPE. Student also demonstrated Southern Kern denied her a FAPE by not properly assessing and evaluating her behavior intervention plan for effectiveness. Southern Kern failed to provide a FAPE because it did not give Mother prior written notice as to why it did not refer Student to a psychologist as Mother requested in May 2017. These failures were interrelated, concerned Student's emotional disturbance disability, and signified a general lack of effort by Southern Kern to fully assess and address Student's educationally related mental health needs.

The failure to assess for educationally related mental health services and for the behavior intervention plan was longstanding and predated the running of the two-year statute of limitations. Southern Kern belatedly recognized the need for more intense services when it assigned licensed marriage and family therapist, Ms. Conklin, and increased Student's counseling to two hours a month at the January 25, 2018 IEP team meeting. However, Southern Kern's provision of a licensed therapist and increased counseling was merely a well-intentioned presumption because Student was not assessed for educationally related mental health services. Mother was not asked for a release, so Ms. Conklin was not properly informed of Student's mental health needs. Student did not receive counseling in the spring 2017 semester during investigation of her complaint against the school counselor, and Mother stated Student was not accessing counseling from Ms. Conklin, which would have been insufficiently effective without full and complete information on Student's mental health needs. In the meantime, the behavior intervention plan stagnated, unchanged and questionably effective, and Mother did not have the benefit of a prior written notice that would have better informed her of Southern Kern's reasoning.

Compensatory relief for these failures cannot be determined by mere computations. Student is entitled to appropriate relief, in light of IDEA purposes, including additional services. The conduct of both parties may be considered to determine the appropriate equitable relief. Here, Southern Kern's persistent indifference to properly assess and provide effective related services associated with Student's emotional disturbance seriously impeded Student's ability to benefit from her education. The evidence revealed a young woman who struggled with an increasing array of emotional challenges, including molestation, suspended expulsion, family conflict, multiple changes of placement in high school, depression, anxiety, hospitalization, and suicide attempts. Student will need more intense compensatory

services to address her emotional needs in conjunction with the added stress of moving on from high school to pursue community college and a career with the language deficits and lack of coping skills neglected by Southern Kern.

Student is entitled to both mental health services and support services to better enable her to be successful in the community, career or college. Southern Kern shall fund 38 hours of mental health therapy, from a licensed marriage and family therapist. Student shall choose the licensed therapist, but the therapist's hourly fee must meet the criteria of Southern Kern's SELPA. If the SELPA does not have hourly fee guidelines for a licensed marriage and family therapist, the therapist's hourly fee must be in accordance with the community standard. Southern Kern shall pay the licensed marriage and family therapist directly. If Student chooses a therapist who will not accept direct payment from Southern Kern, Student may pay for services actually rendered and be reimbursed by Southern Kern. Student shall comply with Southern Kern's standard reimbursement process. Student must access and use the compensatory hours by June 30, 2021, at which time the right to any remaining compensatory hours is extinguished.

Southern Kern shall fund 76 hours, calculated at one hour per week for 76 weeks, of specialized academic support from a nonpublic agency or agencies to provide tutoring and behavioral support, which may occur in the home, college, trade school, or the community. Student shall choose the nonpublic agency, but the agency's fees must meet the criteria of Southern Kern's SELPA. Southern Kern shall pay the agency directly. Student must choose a nonpublic agency that will accept direct payment. Student must access and use the compensatory hours by June 30, 2021, at which time the right to any remaining compensatory hours is extinguished.

ORDER

1. Southern Kern shall fund 76 hours of speech and language services for Student by a nonpublic agency or a credentialed/licensed speech therapist, chosen by

Student. The hourly fee may not exceed local SELPA guidelines or, if SELPA guidelines are unavailable, the hourly fee must be in accordance with the community standard. Southern Kern shall pay the agency or therapist directly. If Student chooses a provider who will not accept direct pay from Southern Kern, Student may pay for services actually rendered and then be reimbursed by Southern Kern.

2. Southern Kern shall fund 38 hours of mental health therapy, from a licensed marriage and family therapist. Student shall choose the therapist whose hourly fee may not exceed local SELPA guidelines or, if SELPA guidelines are unavailable, the hourly fee must be in accordance with the community standard. Southern Kern shall pay the therapist directly. If Student chooses a therapist who will not accept direct pay from Southern Kern, Student may pay for services actually rendered and then be reimbursed by Southern Kern.

3. Southern Kern shall fund 76 hours of specialized academic support from a nonpublic agency or agencies to provide Student with tutoring and behavioral support in the home, college, trade school, or the community. Student shall choose the nonpublic agency, but the agency's fees must meet the criteria of Southern Kern's SELPA. Southern Kern shall pay the agency directly. Student must choose a nonpublic agency that will accept direct payment from Southern Kern.

4. Student must access and use the compensatory hours by June 30, 2021, at which time the right to any remaining compensatory hours is extinguished.

5. If Student seeks reimbursement, Student shall comply with Southern Kern's standard reimbursement process in order to be entitled to reimbursement.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on Issues 5a, 5c, 5d, 6a, and 6c. Southern Kern

prevailed on Issues 1 through 4 and Issues 5b, 5e, 5f, 5g, 6b, 6d and 6e, and Issue 7.

RIGHT TO APPEAL THIS DECISION

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: July 25, 2019

/s/

CLIFFORD H. WOOSLEY

Administrative Law Judge

Office of Administrative Hearing