

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2020090289  
CASE NO. 2020070003  
CASE NO. 2020100652

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THE CONSOLIDATED MATTERS INVOLVING

PARENT ON BEHALF OF STUDENT, AND  
PANAMA VISTA UNION SCHOOL DISTRICT.

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DECISION

MARCH 15, 2021

On June 26, 2020, Panama-Buena Vista Union School District, called Panama, filed a Request for Due Process Hearing, called a complaint, in OAH case number 2020070003, Panama's First Case, naming Student. On September 9, 2020, Student filed a complaint in OAH case number 2020090289, Student's Case, naming Panama. By Order dated September 14, 2020, OAH consolidated the cases, ordering that Student's Case was designated as the primary case. Thereafter, on October 20, 2020, Panama filed another complaint, in OAH case number 2020100652, Panama's Second Case, also naming Student. At a prehearing conference on October 26, 2020, OAH consolidated

the cases, ordering that Student's Case was designated as the primary case, and the matter was continued for good cause.

Administrative Law Judge June R. Lehrman heard this matter via videoconference on January 5, 6, 7, 12, 13, 14, 19, 20, 21, 26, 27, 28 and 29, 2021. David Grey and Barbara Grey, attorneys at law, represented Student. Mother and Grandmother attended on Student's behalf. Dee Anna Hassanpour and Anisha Asher, attorneys at law, represented Panama. Special Education Local Plan Area Executive Director Denita Maughan attended on Panama's behalf. At the parties' request, the matter was continued to March 1, 2021 for written closing briefs. The record was closed, and the matter was submitted on March 1, 2021.

## ISSUES

Student's Issue is number 1. Panama's Issues are numbered 2 and 3. Free appropriate public education is referred to as FAPE. Individualized education program is referred to as IEP.

1. Did Panama deny Student a FAPE, by failing to appropriately assess him in all areas of suspected disability from September 9, 2018 through the filing of Student's complaint?
2. Was Panama's February 2020 functional behavior assessment appropriate such that it need not fund an independent educational evaluation?
3. Was Panama's IEP offer dated December 19, 2019 as amended February 28, 2020 necessary to provide Student a FAPE in the least restrictive environment such that it may be implemented without parental consent?

By motion dated January 12, 2021, Panama withdrew from its Second Case an additional issue concerning the appropriateness of its February 2020 language and speech assessment.

## JURISDICTION

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.) All future references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted. The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- 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
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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 free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 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, and has the burden of proof by a

preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proof on Issue 1. Panama had the burden of proof on Issues 2 and 3. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was eight years old at the time of hearing and in the first grade. Student resided within Panama's geographic boundaries at all relevant times.

#### ISSUE 1: DID PANAMA DENY STUDENT A FAPE, BY FAILING TO APPROPRIATELY ASSESS HIM IN ALL AREAS OF SUSPECTED DISABILITY FROM SEPTEMBER 9, 2018 THROUGH THE FILING OF STUDENT'S COMPLAINT?

Student contends that Panama failed to assess him for eligibility for special education and related services prior to May 28, 2019 and that when he was ultimately assessed on or around May 28, 2019, the assessment was not appropriate because Panama failed to assess him for autism, failed to conduct an appropriate behavioral assessment, and failed to find him eligible for special education and related services. Student further contends that when Student was later assessed and ultimately found eligible for special education on or around December 19, 2019, Panama denied him a FAPE because it still failed to conduct an appropriate behavioral assessment, and failed to assess him for autism. In or around February 2020, when Student was first assessed for autism and given a behavior assessment, Student further contends those assessments were not appropriate. Panama contends that, at all times, it appropriately

assessed Student. Panama further contends that the period of time prior to its first assessment on May 28, 2019 was not at issue in Student's complaint.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201-204; *Andrew F. v. Douglas County School District RE-1* (2017) 137 S.Ct. 988, 1000.)

The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106), reversed in part on other grounds by *Schaffer, supra*, 546 U.S. 49, 56-58.)

The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities residing in the state who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).) A school district's obligation toward a specific child is triggered when there is knowledge of, or reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability. (*Dept. of Ed., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Dept. of Ed., State of Hawaii v. Cari Rae S., supra*, 158 F.Supp.2d at 1195.)

A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School District* (9th Cir. 2016) 822 F.3d 1105, 1120-21.) That notice may come in the form of concerns expressed by parents about a child's symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child's behavior.

A local educational agency must assess a special education student in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. (20 U.S.C. § 1414(b)(2)(A).) No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34

C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) The assessments used must be selected and administered so as not to be discriminatory on a racial or cultural basis, provided 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, and administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b)(3)(A)(v); Ed. Code, §§ 56320, subds. (a) & (b).) Individuals who are both knowledgeable of the student's disability and competent to perform the assessment, must conduct assessments of students' suspected disabilities. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code §§ 56320, subd. (g); 56322.) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) The determination of what tests are required is made based on information known at the time. (*Vasherresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.)

## PANAMA FAILED TO ASSESS STUDENT AT ALL PRIOR TO MAY 28, 2019

The time period from September 9, 2018, to May 28, 2019, is properly within the four corners of Student's Issue 1. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, §56502(i).) Student's complaint alleges that "[w]hile enrolled with the District, [Student] had a history of behavioral issues and attendance problems. He was not assessed for eligibility for special education until spring 2019." Moreover, this time period was the subject of extensive testimony and documentary evidence to which Panama did not

object. It was thus both within the four corners of the complaint, and extensively litigated. (*M.C. v. Antelope Valley Union High School District* (9th Cir. 2017) 858 F. 3d 1189, 1196.) The failure to assess Student for special education and related services during this time period is therefore properly at issue.

Panama first assessed Student for special education and related services in May 2019 after Mother requested an assessment on March 27, 2019, which resulted in a signed assessment plan dated April 2, 2019, and a psychoeducational assessment report dated May 28, 2019. However, prior to the first assessment on May 28, 2019, Panama was on notice of all the following facts. Student was enrolled at Stine Elementary School during kindergarten, the 2018-19 school year. Student came to the attention of Assistant Principal Jared Coppolo during the second quarter of the 2018-19 kindergarten school year, roughly between October 12, 2018 and January 11, 2019. Student displayed physical aggression in the yard, which progressed over time to shoving faces onto concrete, shoving peers into fences, and slapping and headbutting the teacher. Prior to being assessed in May 2019, Student had had 13 behavioral incidents Panama categorized as "major," and 12 minor behavioral incidents during the 2018-19 school year. The incidents included hitting peers and staff, kicking peers, throwing objects at staff and peers, and name-calling. Four incidents resulted in an office referral. One involved hitting the teacher, Alysia Stevens, for which Student got sent home for the remainder of the day. On November 1, 2018, Student hit a peer in the face and was suspended for one day. None of other incidents were referred for formal discipline. School staff dealt with these incidents informally, either by sending trained school behaviorists into the classroom, or by sending Student to the administrative offices. Panama staff contacted Mother multiple times a week, by phone call or text message, and they led Mother to believe that Student's behaviors were

severe, serious, abnormal, and alarming. Assistant Principal Coppolo spoke to Mother about ten times during that school year because of Student's tantrums and physical aggressions.

Sometime during the second quarter, between October 2018 and January 2019, Panama convened a "student success team" or SST meeting, to discuss Student's behaviors. The meeting was not documented. Because the participants had inconsistent and vague recollections as to when it occurred, its precise timing was unclear. The SST team met to discuss behavior strategies, systems and rewards, that the teacher Stevens, school psychologist Andrea Hunt, and behavior interventionists could implement. The behavior interventionists were on a school wide behavior team sent into classrooms to deal with problems when they occurred. As described at hearing by Hunt, the SST strategies implemented for Student consisted of daily communication with Mother, positive reinforcements, rewards and consequences.

Panama convened a second SST team meeting sometime later, between January and March 2019. The meeting was not documented, and its precise timing was unclear from the conflicting testimony. By the time of the second SST meeting, Student was exhibiting more physical aggression. The SST strategies put in place after the first SST meeting were not working and the team needed new strategies. Prior to March 2019, Student exhibited problems on and off the playground with both peers and adults. He threw food in the cafeteria. He exhibited new and more aggressive behaviors. He pushed teacher Stevens out of the way, nudged her elbow and shoulder, tried to sock her when she blocked Student's hands, head-butted her, and cursed, calling her a "bitch" and used the terms "shut up" and "fuck." There was more than one incident of Student kicking and scratching, resulting in peers being injured.

At the second SST meeting, Panama implemented new interventions to address Student's behaviors that included a "check-in, check-out" system. The behavioral team "checked in" with Student in the morning, and the teacher filled out a daily form to document Student's behaviors. The team also "checked out" with Student in the afternoon. Per Hunt, Panama also intended to "implement social skills" either as "pull out" or during the "check-in, check-out." The implementation of these new interventions for Student would involve "go[ing] over the skills" to address "what problems he had" and to "dig deeper into these situations." The behaviorists went into Student's classroom during structured and unstructured times and used various behavior intervention strategies.

Mother requested an assessment on March 27, 2019, which resulted in a signed assessment plan dated April 2, 2019. During April and May 2019, the SST team increased the daily number of check-ins with Student from two to three a day, according to Hunt, "just to try something new while he was being assessed."

The interventions implemented by the SST meetings were informal. They were not documented, and it is therefore unclear exactly when these interventions occurred, and what strategies the behaviorists implemented. The witness' descriptions of the strategies were vague because the plan itself was vague. The SST interventions were clearly experimental, meant to try and see what worked. Although in a later document, school psychologist Hunt described the interventions she had tried, there was no contemporaneous documentation.

There was no evidence that Mother was provided notice of her procedural rights to request a formal assessment at either the first or second SST meeting. When asked whether he recommended a special education assessment for Student, Assistant

Principal Coppolo testified that he was under the impression that an SST meeting was a required first step before any referral could be made for a special education assessment.

Panama argues that it properly implemented non-special education interventions as a first step in addressing Student's behaviors. But it was clear, as early as the suspension in November 1, 2018, and certainly prior to Mother's March 2019 formal written assessment request, that Panama's non special-education interventions were ineffectual, and that Panama had knowledge of and reason to suspect a disability and that special education may be need to address that disability. The circumstances, as evidenced by the need for increasing interventions, easily met and exceeded the low threshold for suspecting that a child has a disability. Panama should have offered to assess Student for eligibility for special education and related services.

As explained in further detail below, the failure to assess prior to May 2019 impeded Student's right to a FAPE, significantly impeded Mother's opportunity to participate in the decisionmaking process regarding the provision of a FAPE, and caused a deprivation of educational benefits.

#### THE MAY 28, 2019 ASSESSMENT

In May 2019, Panama then performed a psychoeducational assessment of Student pursuant to Mother's March 2019 request. The lead assessor was school psychologist Hunt, aided by school psychologist Stephanie Elrod and special education teacher Charles Coleman, and others. Hunt and others at her request conducted observations of Student. She reviewed records, including Student's behavioral incidents outlined above. She provided Mother with a written questionnaire and interviewed the teacher Stevens and Student. She administered

and reviewed the administration of formal testing instruments conducted by other assessors.

Hunt assessed Student's cognitive abilities appropriately, using the Weschler Preschool and Primary Scale of Intelligence, fourth edition. Hunt's assessment results revealed Student was of average intelligence. Coleman assessed Student's academics using the Woodcock-Johnson Tests of Achievement, fourth edition and Bracken Basic Concept Scale, Receptive, third edition. Student had average educational achievement in reading, math, written and oral language, and academic and school readiness skills. The cognitive and academic instruments were appropriate to their purpose, were appropriately administered and scored, and the results were valid and reliable.

Hunt suspected and investigated the special education eligibility categories of specific learning disability, other health impairment, and emotional disturbance. She did not suspect nor assess for autism. Panama's failure to suspect autism as of the May 28, 2019 assessment is discussed elsewhere in this Decision.

The May 2019 assessment failed to appropriately investigate Student's aggressive and off-task behaviors and did not conduct nor recommend a behavioral assessment. The May 2019 assessment also inappropriately concluded that Student was ineligible for special education and related services.

#### THE MAY 2019 ASSESSMENT FAILED TO APPROPRIATELY ASSESS STUDENT'S BEHAVIORS

Hunt chose only one social-emotional instrument, the Behavior Assessment System for Children, third edition, known as the BASC. This is a system of rating scales,

completed by Mother and teacher Stevens. Student's hyperactivity and aggression scored as clinically significant on both parent and teacher rating scales. Student's behavioral index scores, which included attention, fell within the clinically significant range for parent ratings, and in the at-risk range for the teacher Stevens. Student's adaptability, social skills, activities of daily living, and functional communication fell in the at-risk or clinically significant range for parent scales, and in the typical range for teacher ratings. Student received at-risk scores in the areas of leadership and functional communication from Mother.

School psychologists Hunt and Elrod observed Student hitting a female peer in the face once, and numerous instances of off-task and disruptive behavior and inattention. During a single observation, Student pushed other students 19 times, grabbed other students by their shirts and swung them around or pulled them, grabbed peers' papers and ripped them up, and threw paper at the examiner. Student required 23 prompts and redirections to get back on task. Nevertheless the assessors, particularly Elrod, opined in the assessment report that Student was "capable" of answering questions and listening to directions, "capable" of sitting still and being attentive and focused, and that Student "had the capability" to sit still and concentrate for a large amount of time. There was no justification in the assessment report, and none presented at hearing, for Elrod's analysis and conclusions regarding Student's "capabilities." The assessment, without explanation, data or analysis, concluded that Student's inattention and impulsivity occurred when he was "bored."

The assessment did not propose any explanation for Student's aggressions. The assessment did not adequately explore Student's behaviors, which over the course of the school year should have been viewed by Panama as significant enough to warrant a

full and comprehensive behavior assessment. The BASC and observation results alone, when combined with the totality of Student behaviors during the 2018-19 school year, should have alerted Panama to the need to further assess Student's behaviors. The ineffectiveness of SST interventions established that Panama did not understand and did not appropriately address Student's significantly aggressive behaviors, and that their haphazard experimental approaches were not working. All this information was known to Panama at the time of the May 2019 assessment.

At hearing, Hunt and Elrod attempted to justify their lack of concern about Student's behavioral history during the 2018-19 school year. Their explanations, particularly Elrod's were strained and not believable. Elrod unpersuasively downplayed the severity of Student's behaviors, stating that Student had "some" inappropriate social behaviors, but nothing that got in the way of his education. This testimony was belied by the assessment itself, which stated that during the assessment observations Student's "on-task behavior overall was significantly below that of peers in the same environment," and that Student "displayed very inattentive and hyperactive type behaviors within the classroom" and required multiple prompts to follow classroom rules and directives. The assessment report itself is internally inconsistent, at one point stating that Student's on-task behavior overall was "significantly below" his peers, and at other points, comparing his behavior as equivalent to that of other students. These inconsistencies further demonstrated that the May 2019 assessment was inappropriate.

In conclusion, Student's "capabilities" aside, his significant off-task behavior, inattentive and hyperactive type behaviors, requirement of multiple prompts, inconsistent performance, and numerous instances of physical aggression during the school year, warranted further investigation. As explained in further detail below, the failure to assess prior to May 2019 impeded Student's right to a FAPE, significantly

impeded Mother's opportunity to participate in the decisionmaking process regarding the provision of a FAPE, and caused a deprivation of educational benefits.

#### THE FAILURE TO FIND STUDENT AS BEING ELIGIBLE FOR SPECIAL EDUCATION

For a child to be eligible for special education in California, the child must have a disability as defined by state and federal law. (Ed. Code, § 56026, subd. (d); 34 C.F.R. § 300.8.) Section 3030 of Title 5 of the California Code of Regulations defines the various eligibility categories under California law. One of the eligibility categories is called "other health impairment." Under California Code of Regulations, Title 5, Section 3030, subdivision (b)(9), there are two prongs to the eligibility category of "other health impairment." The first prong requires a finding that a student has limited strength, vitality, or alertness, that is due to chronic or acute health problems such as attention deficit disorder or attention deficit hyperactivity disorder. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9)(A).) The second prong requires a finding that the impairment "adversely affects a child's educational performance." (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9)(B).)

In the May 2019 assessment, school psychologist Hunt correctly discerned that Student suffered from limited alertness due to attention deficit disorder or attention deficit hyperactivity disorder, and therefore met the first prong of the eligibility category of "other health impairment."

However, despite ample evidence that Student's social functioning impeded his education, the May 28, 2019 assessment improperly concluded that Student was not eligible for special education and related services. Because of Student's academic strengths, Panama concluded that Student's "educational performance" was not

“adversely affected” and therefore he did not meet the second prong of eligibility for that category.

Hunt opined, with Elrod’s concurrence, that as of May 2019, Student’s off-task behaviors and impulsive behaviors were not “adversely impacting his educational performance,” because Student had demonstrated the ability to complete tasks independently and correctly, and because his grades indicated he was meeting standards and expectations, and making satisfactory academic progress. Therefore, Panama found Student not eligible as a child with other health impairment.

The discounting of Student’ aggression and off-task behaviors, and reliance solely on his academic performance and on his perceived capabilities was not appropriate. Social functioning is a part of “educational performance.” (See, e.g., *L.J. v. Pittsburg Unified School District* (9<sup>th</sup> Cir. 2016) 835 F.3d 1168 [it was “clear error” to find emotionally disturbed youngster ineligible for special education and related services based solely on academic performance in general education, especially when district provided accommodations and interventions that should have been but were not procedurally compliant with IDEA.])

A child’s unique educational needs are to be broadly construed to include the child’s academic, social, health, emotional, communicative, physical, and vocational needs. (*County of San Diego v. California Special Educ. Hearing Office, supra*, 93 F.3d 1458, 1467; *Seattle School District No. 1 v. B.S., supra*, 82 F.3d 1493, 1500.) At hearing, Student’s first-grade teacher for the 2019-20 school year, Jennifer Rodriguez, confirmed that the first-grade curriculum includes non-academic components such as behavior, conflict resolution, relationship management, communication, following classroom rules, peer relationships, playing and sharing.

The eligibility category of "emotional disturbance" is a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance. An inability to learn that cannot be explained by intellectual, sensory, or health factors. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. Inappropriate types of behavior or feelings under normal circumstances. A general pervasive mood of unhappiness or depression. A tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(4).)

Panama found that Student did not meet the eligibility category of emotional disturbance. Panama concluded Student did not meet the prong of emotional disturbance eligibility which required, in pertinent part, "an inability to build or maintain satisfactory interpersonal relationships with peers and teacher," because during observations Student demonstrated the "ability" to socially interact appropriately with adults and peers during observations. Nor did Panama find that Student had met the prong of eligibility for emotional disturbance requiring "inappropriate types of behaviors or feelings under normal circumstances." In the May 2019 assessment report Hunt opined, and confirmed in her testimony, that Student's aggressive displays were not inappropriate "under normal circumstances" because they occurred when he was told "no," corrected, or when he became frustrated. Hunt therefore considered Student's behaviors "appropriate given the situation," and thus, according to her, he was not eligible under this prong of emotional disturbance eligibility. This explanation simply defies believability, that Student's behaviors, such as striking or slamming classmates heads, could have been considered appropriate under any circumstances.

As explained in further detail below, the failure to appropriately assess, in the May 2019 assessment, impeded Student's right to a FAPE, significantly impeded Mother's opportunity to participate in the decisionmaking process regarding the provision of a FAPE, and caused a deprivation of educational benefits.

## THE DECEMBER 2019 ASSESSMENT

At the end of the 2018-19 kindergarten year, after Panama found Student not eligible for special education, Hunt created a "Tier 2 Lesson Plan Implementation Guide to Address Behavior." The document contained target behaviors, a hypothesized function of the behaviors, antecedents or triggers to the behaviors, desired replacement behaviors and a list of antecedents and consequences. Hunt did not conduct any formal assessment or analysis of data to draft this document. Hunt created the Tier 2 Lesson Plan based purely on her observations. The Tier 2 Lesson Plan did not purport to be, nor was it, a behavior assessment.

During the 2019 summer program, Student hit an aide and a teacher, which resulted in Assistant Principal Coppolo removing Student from that program. At the end of the summer of 2019, school psychologist Elrod reached out to the Rodriguez, Student's 2019-20 first grade teacher, to advise her about Student's behaviors. Elrod told Rodriguez there had been issues in kindergarten, where Student had been disruptive, physically aggressive and had hit teacher and staff.

On or around October 21, 2019, Elrod assessed Student under Section 504 of the American with Disabilities Act. Hunt had originally proposed the Section 504 assessment the prior spring and, in the absence of other interventions, Mother consented when the idea was re-introduced at the beginning of first grade. But Panama did not formally assess Student again for special education and related services until

December 2019. In the meantime, during the first two quarters of first grade, Panama was on notice not only of the prior year's behaviors, and the summer school incident, but of all the following circumstances. Student's aggressive behaviors resumed in Rodriguez' class during the first week of school.

On August 28, 2019, Student elbowed another student several times and then rammed his desk into other desks, which was noted in a parent-teacher communication log. Panama suspended Student on September 16, 2019 for slapping a student and head-butting the teacher. Other incidents classified by Panama as "major" but that did not result in Student's formal suspension, occurred on October 17, November 4, November 5, November 8, November 12, November 13, December 2, December 11 and December 13, 2019. These incidents involved Student forcibly grabbing another student's backpack, grabbing and twisting another student's hand, flipping chairs and desk over, pushing the teacher, making inappropriate noises, throwing a pencil, throwing an object hitting another student's head, throwing folders and flipping his desk, screaming and throwing books, kicking chairs, twisting and bruising another student's arm, in addition to other similar incidents. Principal Katrina Wilson was so concerned by Student's behavior that she started keeping a contemporaneous log of incidents on November 12, 2019, in anticipation of possible litigation from those injured by Student. On November 14, 2019, Elrod proposed another special education assessment of Student and Mother consented on November 18, 2019.

Elrod's opinion, expressed at hearing, that prior to November 14, Hunt's Tier 2 Lesson Plan was sufficient and that Student's behaviors did not rise to the level of requiring further assessment, was undermined by the fact that Elrod had, in essence, warned Rodriguez about Student's behaviors prior to the start of the 2019-20 school year. Elrod's explanations to justify waiting until November 14, 2019 to propose another

special education assessment were unconvincing and devoid of credibility. Not only was Elrod on notice of the prior year's events while Student was in kindergarten such that she had felt it necessary to warn Rodriguez about Student's behaviors, but she was also aware of Student's September 16, 2019 suspension because of his behavior. Nevertheless, she testified that prior to the 504 assessment on October 21, 2019, there was "only one" suspension during the 2019-20 school year so far, and "no major concerns with Student's behavior." Elrod was also aware of the May 2019 assessment and the 13 major behavior incidents and 12 minor behavior incidents in kindergarten including the November 1, 2018 suspension. Yet, she testified that these were only "a few" behaviors in kindergarten, and opined that was "not bad" considering the fact that Student's kindergarten school, Stine Elementary, had been a "lower socioeconomic" school. She expanded on this opinion at hearing, testifying that in "lower socioeconomic" schools, she had generally seen more maladaptive behaviors. She asserted that the reason "lower socioeconomic" schools have higher levels of maladaptive behavior was because of "lack of exposure to proper social skills." When asked whether Student himself was of a "lower socioeconomic" status, Elrod attempted to substantiate her opinions by claiming that Student was from a "single parent household." According to Elrod, because Student's kindergarten location was of a "lower socioeconomic" status, Student's 25 behavior incidents were not too concerning to her.

The evidence belied all of Elrod's stereotyped assumptions about Student. At the time of the hearing, Mother was a para-professional, held an Associate Arts degree in radiologic sciences, and was an x-ray technician, all of which is completely irrelevant to Student's legal entitlement to appropriate assessments, but which bears stating to demonstrate Elrod's false narrative. The evidence established that

Student's family had a strong family structure including Grandmother, who attended every day of hearing, Grandfather with whom records indicated Student had spent considerable time, and an aunt who oversaw Student during the entirety of the 13 hearing days. Per Mother's credible testimony, the family was strong, supportive and intact. Mother's testimony severely undermined Elrod's credibility and her improper opinions justifying Panama's failure to assess Student during the first two quarters of first grade. The law does not impose on Panama a different duty to assess for special education because a student attends schools in "lower socioeconomic" neighborhoods.

Although Elrod alerted Rodriguez to Student's behaviors before the 2019-20 school year began, Elrod implausibly testified that she felt she and Rodriguez could "easily handle" them. Elrod admitted, however, that Student's slapping, head-butting, and saying "I'm gonna kill you" and making slicing motions as if with a knife, were not common behaviors. She also admitted she was aware that in summer school 2019 Student had stabbed an aide with a pencil. Given these admissions, her insistence that Student only warranted a Tier 2 plan, and did not warrant further assessment under the IDEA prior to December 2019, was simply unconvincing.

On or around October 21, 2019, during the non-special education assessment for 504 accommodations, Elrod interviewed teacher Rodriguez, who informed Elrod that Student had hit Rodriguez more than once. Elrod nevertheless was staunch in her testimony that when she, Mother and others met on October 21, 2019, to discuss the 504 assessment, Student's behaviors did not rise to the level of requiring re-assessment for special education.

During the first two quarters of the 2019-20 school year, from August 2019 to December 2019, Panama used behavioral strategies that did not work. Principal Wilson used funds from her general fund to provide Student with extra support. Behavioral aides were placed into the classroom. As was true during kindergarten, Panama's non special-education interventions during first grade were ineffectual. Panama should have offered to re-assess Student prior to November 14, 2019.

Panama performed another psychoeducational assessment of Student, resulting in a written report dated December 19, 2019. As discussed below in Issue 3, the December 2019 assessment was appropriate in its assessment of Student health, cognition, academic achievement, and to the extent it investigated, his social emotional functioning. But the assessment failed to appropriately investigate Student's aggressive and off-task behaviors, rendering the assessment inappropriate.

#### FAILURE TO APPROPRIATELY ASSESS STUDENT'S BEHAVIORS

As part of the December 2019 assessment, Elrod, like Hunt in May 2019, chose only one social-emotional instrument, the BASC system of rating scales, completed by Mother and teacher. Student's hyperactivity and aggression scored as clinically significant on both the parent and teacher rating scales, as they had the previous spring when Hunt administered the same instrument. Student's behavioral index scores and conduct problems were also clinically significant for both Mother and Rodriguez. Student's adaptability, social skills, activities of daily living, and functional communication fell in the at-risk or clinically significant range for parent scales, and in the at-risk or typical range for teacher ratings.

Observations revealed that Student was engaged in physical aggression, hitting, pushing, slapping, kicking, biting, bending other's fingers, head butting,

stomping, body slamming, flipping desks, shoving desks, kicking chairs, throwing chairs and throwing objects, five times per day on average. Elrod took “frequency data” from December 2 through December 13, 2019, but she did not formally analyze it. During observations, Student was sometimes on-task zero percent of the time. During one observation he was redirected 47 times and shouted out of turn 16 times.

As with the prior May 2019 assessment, the December 2019 assessment did not adequately assess Student’s behaviors, which should have been viewed as significant enough to warrant a comprehensive behavior assessment. The BASC and observation results when combined with the totality of Student behaviors during the first two quarters of the 2019-20 school year and entire prior 2018-19 school year, should have alerted Panama to the need to further assess Student’s behaviors. It was clear from Panama’s failed interventions over the past year and a half, that Panama did not understand, and did not appropriately address Student’s significantly aggressive behaviors, and that Panama’s haphazard experimental approaches were not working. All this information was known to Panama at the time of the December 2019 assessment.

Panama failed to appropriately assess Student’s behaviors between May and December 2019. As explained in further detail below, this failure to assess impeded Student’s right to a FAPE, significantly impeded Mother’s opportunity to participate in the decision-making process regarding the provision of a FAPE, and caused a deprivation of educational benefits.

## THE FAILURE TO ASSESS FOR MALADAPTIVE BEHAVIOR PRIOR TO FEBRUARY 2020

As discussed in Issue 3, Panama conducted an appropriate behavior assessment, but not until February 2020. During the period from December 2019 until the February 2020 assessment was conducted, Panama failed to conduct an appropriate behavior assessment. All the procedural violations discussed above, in failing to assess Student at all prior to May 2019, failing to assess his behaviors or find him eligible in the May 2019 assessment, failing to assess his behaviors in December 2019 assessment, and failing to assess his behaviors until February 2020, denied Student a FAPE. A local educational agency must assess in all areas of suspected disability, including social, emotional and communicative status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) 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. (See *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031-1032.) The failure to obtain critical assessment information about a student, renders the accomplishment of the IDEA's goals, and the achievement of a FAPE, impossible. (*N.B. v. Hellgate Elementary School District* (9th Cir. 2008) 541 F.3d 1202, 1210 [quoting *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 894].) In the event of a procedural violation, a denial of FAPE may only be found if the procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE, or caused deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f) and (j).)

The procedural violations denied Student a FAPE because Panama's failure to assess in all areas of suspected disability deprived his IEP team of critical evaluative information. That deprivation made it impossible for the IEP team to consider and recommend appropriate services necessary to address his needs, thus depriving him of critical educational opportunities and substantially impairing parental ability to fully participate in the collaborative IEP process. (*Timothy O. v. Paso Robles Unified School District, supra*, 822 F.3d 1105, 1120-21.) For this reason, Student prevails on Issue 1 for the time period up to and until Panama finally conducted an appropriate behavior assessment on or around February 28, 2020. In conclusion, Student's significant off-task behavior, inattentive and hyperactive type behaviors, requirement of multiple prompts, inconsistent performance, and numerous instances of physical aggression during the prior year and a half, warranted further investigation.

**FAILURE TO SUSPECT OR ASSESS FOR AUTISM PRIOR TO THE AUTISM ASSESSMENT CONDUCTED ON FEBRUARY 24, 2020, DID NOT DENY STUDENT A FAPE.**

Student did not prove Panama denied Student a FAPE by failing to assess for autism prior to February 2020. Although the threshold for suspecting that a child has a disability is relatively low (*Department of Education, State of Hawaii v. Cari Rae S., supra*, 158 F. Supp. 2d 1190, 1195), the actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 [citing *Fuhrmann v. East Hanover Bd. of Education*. (3rd Cir. 1993) 993 F.2d 1031, 1041].) A disability is "suspected," and a child must be assessed, when the district is on

notice that the child has displayed symptoms of that particular disability or disorder. (*Timothy O. v. Paso Robles Unified School District, supra*, 822 F.3d 1105, 1119.)

Under California law, autism is a developmental disability that significantly affects verbal and nonverbal communication and social interaction, generally evident before age three, which adversely affects a child's educational performance. Characteristics often associated with autism are repetitive activities, stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).)

Here, the evidence demonstrated, based on what Panama reasonably knew at that time, that Student's presentation prior to the February 2020 assessment was not consistent with suspicions of autism. Student was talkative, had reciprocal conversations with students and adults, and was not sensitive to sound or loud noises. He did not notably perseverate. He made eye contact. The testimony of every Panama witness concerning Student's presentation was credible and persuasive that Student's off-task behaviors and impulsivity were not reasonably associated with a suspicion of autism. For example, during Hunt's May 2019 assessment, she easily established rapport with Student, who maintained it throughout the testing session. Special education teacher Coleman, who administered the May 2019 academic assessments, noted that Student was focused and gave ready, confident answers. Student's behavior during testing was appropriate, he made eye contact, and he was conversational. He exhibited no perseveration or sensory sensitivity. During staff observations in May and December 2019, Student made eye contact, did not perseverate, appeared to have friends, and engaged in communication that all seemed age-appropriate. He did not misunderstand social cues. He interacted with peers and engaged in appropriate play and conversation. He comforted peers and ignored peers when appropriate. He initiated

conversations with friends and staff, exhibited no repetitive movements, nor rocking or self-stimulation. The school nurse who conducted Student's health assessment as part of the December 2019 assessment could understand his speech. Her testimony confirmed that he made appropriate eye contact, followed directions, understood social cues, and did not exhibit self-stimulatory or repetitive motions.

Panama did not suspect or assess Student for autism at that time based on their observations, assessments or Parent's concerns. Rather, at that time, Panama attributed Student's reported behaviors to attention deficit hyperactivity disorder, which even Student's expert psychologist B.J Freeman, conceded explained many of Student's symptoms and mental health issues. Prior to assessing for autism in February 2020, Panama personnel observed serious behaviors and social pragmatic deficits, but as further discussed in Issue 3, these were more consistent with the suspected categories of other health impairment and emotional disturbance than autism.

Mother's responses in the May 2019 assessment did not alert Panama that autism was a suspected area of disability. Mother reported Student often, almost always, acted without thinking, was overly active, had poor self-control, fiddled with things while at meals, was in constant motion, argued when denied his own way, interrupted others when speaking, disrupted other children's activities, was unable to slow down, acted out of control, threw or broke things when angry, manipulated others, hit other children, bullied others, and was overly aggressive. The very disturbing behaviors observed during the December 2019 assessment, involving hurting others with no remorse, defiance, grabbing other children by the neck, cursing, and causing significant risk of harm to himself and others did not flag autism as a suspected disability to any Panama staff.

B.J. Freeman's testimony failed to establish that Panama should have suspected autism prior to the February 2020 assessment. Freeman conducted an independent educational evaluation of Student on May 26, September 5, and October 9, 2020, including testing, interviews, and observing Student by video. Freeman documented her findings in a report dated on or around October 9, 2020. Importantly, Freeman's assessment was not completed until October 2020 and was not known to Panama at the time of the assessments and IEP's that are at issue here Panama's obligation to suspect a particular disability and assess for it was measured by what Panama knew, or reasonably should have known, at the time. Therefore, Freeman's report and testimony is pertinent here only insofar as it concerns her critique of Panama's actions based on what they knew or should have known at the relevant points in time.

Freeman's education and credentials included a PhD in 1968-69, and extensive clinical training and experience. She published numerous articles and presented trainings to groups including school districts about behaviors and autism. Her specialty was working with autistic children. She held the position of Emerita Professor at UCLA after 2004. She testified and consulted in numerous legal matters involving children with special needs. Freeman has been a recognized pioneer in the field of autism since the 1970's. At that time, autism was not a diagnosable condition and did not become one until 1980. Freeman's research was instrumental in the first working diagnostic definitions of autism. She has performed thousands of assessments and testified numerous times on behalf of both students and school districts.

Despite her impressive credentials, her testimony critiquing Panama for failing to suspect autism was not persuasive. Relying on Panama's assessors' descriptions of their contemporaneous observations, she pointed out examples of behaviors that she considered consistent with autism. For example, during one of the assessment

observations by Panama staff, Student got out of his seat and pretended to be a dog on all fours. He also made noises, stomped, hit his pencil against the table, placed a sticker on his nose and turned toward a peer and said, "I'm a blue nose." In Freeman's opinion, this making of noises and inappropriate social approaches were examples of repetitive behaviors and vocalizations characteristic of autism. During another observation, Student shouted out of turn, talked over the teacher, struggled to follow directives, and required numerous prompts and re-directives to get back on-task. Freeman contended, and Elrod conceded, that these behaviors "could" be symptoms of autism, because autism can be subtle and manifest itself in different ways including physical aggression. According to Freeman, aggression, off-task behaviors and impulsivity can be associated with autism. Similarly, throwing objects, pushing, and shoving can be a symptom of autism. And, struggling with directions, walking around the classroom, aggression, difficulty with transitions, lack of ability to calm oneself, lack of empathy for others, and crawling around on the carpet can all be symptoms of autism. Student exhibited all these behaviors.

But all these symptoms can also stem from attention deficit hyperactivity disorder. Freeman conceded the complexity of Student's presentation, and acknowledged that attention deficit hyperactivity disorder could explain many of his behaviors. Freeman's analysis of the signs of autism was not available to Panama at the time at issue, and overall, the weight of evidence established that Panama's suspicions were reasonable based on the information known to it at the time.

In sum, Student did not establish that autism was a suspected area of disability prior to February 2020 when Panama ultimately assessed him in that area. Student's behavior did not place Panama staff on notice of a suspicion of autism. Thus, Panama was not on notice that prior to the autism assessment ultimately conducted in February

2020, that autism was a suspected disability. Student failed to prove by a preponderance of the evidence that Panama denied Student a FAPE for failure to assess for autism. The appropriateness of the February 2020 autism assessment, when it was performed on February 2020, is addressed in Issue 3 below.

The foregoing analysis of Student Issue 1 decides that Student prevailed on his contentions that Panama failed to assess him for eligibility for special education and related services prior to May 28, 2019. Further, when Panama finally assessed him on or around May 28, 2019, the assessment was not appropriate, because Panama failed to conduct an appropriate behavioral assessment, and failed to find him eligible for special education and related services. The foregoing analysis also decides that when Panama later assessed Student on or around December 19, 2019, Panama denied him a FAPE because it had still failed to conduct an appropriate behavioral assessment, and that failure persisted until the behavioral assessment was ultimately conducted in February 2020. Student, however, failed to establish that autism should have been suspected and assessed for prior to February 2020. All the remaining contentions contained within Student's Issue 1 concern Panama's February 2020 assessments. These are all addressed below in conjunction with Panama's Issues 2 and 3.

## ISSUE 2: WAS PANAMA'S FEBRUARY 2020 FUNCTIONAL BEHAVIOR ASSESSMENT APPROPRIATE SUCH THAT IT NEED NOT FUND AN INDEPENDENT EDUCATIONAL EVALUATION?

In Issue 2, Panama contends that its February 2020 functional behavior assessment was appropriate, such that it need not fund an independent educational evaluation. Student contends that the functional behavior assessment was not appropriate in a number of respects discussed below. Student also contends that

Panama's due process filing on this issue was untimely such that Panama should be determined to have waived it, entitling Student to an independent assessment.

## PANAMA DID NOT UNREASONABLY DELAY IN FILING FOR DUE PROCESS

The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, §§ 56329, subd. (b) and 56506, subd. (c); see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation at public expense. (34 C.F.R. § 300.502(b)(1) & (b)(2).) When a student requests an independent evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent evaluation is provided at public expense (often referred to as "file or fund"). (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

The term "unnecessary delay" as used in 34 C.F.R. § 300.502(b)(2) is not defined in the regulations. It permits a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an independent evaluation. (*Letter to Anonymous*, 56 IDELR 175 (OSEP 2010).) Some delay in the provision of an independent

evaluation is reasonable if the school district and the parents are engaged in active communications, negotiations or other attempts to resolve the matter. (*J.P. v. Ripon Unified School District* (E.D. Cal. April 15, 2009, No. 2:07-cv-02084-MCEDAD) 2009 WL 1034993.) The determination of "unnecessary delay" is a fact-specific inquiry. (See *Pajaro Valley Unified School District v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289 (a delay of almost three months between parent's request for an independent evaluation and district's due process filing was unreasonable where district offered no explanation or justification for its delay); *J.P. v. Ripon Unified School District, supra*, 2009 WL 1034993 (two-month delay during which time district attempted to negotiate an independent evaluation agreement with parent and district filed for due process less than three weeks after negotiations came to an impasse was not unnecessarily long.) If a school district decides not to take a requested action, including agreement to the independent evaluation requested by parents, the district must provide parents with a prior written notice within a reasonable time period. (34 C.F.R. § 300.503.) The notice must include an explanation of why the agency proposes or refuses to take the action.

On March 10, 2020, Mother wrote to Panama, objecting to the functional behavior assessment and requesting an independent evaluation. On April 21, 2020, Panama sent Mother a prior written notice, denying the request and asking Mother to get back to them by May 8, 2020, about her intentions to pursue an independent assessment. On May 19, 2020, Panama's Assistant Director of Special Education, Rebecca Ruiz and Beverly Foster, a special education advocate guiding Mother through the process, spoke. Ruiz asked Foster whether Mother would withdraw or pursue her request. Foster told Ruiz she would speak to Mother. On May 21, 2020, Ruiz wrote an email to Foster concerning that conversation, following up and reminding Foster that

she had told Ruiz she would speak to Mother. On or around May 21, 2020, Mother and Foster spoke and Mother told Foster she wanted to proceed with her request. Foster did not communicate that decision to Panama. On June 4, 2020, Panama wrote another letter asking again about Mother's intentions and requesting a response by June 12, 2020. On June 10, 2020, Foster wrote Panama confirming that Mother intended to pursue her right to request an independent evaluation. Panama then filed its complaint in OAH Case No. 2020070003, containing its Issue 2 on June 26, 2020, approximately three months and two weeks after Mother's request.

Student argues all Panama's letters and emails were all generated without any indication of interest by Mother. Student asserts that this correspondence was a self-serving attempt by Panama to create an illusion of good faith negotiations, thereby giving themselves unwarranted extra time to file for a due process hearing. Student argues that Panama waived its right to file for due process to contest Mother's request for an independent evaluation by its unreasonable delay in filing.

Student's position is not supported by the weight of the evidence. The evidence established that on or around May 19, 2020, there was discussion between Foster and Panama that was in good faith, over the need for the independent evaluation, and that although Foster spoke to Mother she did not immediately communicate the results to Panama. When, on June 10, 2020, Foster wrote Panama confirming that Mother intended to pursue her right to request an independent evaluation, Panama filed its complaint promptly on June 26, 2020. During the time between Mother's original March 10, 2020 request and Panama's June 26, 2020 complaint, Panama issued prior written notice on April 21, wrote Mother on May 8, spoke with Foster on May 19 when Foster advised she would follow up, and wrote Foster on May 21, who did not immediately confirm Mother's intention until after Panama's final letter dated June 4,

2020. The exchanges were in good faith over the need for an independent evaluation. The three month and two-week time lag did not, therefore, constitute “unnecessary delay” amounting to waiver.

## THE FEBRUARY 2020 BEHAVIOR ASSESSMENT WAS APPROPRIATE

In *Butte School District No. 1 v. C.S.* (9th Cir. 2020) 817 Fed.Appx. 321, the Ninth recently held that a “functional behavior analysis” is only required when child is removed from a current placement due to behavioral issues. However, from the evidence provided at hearing, and the lack of any comprehensive behavior assessment by Panama prior to the February 2020 behavior assessment, the elements of a functional behavioral assessment are still pertinent and relevant to the issue of whether Panama appropriately assessed Student’s behaviors.

School psychologist Hunt conducted Panama’s February 2020 functional behavior assessment. A functional behavior assessment is an assessment to look at a maladaptive behavior, determine its the function, and decide how to address it. Hunt was qualified to conduct the assessment. She had a master’s degree in school psychology and was a Board-Certified Behavior Analyst. Hunt prepared a written report in February 2020.

Jeffrey Hayden testified as an expert at hearing on Student’s behalf. Hayden was a Board-Certified Behavior Analyst-Doctoral, with a PhD in education. He was knowledgeable in behavior based upon his education and work experience. During his testimony Hayden explained the components of a functional behavior assessment. According to Hayden, within the professional standards of the behavioral scientific community known as applied behavior analysis, there are certain standards a functional behavior assessment should follow, although there is no required format. Standard

components include a records review and interviews to determine the history of the behavior, how often it occurs, where and when, the environmental circumstances surrounding the behavior and the frequency of the behavior. The assessment should state an "operational definition" of the targeted behavior. The assessor should collect data by a process to discern the antecedents to the problematic behavior and its consequences. The assessor should then analyze the data to develop a hypothesis about when and why the behavior occurs, including identification of the function of the behavior. The assessor should also determine the behavior's frequency per unit of time, or the "rate." Determining the "rate" over different times, allows comparisons to determine if the behavior is increasing, decreasing, or staying the same.

A functional behavior assessment should also contain a functional equivalent replacement behavior, or FERB. A FERB is a different behavior to get the same result. The challenge is how the individual can gain what he wants while teaching that individual to use an appropriate behavior to obtain the desired item or task, instead of using a maladaptive behavior. For example, telling a child to say "please" and "thank you," instead of just grabbing an item, are FERBs.

Despite Hayden's criticisms at hearing, which are addressed below, Hunt's February 2020 functional behavior assessment met all the standard components described by Hayden. It contained a records review, including an educational history and history of Student's problem behavior and interventions. Hunt interviewed Student's teacher and Grandmother, and had other staff interview Mother. Hunt observed Student on five different days over a three-week period. She conducted an environmental analysis and collected data regarding what she observed.

Hunt correctly identified Student's problem behavior as physical aggression and succinctly defined it as hitting with closed or open fist, kicking, throwing items, pushing, biting, headbutting and stomping on others' feet. Hunt determined this was the target behavior based on her records review and interviews. Hunt's data collection over five separate days included the frequency, intensity, duration, and the antecedents, behavior, and consequences, or "ABC" data of the target behaviors. Hunt hypothesized that the function of the target behavior was access to a preferred item, activity or person. "Access" referred to the function of obtaining a preferred item or activity or person, or to gain attention. "Escape" referred to the function of avoiding or escaping something aversive. There can also be automatic functions such as self-stimulation, where the function is simply that the activity feels good.

Hunt developed a FERB recommending that Student would ask or choose to engage in an alternative independent academic task to gain access to the preferred activity or item. Hunt also developed three behavior goals. Hunt's written report also included recommendations.

Hayden was critical of most aspects of the report. For example, Hayden criticized the report's many pages of very detailed recounting of observations, contending that the assessment did not extract useful data points to define the target behavior or its function. Hayden also opined that the assessment did not contain rates of the target behavior. He also disagreed with Hunt's hypothesis as to the function of the observed target behaviors. He also contended that the assessment did not provide an appropriate FERB.

Contrary to Hayden's assertions, the assessment contained appropriate data points and rates of behavior, although not in the precise format he would have

preferred. Data were collected over five different days on February 5, 11, 12, 18, and 19, 2020, and summarized into a concise and useful chart. Hayden's opinion that the assessment did not contain the "rates" of these behaviors per unit of time, was undermined by the fact that the rates could be determined by comparing the number of behaviors per observation to the duration of each observation. Hayden's opinion that one should not have to do that calculation was a question as to the form, but not the content of the assessment, which overall complied with the standards he detailed.

The assessment also contained an appropriate hypothesis as to the target behavior's function. Hunt hypothesized that the function of the target behaviors was to access an item, activity or person. Hayden criticized both Hunt's methodology and her results, arguing that Hunt did not do a mathematical probability analysis of her data to support her hypothesis. Hayden claimed he was therefore unable to discern how Hunt arrived at her hypothesized function. But he did admit that the five days of incidents contained quantitative data of discrete events, and that there was sufficient information to construct a behavioral hypothesis as to what was the function of these behaviors. Thus, the assessment complied with its main purpose, to hypothesize a function of behaviors based on analysis of data points.

Hayden also disagreed with Hunt's conclusion that "access" was the function of the behaviors, opining that the function was "escape" instead. But he admitted that when forming a hypothesis, there is room for disagreement. Moreover, he conceded that some of the items he labeled as "escape" could also be interpreted as "access."

Finally, the assessment also contained a FERB that met the standards Hayden opined it should. Although Hayden disagreed with its content, he was unpersuasive in his testimony that the "FERB was not a FERB." Hunt wrote that, "[i]n order to gain access

to an item [or] activity, [Student] will ask or choose to engage in alternative independent academic tasks.” Hunt explained at hearing that her intent was to have Student ask to do easier tasks to gain access to preferred items. For example, if he was supposed to do a math problem, but wanted to play on the computer, he might ask to be allowed to do something easier than the math problem to get access to the computer. Hayden claimed that this was not a FERB because it was not directed toward an alternate way of gaining access to a preferred item. However, this critique was not persuasive. The FERB was directed toward an alternate means “in order to gain access to an item or activity.” This met the definition of a FERB that Hayden himself laid out.

Therefore, Hayden’s opinions did not carry enough weight to establish that Panama’s behavioral assessment was so procedurally deficient that it resulted in a denial of a FAPE. Panama met its burden that its behavior assessment was appropriate.

### ISSUE 3: WAS PANAMA’S IEP OFFER DATED DECEMBER 19, 2019 AS AMENDED FEBRUARY 28, 2020, NECESSARY TO PROVIDE STUDENT A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT SUCH THAT IT MAY BE IMPLEMENTED WITHOUT PARENTAL CONSENT?

Panama contends its December 19, 2019 IEP, as amended on February 28, 2020, both procedurally and substantively complied with the IDEA. It contends the FAPE offer was reasonably calculated to enable Student to make measurable progress in light of Student’s circumstances. Student contends the IEP did not offer FAPE, particularly in the areas of behavior, eligibility under the category of autism, and appropriate programming. Student also contends that Panama’s October 20, 2020 due process filing on this issue was untimely and that the delay renders Issue 3 “moot.”

Preliminarily, Student's mootness argument is not persuasive. Panama filed its October 20, 2020 complaint approximately eight months after making the February 28, 2020 IEP offer. Student cites no law that would disable Panama from seeking an order that that IEP offer was necessary to provide Student a FAPE. Student relies on *I.R. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164,1169 (*I.R.*) in support of the mootness claim, but that case is inapposite. First, the delay in *I.R.* was double that at issue here. In *I.R.*, there was more than a year and a half delay in requesting a due process hearing following that mother's failure to consent to the provision of special education and related services. In contrast, here, there was only a delay of about eight months. Second, the holding in *I.R.* was not that the filing delay rendered Los Angeles' case "moot." Rather, *I.R.* held that Student had a cause of action to seek remedies for the denial of FAPE caused by a school district's filing delay. Here, Student did not raise such a claim.

Panama had the burden of proof on its claim that the IEP offered FAPE. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

An IEP should include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. It should include a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the

child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) The IEP need only include the information set forth in Title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

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

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 District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.* [citing *Fuhrmann v. East Hanover Board of Education, supra*, 993

F.2d 1031, 1041].) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

Here, the February 28, 2020 IEP team met for the purposes of reviewing the behavior, autism, speech and mental health assessments that Panama had conducted since the December 2019 IEP. The February 2020 IEP team developed an amendment to the offer of special education and related services that had been made at the December 19, 2019 IEP meeting. Therefore, the two IEP team meetings are both considered. As explained below, taken together the offer Panama made was necessary to provide Student a FAPE in the least restrictive environment.

#### BY FEBRUARY 2020, PANAMA'S PSYCHOEDUCATIONAL AND BEHAVIOR ASSESSMENTS WERE APPROPRIATE

The December 2019 psychoeducational assessment appropriately assessed Student's health, academic, and cognitive functioning. School nurse, Valerie Hernandez, conducted a vision and hearing screening, administered according to the protocols. She submitted a health questionnaire to Mother and noted Student's medical diagnoses of Attention Deficit Hyperactivity Disorder and oppositional defiance disorder. She reviewed prior assessments. Hernandez prepared a health care plan based on her evaluation.

School psychologist Elrod appropriately assessed Student's cognitive abilities. She used the Wechsler Intelligence Scale for Children, fifth edition to assess Student's cognitive abilities. Results revealed Student was of average intelligence. Elrod conducted, and had others conduct, observations of Student. She reviewed records, including Student's behavioral incidents during the 2018-19 and 2019-20 school year, outlined above. She interviewed Mother and Student, and

re-interviewed first grade teacher Rodriguez, whom she had previously interviewed in October 2019.

Special education teacher Patricia Keene administered the December 2019 academic assessment, using the Woodcock-Johnson Tests of Achievement, fourth edition and the Dynamic Indicators of Basic Early Literacy Skills to assess for academic achievement. As part of the May 2019 assessment, Coleman had previously assessed Student's academics using the Woodcock-Johnson, but nothing in the manual prohibited re-testing in February 2020. Keene gave Student the appropriate subtests in accordance with the manual's instructions. Student scored overall average or low average educational achievement in the areas of reading, math, written language, oral language, and academic skills. The cognitive and academic instruments were appropriate to their purpose, were appropriately administered and scored, and the results were valid and reliable.

As far as it went, Elrod's December 2019 assessment of Student's social-emotional functioning was appropriate. And, as discussed above in Issue 2, Panama's February 2020 behavior assessment was appropriate. It cured the sole defect in the December 2019 psychoeducational assessment, which except for failing to appropriately assess Student's behavior had appropriately assessed his cognition, academics and social-emotional functioning. And, correcting the error in judgment that had been made in the May 28, 2019 assessment, Panama appropriately determined in December 2019 that Student was eligible for special education and related services. Thus, by February 2020 Panama had appropriately assessed Student's psychoeducational and behavioral functioning.

## THE FEBRUARY 2020 AUTISM ASSESSMENT WAS APPROPRIATE

The February 2020 autism assessment was appropriate. Panama program specialist Bryan Morris conducted the assessment. Morris was a school psychologist by training. Morris reviewed Student's records, including the two psychoeducational assessments and disciplinary records. He interviewed Mother and teacher, observed Student, and administered rating scales, specifically the Autism Spectrum Rating Scales. He also administered the Autism Diagnostic Observation Schedule, second edition, known as the ADOS. The testing and assessment materials and procedures were chosen so as not to be racially, culturally, or sexually discriminatory. The tests were provided and performed in the language most likely to yield accurate information. The tests and other instruments were used for the purposes for which the assessments and measures were valid and reliable. The tests and other assessments were administered in accordance with the instructions provided by the producer of the tests and assessments. The assessor did not rely on a single tool or assessment tool. The tests and assessments selected and administered ensured that the results accurately reflected Student's abilities in the areas tested. The assessment resulted in a February 2020 written report prepared by Morris that included recommendations.

At hearing, Freeman criticized Morris' assessment, but her criticisms were not persuasive. Freeman claimed Morris relied solely on one instrument, the ADOS, when in fact, Morris clearly also used rating scales, observations amounting to almost four hours, and record reviews including a review of Student's disciplinary history. Freeman criticized Morris' administration of the ADOS because a speech language pathologist observed Student at the same time. But the evidence showed that the speech pathologist sat in the background and unobtrusively observed the assessment. The

presence of an observer was not in violation of the ADOS protocols. The speech pathologist's observation did not affect the assessment results. Freeman criticized Morris for not eliciting information about Student's "obsessions" with topics such as the Titanic and the Beach Boys, but the records show only passing references to these interests that do not appear to amount to "obsessions." Freeman criticized Morris' interview of Mother for not eliciting the most pertinent information, but the evidence showed that Morris interviewed Mother, in person, for an hour, specifically to discern why she suspected autism, and he noted Mother's concerns with Student's eye contact and sensory sensitivities.

To Freeman, it appeared that Morris had a preconceived notion of the cause of Student's behaviors. This criticism was not warranted. Morris' report and testimony revealed a thoughtful analysis that acknowledged Student's many varied behaviors and came to one, reasonable, interpretation of them. Morris did not ignore concerns with Student's inconsistent eye contact, sensory issues, problems with verbal and nonverbal communication, difficulties with transitions and difficulties with socialization. But Morris did not interpret these behaviors as indicative of autism. In Morris' view, Student's lack of impulse control, attention-seeking behaviors and the other concerns mentioned by Mother were, in his opinion, more consistent with attention deficit hyperactivity disorder and impulsivity, than with autism. Although acknowledging that lack of impulse control could also appear in students with autism, in Morris' judgment Student's behaviors were much more related to, and better explained by his attention deficit hyperactivity disorder.

This conclusion was reasonable based on the information available to Panama in February 2020, which notably did not yet include Freeman's contrary opinions. During Morris' observations, Student was interested in peers and engaged in several socially

appropriate interactions. He demonstrated awareness of social cues. For example, he asked another student if he was okay, then looked up at Morris and shrugged his shoulders. Student made eye contact, although inconsistently, and showed appropriate facial expressions toward Morris. He had reciprocal conversations with peers about appropriate topics such as food. He cleaned up after himself at lunch. Morris' takeaway from his observations was that Student had social interests, clear use of verbal and nonverbal language used appropriately to gain attention, several appropriate reciprocal conversations, no perseveration, and tolerated loud noises. Student had difficulty resolving conflicts and engaged in unprovoked verbal harassment, and there was emotional dysregulation, that Morris attributed to hyperactivity and impulsivity.

During the ADOS, Student was able to converse in a typical manner about both preferred and non-preferred or neutral topics. Student showed the ability to use several different descriptive gestures during both structured tasks and less formal conversations. Morris acknowledged that during the ADOS, Student showed inconsistent reciprocal social interaction and poorly modulated, inconsistent eye contact. But Student did not exhibit any stereotyped behaviors or restricted interests. He did not show any sensory interests and did not engage in any hand or finger mannerisms such as hand-flapping or finger flicking. Student did not bring up any interests or highly specific topics to an unusual degree during the assessment or engage in any obvious compulsive behaviors. Morris appropriately scored and interpreted Student's activities during the ADOS, and Student's score fell just below the cutoff, in the "Non-Spectrum" range. Contrary to Freeman's assertions, Morris did not ignore Student's characteristics identified as autistic-like on the ADOS, but rather, he assigned them less weight than did Freeman in her critique. To Morris, it was very significant that both Mother and teacher in their Autism Spectrum Rating Scale responses agreed that

Student was average in the category of social communication, which measured Student's ability to use verbal and nonverbal language appropriately to initiate, engage in and maintain social contacts.

In sum, Morris interpreted the ADOS results, Student's observed behaviors, and teacher's and Mother's rating scales as all being more consistent with defiance, emotional dysregulation and attention deficit hyperactivity disorder, than with autism. This was not inappropriate. Both Morris and Freeman acknowledged at hearing that certain characteristics of Student's behavior could be consistent with attention deficit disorder, emotional disturbance, and autism. Freeman acknowledged that there could be a great deal in overlap of behaviors between different disabilities. Because Student's scores could indicate either autism or other ailments, the results were subject to interpretation. Morris' report was thorough and thoughtful, as was his testimony at hearing, where he gave consistent and thoughtful answers. The judgment Morris came to was reasonable.

Freeman's critique of Morris' assessment focused on reported incidents of Student crawling on the floor, making squealing sounds, rolling on the carpet, running around in circles and making car sounds, and singing, all of which were, in her opinion, consistent with autism. She also opined that although Student made social overtures to peers, he was initiating play, but not sustaining it. Freeman emphasized repeatedly that "inconsistency is a hallmark of autism," and "throughout all the reports, the one thing that stands out is the inconsistency of Student's behavior."

Special Education Coordinator Russell B. Van Dyke supervised all Panama's school psychologists, speech pathologists, occupational therapists, and mental health clinicians. A school psychologist by training, he also held a PhD in Guidance and Psychological

Services. He gave knowledgeable, detailed, consistent and thorough testimony in which he disputed Freeman's critique of Morris' assessment. In pertinent part, disputing Freeman's opinions about inconsistency being the hallmark of autism, he cited to the definition of autism contained in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders. That publication stated that the diagnosis of autism was based on "persistent" deficits in social communication and social interaction "across multiple contexts," not inconsistency. Moreover, Freeman's opinion about "inconsistency" was not available to the February 2020 IEP team. In sum, because Morris' data were valid, and his interpretation of that data was fair and reasonable, Student failed to carry his burden of proof in establishing that the autism assessment was inappropriate. Panama, as part of its case, has carried its burden of proof in establishing that the autism assessment was appropriate.

#### EDUCATIONALLY RELATED MENTAL HEALTH, OCCUPATIONAL THERAPY, AND SPEECH AND LANGUAGE ASSESSMENTS WERE APPROPRIATE

Licensed clinical social worker Adriana Corral assessed Student for educationally related mental health services in February 2020. Corral was qualified to conduct the assessment. She used a variety of tools, including interviews of Student, Mother, Grandmother, and Student's teacher. She reviewed Student's records and observed Student. She used the Early Development and Home Background Form from Mother, the Traumatic Events Screening Inventory from Mother, the Strengths and Difficulties Questionnaire for Student, teacher, and Mother, the Diagnostic Statistical Manual Level 1 Cross-Cutting Symptom Measure for Student and Mother, the Adverse Childhood Experiences Survey for Student, and the Behavior Interview and Reinforcement Survey for Student.

The assessment used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. The assessment tools were selected and administered so as not to be discriminatory on a racial or cultural basis, provided 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, and administered in accordance with any instructions provided by the producer of such assessments. A competent and knowledgeable individual conducted the assessment. The testing instruments were technically sound.

Corral recommended that Student receive mental health services to help manage symptoms and behaviors in the school setting.

Amanda Litten, Occupational Therapist, conducted Panama's occupational therapy assessment of Student in January and February 2020. Litten was qualified to conduct the assessment. Her assessment used a variety of assessment tools, including records review, interviews, observations, the Schoodles Fine Motor Assessment, the Beery Visual Motor Integration, fifth edition with Visual Perceptual and Motor Coordination subtests, the Bruininks-Oseretsky Test of Motor Proficiency, second edition, the Child Sensory Profile, second edition, and the Sensory Profile School Companion, second edition. The tests were non-discriminatory and were provided and performed in the language most likely to yield accurate information. The tests and other instruments were used for the purposes for which the assessments and measures were valid and reliable. The tests and other assessments were administered in accordance with the instructions provided by the producer of the tests and assessments. The tests and assessments selected and administered ensured that the results accurately

reflected Student's abilities. The assessment resulted in a written report that included recommendations.

Speech language pathologist Sheri Messiha conducted Panama's February 2020 speech and language assessment. Messiha was qualified to conduct the assessment. The assessment consisted of records reviews, interviews, observations, an orofacial examination, the Goldman-Fristoe Test of Articulation, third edition, a spontaneous language sample, the Receptive and Expressive One-Word Picture Vocabulary Tests, fourth edition, the Comprehensive Assessment of Spoken Language, second edition, and a social skills observation profile. The testing and assessment materials and procedures were chosen so as not to be racially, culturally, or sexually discriminatory. The tests were provided and performed in the language most likely to yield accurate information. The tests and other instruments were used for the purposes for which the assessments and measures are valid and reliable. The tests and other assessments were administered in accordance with the instructions provided by the producer of the tests and assessments. Messiha did not rely on a single tool or assessment. The tests and assessments selected and administered ensured that the results accurately reflected Student's abilities in the areas tested. The assessment resulted in a written report that included recommendations.

### ELIGIBILITY CATEGORY WAS APPROPRIATE

As discussed above, for a child to be eligible for special education in California, the child must have a disability as defined by state and federal law. (Ed. Code, § 56026, subd. (d); 34 C.F.R. § 300.8.) Section 3030 of Title 5 of the California Code of Regulations defines the various eligibility categories under California law.

Other health impairment means having limited strength, vitality or alertness that is due to ailments including attention deficit hyperactivity disorder, that adversely affects a child's educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9); 34 C.F.R. § 300.8(c)(9).

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1); 34 C.F.R. § 300.8(c)(1). The evidence established that a "developmental disability" comprised delays and deviances in development and functioning, generally in a child's neurodevelopment. "Nonverbal communication" included gestures, eye contact, body language and interpretation of social cues. "Social interaction" included the ability to initiate and sustain friendships.

Emotional disturbance is a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance. An inability to learn that cannot be explained by intellectual, sensory, or health factors. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. Inappropriate types of behavior or feelings under normal circumstances. A general pervasive mood of unhappiness or depression. A tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(4); 34 C.F.R. § 300.8(c)(4).)

In the IEP as finalized on February 28, 2020, Panama offered Student a primary eligibility category of emotional disturbance and a secondary eligibility category of other health impairment. Panama did not deny Student a FAPE by choosing emotional disturbance and other health impairment as Student's eligibility categories. Panama assessed Student for autism and made an appropriate and reasonable determination based on the information known at that time, that Student did not fall within that category because Student's educational performance was adversely affected primarily because of an emotional disturbance.

The evidence unequivocally demonstrated that Student met the definition of emotional disturbance under the law. He clearly exhibited both an inability to build or maintain satisfactory interpersonal relationships with peers and teachers and engaged in inappropriate types of behavior or feelings under normal circumstances, over a long period of time and to a marked degree, that adversely affected his educational performance. Panama staff, including Elrod, Van Dyke, Messiha, Ruiz and Morris, persuasively testified that as of February 2020, the categories of emotional disturbance and other health impairment provided a more accurate picture of Student's needs and current levels of functioning, than autism.

Panama had to choose either autism or emotional disturbance as the most appropriate primary eligibility category, because under California law the two categories are mutually exclusive. The definition of autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. (34 C.F.R. § 300.8(c)(1)(ii); Cal. Code Regs., tit. 5, § 3030, subd. (b)(1)(A).) Similarly, the definition of emotional disturbance provides that the child's inability to learn "cannot be explained by intellectual, sensory, or health factors." (34 C.F.R. § 300.8(c)(4)(i)(A); Cal. Code Regs., tit. 5, § 3030, subd. (b)(4)(A).) As a developmental

disability, autism is a “health factor.” Thus, the law precludes, in the definitions of autism and emotional disturbance, a child from being eligible under both categories. On the basis of what Panama knew at the time, emotional disturbance was the appropriate choice.

Thus, contrary to Student’s assertions, Panama did not commit a procedural violation by offering emotional disturbance as Student’s primary eligibility category, instead of autism. Moreover, the IDEA does not require that a student be placed in the most accurate disability category.

“Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in...this title and who, by reason of that disability, needs special education and related services, is regarded as a child with a disability...”

(20 U.S.C. § 1412(a)(3)(B).) Thus, as interpreted by the Ninth Circuit, the IDEA “does not give a student the legal right to a proper disability classification.” (*Weissburg v. Lancaster School District* (9th Cir. 2010) 591 F.3d 1255, 1259.) When a student is found eligible under any category, the analysis of whether he was denied a FAPE shifts to an examination of whether his IEP was tailored to meet his unique needs. Similarly, the Seventh Circuit held,

“The IDEA concerns itself not with labels, but with whether a student is receiving a [FAPE]. A disabled child's [IEP] must be tailored to the unique needs of that child ... The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [a student’s] multiple disabilities.”

(*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055.) The United States Department of Education has advised that “a child's entitlement is not to a specific disability classification or label, but to a [free appropriate public education].” (*Letter to Fazio* (OSEP 1994) 21 IDELR 572.) A properly crafted IEP addresses a student’s individual needs regardless of his eligibility category. (See *Fort Osage R-1 School District v. Sims* (8th Cir. 2011) 641 F.3d 996, 1004 [category “substantively immaterial”]. “The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself.” (*Pohorecki v. Anthony Wayne Local School District*, (N.D. Ohio 2009) 637 F.Supp.2d 547, 557.)

Here, even assuming Student’s eligibility classification was incorrect, it did not cause a substantive denial of FAPE, because as discussed below, Panama developed an appropriate program for Student. The evidence demonstrated that Panama’s proposed program was designed to address Student’s needs, not his eligibility classification. Panama’s December 2019 IEP offer of special education and related services, as amended on February 28, 2020, was reasonably calculated to provide Student with educational benefit at the time it was proposed.

#### NOTICE, PARENTAL PARTICIPATION, AND MEMBER ATTENDANCE AT IEP TEAM MEETING WERE PROCEDURALLY COMPLIANT

The IDEA explicitly requires formal written notice to parents when an educational agency proposes, or refuses, to initiate or change the educational placement of a disabled child. (See 20 U.S.C. Sec. 1415(b)(3); *Union v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, cert. denied (1994) 513 U.S. 965.)

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational

placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(b); Ed. Code, § 56500.4.) School districts are legally required to take whatever action is necessary to ensure that the parent is given the opportunity to attend and understands the proceedings of the IEP team meeting. (34 C.F.R. § 300.322 (a) through (c).)

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

The IEP team meetings met these procedural requirements for notice, participation and attendance. All required members attended the December 2019 and February 2020 IEP team meetings. All assessment reports were presented and discussed at the December 19, 2019 and February 28, 2020 IEP team meetings. Mother, and her advocate participated at the December 2019 and February 2020 IEP team meetings in a meaningful way. The denial of Mother's participatory rights that had occurred in the May and December IEP team meetings, by virtue of the lack of a behavioral assessment, was cured by the February 2020 functional behavior assessment. By February 28, 2020, Mother and the rest of the IEP team were provided with all of required information

necessary to develop and appropriate program. Panama's assessors participated in the IEP meetings and offered their opinions. The IEP team considered, discussed, had the opportunity to disagree with, and or incorporate recommendations from all assessors. Panama complied with these procedural requirements.

## PLACEMENT IN A SPECIAL DAY CLASS IN PANAMA'S BEHAVIOR PROGRAM WAS THE LEAST RESTRICTIVE ENVIRONMENT FOR STUDENT

Under *Rowley, supra*, 458 U.S. at pp. 201-204, as clarified by *Endrew F. v. Douglas County School District RE-1, supra*, 137 S.Ct. 988, 1000, Panama was required to offer Student an educational program tailored to Student's unique needs to enable him to make meaningful progress in light of Student's circumstances.

In determining the educational placement of a child with a disability, a school district must ensure that the placement decision is made by a group of persons including the parents and other persons knowledgeable about the child. The IEP team must consider the meaning of the evaluation data and the placement options and consider educating the child in the least restrictive environment. (34 C.F.R. § 300.116.) Federal and state laws require school districts to provide a program in the least restrictive environment to each special education student. (Ed. Code, § 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To

determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors:

1. "the educational benefits of placement full-time in a regular class";
2. "the non-academic benefits of such placement";
3. the effect [the student] had on the teacher and children in the regular class"; and
4. "the costs of mainstreaming [the student]."

(*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (Rachel H.) [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School District No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying Rachel H. factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].) If it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education*, supra, 874 F.2d at p. 1050.) 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 instructions in hospitals or institutions.

(Ed. Code, § 56361.)

Here, neither party contends that general education was appropriate for Student. It is beyond dispute that, considering only the third *Rachel H.* factor, Student's behaviors had such a serious impact on the classroom teacher and other children, such that a general education classroom was not an appropriate placement for him. By the time of the February 2020 IEP, Student's behaviors had escalated to the point of seriously injuring staff and being himself subjected to restraints. As mentioned above, principal Wilson began keeping a contemporaneous log of incidents starting in November 2019, in anticipation of litigation. Between November 2019 and February 2020, Student had had behavioral incidents causing injuries too numerous to summarize, but which included bruising Rodriguez' ribs, giving Elrod a black eye, and throwing a chair at an aide hitting her hand. Student had been suspended, restrained, and the subject of behavioral emergency reports. The other *Rachel H.* factors also made general education not appropriate. The educational and nonacademic benefits of placement full-time in a regular class were not superior to those that would have been available in Panama's proposed program, discussed below. As far as cost, no evidence was presented except that concerning Principal Wilson's dipping into her general funds to add behavioral support.

The next step in the analysis is to determine what was the least restrictive environment under *Daniel R.R. supra*, 874 F.2d at p. 1050, on the continuum of placement options. The December 19, 2019 and February 28, 2020 IEP teams discussed a continuum of placement options and offered Student placement in a special day class, in a behavior intervention program. Panama's proposed program was designed to address extreme physically aggressive behaviors while providing grade level academics. The placement offered was not determined based on eligibility category. There were students in the proposed program with different disabilities, including autism, Parent's preferred eligibility category. Panama's behavior intervention class focused on academics, behavior and therapy and had

- a behavior "levels" system,
- a daily point system,
- a regulation zone within the classroom,
- social skills groups,
- core curriculum instruction, and
- supports provided by a mental health therapist and a school psychologist.

There were never more than 10 students in the classroom, and it had a special education teacher and approximately three behavior aides. The program's goal was to decrease behavior problems so that students could eventually return to general education.

The IEP as amended in February 2020, provided for 1,755 weekly minutes of specialized academic instruction, 60 minutes per month of behavior intervention services, 180 minutes monthly individual counselling and 60 minutes monthly parent and family counselling services. The IEP offered curb-to-curb transportation, and extended school year services for the summer of 2020. The extended school year services offered consisted of 1200 weekly minutes of specialized academic instruction,

30 minutes per month of behavior intervention services, 60 minutes monthly individual counselling and curb-to-curb transportation. Mainstreaming was offered for lunch, recess and school wide activities.

Assistant Director of Special Education Ruiz developed the behavior program and credibly opined that it was appropriate for Student. She was well-qualified to render such an opinion, as a Board-Certified Behavior Analyst, a Behavior Intervention Case Manager, and the supervisor of Panama's autism, behavior and mental health services. Van Dyke, Corral and Ruiz all persuasively testified as to the structure and content of the behavior class. It contained academic, behavioral and therapeutic supports. Students earned point rewards including access to mainstreaming activities. The staff were trained to deal with emotional and behavioral difficulties. The class had physical features such as tables set up for small groups, and a walled-off area for regulation or recovery. This area did not, as Mother perceived when she visited the class, have padded walls. The daily schedule was posted on the wall. The class was multi-grade for first through third grades. Instruction for each student was tailored to their grade level curriculum with separate groups for each grade level. Students in the class were placed into behavioral "levels," with consequences that involved promoting to levels with more freedoms, or remanding to levels with more restrictions. To move from one level to the next, students must have exhibited 80% compliance with the expectations of their current level for 10 or more days. After at least 20 days or more above the second highest level, called the "coasting" level they could access certain mainstreaming activities such as physical education, music, or recess. Once at the highest or "star" level, they earned access to more mainstreaming.

The therapeutic component of the program involved individual counselling. There was weekly social skills training embedded into the class curriculum, that was run

by school psychologists and mental health professionals, who assisted the teachers in doing small group or whole group social skills instruction.

Van Dyke supervised the program for a year and a half. Some students had to remain in the program for years. Others exited back to general education. According to the very credible and detailed explanations of this program given by Van Dyke, Ruiz, and Corral, it appeared to be an exemplary program for Student's needs. It was based on the principles of applied behavioral analysis and was suited to children with average or high average cognition with autism, emotional disturbance, a history of trauma or attention deficit disorders. The evidence demonstrated Panama's IEP offer of placement was designed to address Student's behaviors, whether he was classified as emotionally disturbed or autistic, through intensive applied behavioral analysis-based instruction.

The similarity of Panama's program to what Freeman herself recommended further demonstrated the appropriateness of Panama's program. At hearing, Freeman recommended a full school day of developmentally appropriate structured activities, based upon the principals of applied behavioral analysis, targeted to Student's behaviors and the appropriate level of services needed to achieve his individual goals and objectives.

Freeman's recommendations did depart from Panama's offer, but not persuasively so. She recommended the most restrictive setting. Specifically, Freeman opined that Student needed one-to-one teaching in a separate class with a competent behaviorist and no other students, until he was re engaged in the learning process. She asserted that Student was unable to function when any other peers were around, and that placement in any classroom situation with any peers set Student up for failure. Her testimony on this point was unclear and unconvincing as to the basis of her opinion.

Moreover, Freeman did not know anything about, and had never seen, Panama's behavior program classes. Thus, her assertion that it was inappropriate was unfounded.

Panama's placement offer was based upon and supported by a considerable amount of data collected from numerous professionals and multiple assessments and observations of Student. The evidence was convincing that Panama's behavior proposed program could provide significant benefit to Student in addressing his problematic behaviors. Panama proved that its offer of placement in a special day class was an appropriate placement for Student in the least restrictive environment.

### IEP GOALS WERE PROCEDURALLY COMPLIANT AND APPROPRIATE

An IEP must conclude a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A)(II); 34 C.F.R. § 300.320 (a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP shall show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040.) When appropriate, the IEP should include short-term objectives that are based on the child's present levels of academic achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, and when periodic reports of the child's progress will be issued to the parent. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320; Ed. Code, § 56345, subd. (a)(3).)

The December 19, 2019 IEP, as amended by the February 28, 2020 IEP, offered annual goals, including the four academic goals that had been proposed in December

2019. The February IEP, based on the functional behavior assessment and the mental health assessment, offered five additional goals. Three of these were behavioral goals contained in a proposed behavior intervention plan. Two were social emotional goals proposed by Corral based on her educationally related mental health assessment. The content each of the nine goals was proven at hearing through the documents admitted into evidence and the testimony of Panama's witnesses.

The goals were appropriate for Student. Each goal was objectively measurable. They were developed by Panama based on Student's present levels of academic achievement and functional performance, and the evidence demonstrated that Student had a reasonable chance of attaining each of his nine annual goals within a year.

Special education teacher Keene drafted the four academic goals in reading and math for the December 2019 IEP, with baselines based on her academic assessment of Student, including her administration of the Woodcock Johnson. The academic goals were objectively measurable and appropriately ambitious, with appropriate short-term objectives, which Student had a reasonable chance of attaining over the next year.

The behavior intervention plan contained three goals based on the February 2020 functional behavior assessment. The first goal stated that to gain access to an item or activity, Student would ask or choose to engage in alternative independent academic tasks with no more than three prompts for 70% of opportunities for four out of five days. The second goal stated that during academic instruction and tasks, Student would remain in a designated area, engage in an activity as directed, and keep his hands feet to himself during a 30-minute observation interval using whole interval recording, for 60% of intervals for three out of four observations. The third goal stated that when

denied access to an item or activity, redirected or given a demand, Student would decrease incidents of physical aggression, defined as hitting with a closed or open fist, kicking, throwing items, pushing, biting and headbutting, to one incident per day as measured by teacher and staff.

Social worker Corral proposed two social emotional goals based on her educationally related mental health assessment. The first goal addressed Student's needs regarding poor mood regulation, when frustrated or angry. It stated Student would use self-regulation strategies such as deep breathing, movement breaks or taking quiet space, with two or fewer reminders, in four out of five opportunities as measured by staff. The second goal addressed deficits in social relationships and increased social awareness. It stated that Student would increase his score on the Strengths and Difficulties Questionnaire from a two to a six by improving social skills that were measured on the Strengths and Difficulties Questionnaire, such as volunteering to help, as measured by his teacher. Based on Corral's credible testimony and her assessment, both goals were objectively measurable and attainable within a year.

In sum, Panama proved the December 2019 IEP as amended in February 2020 offered Student appropriate goals.

#### PANAMA'S OFFER OF RELATED SERVICES, BEHAVIORAL INTERENTIONS AND ACCOMMODATIONS WAS APPROPRIATE

The term related services means transportation, and such developmental, corrective, and other supportive services (including psychological services, social work services, and counseling services) as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. Section 1401(26).) An IEP must include a statement of the special education and related services, based on peer-reviewed

research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. §300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Here, the IEP as amended in February offered 60 minutes per month of behavior intervention services, 180 minutes monthly individual counselling and 60 minutes monthly parent and family counselling services. The IEP offered transportation and extended school year services. On February 28, 2020, Mother partially consented to the amended IEP, but only to the individual and family counselling services.

Panama also offered a behavior intervention plan. If a child's behavior impedes the child's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); Ed. Code § 56521.1(b).) The behavior intervention plan appropriately addressed Student's behaviors, the impact of the behaviors, and predictors for his behaviors. It suggested environmental changes in line with the accommodations outlined below. It reiterated the hypothesized function of the behavior. It gave detailed instructions to teachers and staff as to how to correct and re-direct Student, how to state desired behaviors and expectations, and how to exhibit and model calm demeanor. It recommended specific methods to praise Student and encourage appropriate behavior from him. It provided detailed teaching strategy and curriculum suggestions, reinforcement procedures, strategies, and directions to staff. The behavior intervention plan was detailed, extensive, and thoughtful. The plan was consistent with the functional behavioral assessment, which as discussed above, was appropriately conducted.

In sum, Panama proved the December 2019 IEP as amended in February 2020 offered Student appropriate related services and behavioral supports.

The December 2019 IEP as amended in February 2020, also offered appropriate accommodations including warnings before transitions, a visual schedule, frequent breaks, individual testing, extended time to complete assignments, use of a timer to signal the end of breaks, no timer during testing, frequent checks for understanding, use of self-monitoring strategies and calming activities, and sensory aides such as a wobble seat or cushion, and access to a weighted blanket.

In summary, Panama met its burden on Issue 3. The December 19, 2019 IEP offer, as amended at the February 28, 2020 IEP team meetings, offered Student a FAPE in the least restrictive environment. The offer was necessary to provide Student a FAPE in the least restrictive environment such that it may be implemented without parental consent. Panama prevailed on Issue 3 which entitles it to implement Student's December 28, 2019 IEP as amended February 28, 2020 without parental consent, if Mother wants Student to receive special education and related services.

In his closing brief, Student argues that the IEP cannot be implemented in the distance learning model that has been necessitated by the closure of schools because of Covid-19. However, whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed. (*Adams v. State of Oregon, supra*, 195 F.3d 1149.) Here, that date was February 28, 2020. Therefore, the remedy that Panama sought is appropriate. Student's closing argument that it cannot be implemented is not addressed by this Decision.

## CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

Issue 1: Panama denied Student a free appropriate public education or FAPE, by failing to appropriately assess him in all areas of suspected disability from November 1, 2018 through February 28, 2020. Panama did not deny Student a free appropriate public education or FAPE, by failing to appropriately assess him in all areas of suspected disability from February 28, 2020 through the filing of Student's complaint. Student prevailed on Issue 1 for the period from November 1, 2018 through February 28, 2020. Panama prevailed on Issue 1 for the period from February 28, 2020 through September 9, 2020.

Issue 2: Panama's February 2020 functional behavior assessment was appropriate such that it need not fund an independent educational evaluation. Panama prevailed on Issue 2.

Issue 3: Panama's IEP offer dated December 19, 2019 as amended February 28, 2020 was necessary to provide Student a FAPE in the least restrictive environment such that it may be implemented without parental consent. Panama prevailed on Issue 3.

## REMEDIES

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (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.)

An award to compensate for past violations must be fact-specific and reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.)

## REMEDIES FOR ISSUE 1

Student prevailed on Issue 1 for the time period from when Panama should have first suspected Student had a disability, and should have proposed an assessment plan, which was when he was first suspended while in kindergarten on November 1, 2018, through February 28, 2020. Student's complaint sought remedies including compensatory education. For purposes of calculating remedies, the ALJ relied on the school calendars for the 2018-19 and 2019-20 regular school years.

Had Panama proposed an assessment plan on November 1, 2018, Mother would have had 15 days to consent and Student's initial IEP team should have occurred within 60 days of consent. (See Ed. Code, §§ 56043, subds (a), (b) and (c); 56302.1; 56321, subd. (a); 56344, subd. (a).) Not counting days of school vacation, Student's initial IEP team meeting should have occurred no later than January 31, 2019. For purposes of determining compensatory education, it is concluded on the basis of the evidence of Student's functioning as of January 31, 2019, that had he been assessed, Student should have been made eligible for special education and related services at that time. The offer that Panama ultimately made on February 28, 2020, is considered in fashioning an

equitable remedy of compensatory education starting on January 31, 2019, until the offer was in fact made on February 28, 2020.

From January 31, 2019 until February 28, 2020 there were approximately 16 school weeks during the 2018-19 regular school year, four school weeks during the 2019 extended school year, and approximately 25 school weeks for the 2019-20 regular school year. Student is entitled to compensatory education for this period, amounting to a total of approximately 41 weeks of regular school year, or approximately 10 months, and approximately four weeks of extended school year, or approximately one month.

When Panama ultimately made Student an appropriate offer of special education and related services in the February 28, 2020 IEP, its offer for the regular school year consisted of 1,755 weekly minutes of specialized academic instruction, 60 minutes per month of behavior intervention services, 180 minutes monthly individual counselling and 60 minutes monthly parent and family counselling services. The extended school year services offered consisted of 1200 weekly minutes of specialized academic instruction, 30 minutes per month of behavior intervention services, and 60 minutes monthly individual counselling.

As an equitable remedy for Issue 1 relating to academic instruction, Student is awarded 160 hours of specialized academic instruction, calculated as follows. Had the February 28, 2020 offer been made on January 31, 2019, Student would have had access to approximately 71,955 minutes (approximately 1,200 hours) of specialized academic instruction during the 41 weeks of the two regular school years and approximately 4,800 minutes (approximately 80 hours) during the summer of 2019. Although Student attended general education, receiving passing grades, the voluminous evidence of his

unmet needs entitles him to compensatory specialized academic instruction for that entire time frame of 41 weeks of regular school and four weeks of summer. This remedy calculates a reasonable amount of one-to-one compensatory services for specialized academic instruction based upon approximately one hour of one-to-one services for each eight hours of services that should have been provided had the February 28, 2020 FAPE offer been made on January 31, 2019. The intensity of one-to-one academic instruction, as opposed to the special day class group instruction that was offered, justifies this ratio of one hour of compensatory education for each eight hours of specialized academic instruction that Student should have had access to.

As an equitable remedy for Issue 1 relating to behavior intervention services, individual counselling and/or parent and family counselling services, Student is awarded a total of 51.5 hours, calculated as follows. Had the February 28, 2020 offer been made on January 31, 2019, during the two regular school years Student would have had access to approximately 600 total minutes of behavior intervention services, 1800 total minutes of individual counselling and 600 total minutes parent and family counselling services, plus 30 minutes of behavior intervention services, and 60 minutes individual counselling for extended school year. Because of his unmet needs as evidenced by Student's continuous behavior problems during January 2019 through February 2020, Student is awarded all these minutes in full, amounting to a total of 51.5 hours, to be used at Mother's discretion for behavior intervention services, individual counselling and/or parent and family counselling services.

All compensatory education hours will be provided by a certified non-public agency of Parents' choosing. All hours will be available through the end of the 2021-22 regular school year. If unused, they will expire on the last school day of the regular 2021-22 school year

## REMEDY FOR ISSUE 2

Panama prevailed on Issue 2 and thus need not fund an independent educational evaluation in the area of behavior.

## REMEDY FOR ISSUE 3

Panama prevailed on Issue 3 which entitles it to implement Student's December 28, 2019 IEP as amended February 28, 2020 without parental consent, if Mother wants Student to receive special education and related services.

## ORDER

1. Student is awarded 160 hours of specialized academic instruction.
2. Student is awarded 51.5 hours to be used for behavior intervention services, individual counselling, and/or parent and family counselling.
3. All hours will be provided by a certified non-public agency of Parent's choosing. Panama shall establish direct payment to any certified non-public agency selected by Parent. All hours will be available to be used throughout the end of the 2021-22 regular school year. If unused, they will expire on the last school day of the 2021-22 regular school year.
4. On Student's case, all other relief sought by Student is denied.
5. Panama is not required to fund an independent educational evaluation in behavior.
6. Panama may implement Student's December 28, 2019 IEP as amended on February 28, 2020 without parental consent, if Mother wants Student to receive special education and related services.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

*/s/*

June Lehrman

Administrative Law Judge

Office of Administrative Hearings