

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

HIGH TECH HIGH AND  
DESERT/MOUNTAIN SELPA.

OAH CASE NO. 2012020045

CORRECTED DECISION

The due process hearing in this case convened on September 12, 13, 14, 21, 28 and October 4 and 19, 2012, before Administrative Law Judge (ALJ) Paul H. Kamoroff, from the Office of Administrative Hearings (OAH), State of California, in San Diego, California.

Margaret H. Adams, Attorney at Law, represented Student at the due process hearing. Eric Austin, legal clerk to Ms. Adams, was present during part of the hearing. Student's mother (Mother), father (Father) and sister (Sister) attended each day of the hearing. Student was not present during the hearing.

Jack B. Clarke, Jr., Attorney at Law, represented both High Tech High (HTH) and the Desert/Mountain Special Education Local Planning Area (Desert/Mountain SELPA), (collectively referred to as the District). Robert Parker, Director of Special Education for HTH, was present on behalf of the District each day of the hearing. Denise Edge, Program Manager of the Desert/Mountain SELPA, also attended each day of the hearing on behalf of the District. Dr. Ron Powell, Director of the Desert/Mountain SELPA, and

Katherine Wright, incoming Special Education Director for HTH, were also present on behalf of the District during part of the hearing.

On February 1, 2012, Student filed a Request for Due Process Hearing naming the District as the respondent. On February 22, 2012, and April 10, 2012, Student and the District jointly filed requests to continue the due process hearing which were granted. On May 18, 2012, Student filed a motion to continue the due process hearing which was also granted. On September 11, 2012, the parties jointly requested a one day continuance which was granted.

At hearing, the ALJ received oral and documentary evidence. The following witnesses testified: Mother, Dr. Mary Baker-Ericzen, Dr. Stephen Parker, Dr. Jill Weckerly, Robert Parker, Geri Brown, Marcus Bell, Thomas Fehrenbacher, Rachel Amato, Dr. Bryan Bruns, Dr. Cynthia Norall, Allison Cordes, Dr. Jay Vavra, and Denise Edge.

At the request of the parties, the record remained open for the submission of written closing arguments. The parties filed their closing briefs on November 9, 2012. The matter was submitted on November 9, 2012.

## ISSUES

The issues for hearing and decision in this matter are as follows:

- 1) Whether the District denied Student a free appropriate public education (FAPE) for the 2009-2010 school year (SY), beginning February 2, 2010, due to the following:
  - a) Failing to refer Student for an AB2726 mental health assessment or assessing Student in the area of mental health;
  - b) Failing to assess Student in the area of speech and language prior to developing a speech and language goal and providing speech and language services;

c) Failing to provide appropriate speech and language services in Student's individualized education program (IEP) and

d) Failing to implement agreed upon speech and language (sometimes S/L) services.

2) Whether the District denied Student a FAPE pursuant to the October 14, 2010 IEP due to the following:

a) Failing to appropriately address Student's unique needs in the areas of (1) pragmatic language, (2) severe anxiety, and (3) social-emotion;

b) Failing to provide a specific, written offer of placement and to offer an appropriate placement; and

c) Failing to offer appropriate transition goals and services.

3) Whether the District denied Student a FAPE for the 2010-2011 SY due to the following:

a) Failing to timely conduct triennial assessments;

b) Failing to timely convene an IEP meeting; and

c) Failing to assess Student's S/L needs in the area of pragmatic language.

4) Whether the District denied Student a FAPE, procedurally and substantively, for the 2011-2012 SY due to the following:

a) By failing to have an IEP in place at the beginning of the SY; and

b) Failing to convene an annual review IEP meeting by October 14, 2011;

## FACTUAL FINDINGS

### THE STUDENT

1. The Student in this case is a 19-year-old female who resides with her natural parents and her younger brothers and older sister within San Diego. Student has graduated from high school. She is not presently working or attending college.

2. Student is very bright but has a history of social, emotional and learning disorders. She has been diagnosed with Generalized Anxiety Disorder, selective mutism, Asperger's Disorder, Learning Disorder and Major Depressive Disorder.

3. In high school, Student was found eligible for special education and related services under the primary disabling condition of specific learning disability (SLD). Student's significant disabilities give rise to unique needs at school, in the home, and in the community. While Student has the intellectual ability to function academically at or above her same-aged peers, Student functions below same-aged peers where the main focus is improving her ability to communicate and overcoming her anxiety.

4. Student's early school years were generally successful. She attended a private school for first and second grade. She attended Ericson Elementary School for the third grade. In grades fourth through sixth, Student attended San Diego Cooperative Charter School. Student enjoyed school and received mainly A's and B's. Student struggled in math at the end of elementary school.

5. Student attended High Tech Middle School, a charter middle school in the District, for grades seven and eight. During Student's seventh grade year, her pediatrician recommended that she be tested for Asperger's Disorder.

6. Student began having difficulties during the middle of her eighth grade year. She was having more trouble with math and other subjects, and had become withdrawn. Student began seeing Dr. Mary Baker-Ericzen, a clinical psychologist, to help with anxiety symptoms and problem solving.

7. Student started HTH, a charter high school in the District, in the ninth grade. Based upon her pediatrician's recommendation that Student be assessed for Asperger's Disorder, Mother requested that the District evaluate Student to determine

whether she qualified for special education and related services. HTH agreed and performed an initial assessment<sup>1</sup> for Student at the beginning of her ninth grade.

#### THE 2007 MULTIDISCIPLINARY REPORT

8. In December 2007, pursuant to Mother's request, the District's performed an initial assessment for Student, entitled a Multidisciplinary Report (sometimes MDA). The District report took two days to complete, and was conducted by Mark Katz, Ph.D., a clinical psychologist, Gretchen Gillingham, Ph.D., a clinical neuropsychologist, Robert Parker, school psychologist, and Rachel Amato, who was listed as a resource specialist teacher. The report included a clinical interview with Student, a review of educational and treatment records, observations. The MDA also included a variety of inventories and standardized tests. The MDA did not include a speech and language evaluation.

9. The District's assessment results indicated that Student possessed well developed cognitive and intellectual strengths in the areas of nonverbal reasoning, behavioral inhibition, auditory processing, visual-spatial perception, visual-motor integration, learning and memory. Student struggled on most timed tasks and tasks involving sustained visual attention, planning, organization and fine motor skills. Student's scores on measures of academic skills deviated significantly to her intellectual/cognitive results, which is similar to profiles of students with a learning disability that negatively impacts academic fluency. While at school, no significant areas of concern were reported with regard to behavior. The MDA recommended that Student receive special education services under the handicapping condition of SLD.

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<sup>1</sup> California uses the term "assessment" in lieu of "evaluation." The terms mean the same and are often interchanged within special education.

10. Subsequent to the District's 2007 MDA, in December 2007, the District convened an IEP meeting for Student.

#### THE DECEMBER 12, 2007 IEP

11. The District convened its first IEP meeting for Student on December 12, 2007, during her ninth grade year. The District recommended that Student receive special education and related services under the handicapping condition of SLD. This meeting was attended by Mother; Robert Parker, Director of HTH; Rachel Amato, who was designated as a special education teacher; and a general education teacher.

12. The December 2007 IEP stated that Student showed a severe discrepancy between intellectual functioning and reading math fluency, with accompanying weaknesses in attention, fine motor skills and oral expression. The December IEP included comments that Student demonstrated a weakness in fluency, organizing, planning and sustained visual attention. The IEP recommended that Student receive support with extended time on tests, organizing and planning her assignments and projects, as well as note taking assistance. The IEP provided accommodations including extra time for assignments and tests, project management assistance, and note taking assistance. The IEP also included a completed check-list for Transition and Post-Secondary Goals.

13. The IEP provided the following two goals:

- a. By 12/12/2008, Student will work with the Resource Specialist Program (RSP) to break down her projects and limit her homework to one hour per night; and
- b. By 12/12/2008, Student will work with her teacher and tutors to ensure she understands the material which will then raise her confidence in her math skills.

14. The IEP also provided Student the following related services:

- a. Specialized Academic Instruction (SAI), 30 minutes weekly;
- b. College Awareness Instruction (College), 30 minutes weekly;
- c. Individual and Small Group Instruction, 30 minutes A<sup>2</sup>; and
- d. Note Taking Services, five minutes daily.

15. Mother consented to all aspects of the IEP. Student received passing grades in each class, including mostly A's and B's, throughout her freshman year at HTH.

#### THE DECEMBER 10, 2008 IEP

16. On December 10, 2008, the District convened its second IEP meeting for Student, for Student's sophomore year at HTH. IEP meeting participants included Mother; Robert Parker; Rachel Amato, who is again described in the IEP as a special education teacher; Spencer Pforsich, general education teacher, and; Andrew Lerario, a general education teacher. Similar to the December 2007 IEP, the December 2008 IEP stated that Student was eligible to receive special education and related services under the handicapping condition of SLD. Similarly, this IEP recommended that Student receive support with extended time on tests, organizing and planning her assignments and projects, as well as note taking assistance.

17. The December 2008 IEP provided identical accommodations to the December 2007 IEP, and provided the following two goals:

- a. By December 2009, Student will work with RSP to break down her projects and limit her homework to one hour per night.; and
- b. By March 2010, Student will be able to express herself in 2/5 trials.

18. The District provided the following related services in the December 10, 2008 IEP:

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<sup>2</sup> No evidence was presented which established what frequency "A" represented. However, the provision of the related service was not at issue in this case.

- a. SAI, 60 minutes daily;
- b. Note Taking Services, 10 minutes daily; and
- c. S/L services, 30 minutes weekly.

19. Similar to the prior IEP, Mother consented to this IEP. Student continued to receive passing grades in each class, including mostly A's and B's, throughout her sophomore year at HTH.

#### THE NOVEMBER 3, 2009 IEP

20. On November 3, 2009, the District convened an annual IEP meeting to offer Student an educational plan for the 2009-2010 SY, Student's junior year at HTH. Prior to the November 2009 meeting, for the first time in Student's educational career, she began receiving failing grades. She also had substantial absences.

21. The following people attended the November IEP meeting: Mother; Robert Parker; Rachel Amato; Jennifer White, a general education teacher; Julia Gordan, a general education math teacher; Tom Fehrenbacher, a general education humanities teacher, and; Jay Vavra, a general education biology teacher. The IEP team discussed that Student was stressed and overwhelmed with school work and that this led to her missing school. Student's anxiety was causing her psychosomatic symptoms. Student was frequently unable to go to school, or classes once at school, due to an anxiety disorder. The IEP team attempted to address Student's anxiety by eliminating all of her homework, and also increased her time in the resource room.

22. IEP comments note: "[Student] has difficulty managing her work. She will often keep her struggles to herself and then become more overwhelmed. This leads to missing school which makes the stress worse."

23. The IEP also provided the following goals:

- a) Student will be able to communicate verbally with her teachers in 2/5 trials;



- b) Student will work with RSP to break down her projects and limit her homework to one hour per night.

24. The IEP provided that Student will receive placement in a general education classroom for 100 percent of the school day, and provided the following related services:

- a) SAI, 45 minutes, twice weekly;
- b) Note Taking Services, 10 minutes daily; and
- c) S/L services, 30 minutes weekly.

25. Mother consented to the IEP. Student missed 36 percent of the semester due to absences related to anxiety, and received failing grades for three classes.

26. Following the November 3, 2009 IEP meeting, Student continued to fail her classes, her anxiety worsened, and her absences increased. There was at least one incident where Student refused to get out of her Mother's car after being driven to school. HTH staff tried to coax her out of the car, but were unable to do so, and Student was eventually sent back home. Additionally, Student's communication deteriorated and she was unable to initiate conversations with her family, teachers, or peers. Due to these concerns, in early January 2010, Mother directly contacted the Desert/Mountain SELPA for help. In response, the District convened an IEP meeting within the next 30 days, on February 9, 2010.

#### THE FEBRUARY 9, 2010 IEP

27. On February 9, 2010, pursuant to Mother's request, the District convened an addendum IEP meeting to Student's annual IEP meeting of November 3, 2009. Since the annual IEP meeting of November 2009, it had become apparent that Student was suffering from an increasing mental health disorder and her educational program was suffering as a consequence. The February 2010 IEP team met specifically to address Student's increasing anxiety disorder, increasing absences, and resulting failing grades.

The following people participated at this IEP meeting: Student; Sister; Mother; Dr. Mary Baker- Ericzen; Rachel Amato, who was listed as Student's RSP teacher; Marcus Bell, Dean of Students at HTH; and Robert Parker. Mother had requested the attendance of the District's speech and language pathologist (SLP) for the meeting, but the SLP was unavailable due to a scheduling conflict. The District did not record this IEP meeting in a written instrument.<sup>3</sup>

28. Throughout the meeting, the District directed many questions to Student. Student was generally non-responsive throughout the meeting and Mother, Sister or Dr. Baker-Ericzen would often respond on Student's behalf.

29. An audio recording of the February 2010 IEP meeting revealed that Ms. Amato was alarmed that Student would be unable to make up her failing grades from the prior semester while simultaneously making up her failing grades from the present semester. Ms. Amato described that she was very concerned regarding Student's increasing anxiety and described that she believed that Student's absences, and subsequent failing grades, were the result of Student's anxiety disorder. Ms. Amato stated the following:

"I think [Student's] absences are apparent...I looked at all of her past years and stuff and thought why does this seem to be erupting, and if you look, each semester gets worse with the absences, meaning her anxiety is getting worse. So, clearly this is not working. The numbers are apparent. 36

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<sup>3</sup> Student's counsel submitted an audio recording of the February 9, 2010 IEP meeting. Due to conflicting testimony surrounding this IEP meeting, compounded with the absence of a written document for this IEP, the undersigned ALJ relied in significant part on this audio recording to determine what transpired during this meeting.

percent gone last semester, before that 25 percent. Each semester just gets worse and worse, and then when she was at middle school, she was gone just two percent of the day [sic]. It's definitely something with high school. The nature of project based learning is difficult with someone with [Student's] profile."

30. HTH employs a "project based learning" modality, which requires group and in-class participation. Ms. Amato was recorded explaining to the team that because of its project based learning modality, HTH was either the best school for Student because it confronted Student's anxiety, which Ms. Amato described as a phobia; or that HTH was the worst possible school for Student because the project based learning modality acted as an antecedent for Student's anxiety. Ms. Amato described that she had gained experience "breaking people's phobias" as a licensed Social Worker, and she gave an example of how to cure a person's arachnophobia by placing them into a room full of spiders. However, Ms. Amato stated she was not certain that such a confrontational approach would work for someone with an anxiety disorder. Ms. Amato described Student's Humanities class, which was taught by HTH teacher Mr. Fehrenbacher, as the "epitome of project based learning." She described that this mode of teaching was difficult and confusing for Student. Ms. Amato commented that she knew Student was having a high level of difficulty in this particular class, which had resulted in one of Student's "melt downs."

31. Mother described that Student stayed up all night because she perseverates on school and home-work and that Student was "broken down" over school. Student would then wake in the morning dizzy and with headaches. Mother also described an incident at a restaurant where Student slid, and then hid, under the table. Mother shared that Student was decreasing in her ability to control her "fear" of going

to school. She described various instances where she would drive Student to school, but that Student, due to panic, would be unable to leave the car. Mother described that on various occasions HTH staff had tried to assist her in removing Student from her car, but that these attempts had failed and that she was eventually forced to return home with Student still in the car. Ms. Amato shared in this particular discussion and described that Student's anxiety had grown worse while at school; she described that Student often refused to leave her office during lunch. Ms. Amato and Sister discussed whether it was better to force Student to leave Amato's office during lunch, so that she "can be healthy and eat," or to let Student stay in Ms. Amato's office, presumably to avoid interaction with others.

32. The District explained that HTH utilizes a "non-conformity approach," and therefore it was difficult for District to put into place any consistent accommodations at school.

33. During the February 2010 IEP meeting, the team generally discussed various concerns pertaining to Student's deficits, including her perseveration on minor details, her stress related melt downs while at school, her absences arising from her anxiety, and Student's difficulty participating in the project based learning which is imbedded in each classroom. The IEP team arrived at a consensus that Student's deficits were getting increasingly worse, that, for the first time in her educational history, Student was receiving failing grades, that the project based learning modality utilized throughout HTH's classes might actually be contributing to Student's anxiety disorder, and that IEP modifications were needed.

34. Despite this consensus, the District did not offer to modify Student's educational program or to assess, or refer Student for assessment, in any area. The District did not change in any manner Student's related services or placement.

35. During the February 9, 2010 IEP meeting, the District also discussed Student's deteriorating communication abilities. Student had not initiated a conversation since the very beginning of the school year. As part of this discussion, Ms. Amato asked Student whether she believed she was benefiting from the District provided S/L services. Student was unable to communicate a response. Rather, Dr. Baker-Ericzen responded that Student did not understand what her S/L goal was, did not know what, in particular, she was working on during these sessions, and that Student did not feel she was benefiting from the S/L service. Dr. Baker-Ericzen described that Student felt as though her S/L session consisted only of the SLP asking her questions about her day, without providing any therapy or strategies to increase her communication skills. She explained that she and Student had tried to compose S/L goals during their counseling sessions, but they were unable to devise any goals on their own. Dr. Baker-Ericzen added that the SLP should address non-verbal communication, social conventions, words which may have dual meanings, and provide a more structured speech session.

36. Mother also described that she was generally confused by the S/L service from the November 2009 IEP. Mother complained that she had never been able to meet or directly share information with the District's SLP. Rather, Ms. Amato had served as a conduit between Parents and the District's SLP. Mother speculated that the SLP should work on Student's "literalness" during conversation, absolutism during conversation, word choices, and connected conversation with others. Mr. Parker responded to the various concerns regarding Student's communication needs by recommending that Student, the District's SLP, and Ms. Amato, have a meeting to review and modify the S/L services.

37. At the conclusion of the February 9, 2010 IEP meeting, Ms. Amato informed Mother that, while the concerns discussed during this IEP meeting were

important and would result in some changes to Student's educational program, it did not require that the Parents sign an IEP, or for the District to provide Parents a written IEP document. The District did not specify what changes would be made to Student's program.

#### THE JUNE 21, 2010 ASSESSMENT PLAN

38. Following the February 2010 IEP meeting, Student continued to receive failing grades, her anxiety continued to worsen, and her absences increased. As a result, Mother requested a meeting with Robert Parker to discuss these concerns. Mother, Student and Mr. Parker met on June 21, 2010, to discuss Student's increasing anxiety problems.

39. During the June 21, 2010 meeting, Mr. Parker presented Mother a copy of a proposed assessment plan for Student. Per this assessment plan, the District delineated it would conduct assessments in the areas of academic achievement, cognitive development, social/emotional development, and observations/interviews. The District's assessment plan did not offer an assessment in the area of Language and Speech development. The assessment plan indicated that all of the assessments would be completed by Dr. Cynthia Norall, who is a clinical psychologist.

40. On June 24, 2010, Dr. Norall sent an email to Mr. Parker and Mother where she detailed the following tests, which she intended to utilize for Student's assessment: the Comprehensive Test of Nonverbal Intelligence (CTONI); the Autism Diagnostic Observation Scale (ADOS); the Diagnostic Achievement Battery – 3rd Edition, the test of Auditory Reasoning Skills (TARP); Visual Motor Processing Tests; the Asperger's Syndrome Diagnostic Scale (ASDS); a Social Communication Scale; and, a Pragmatics Language checklist.

41. In her June 24, 2010 email, Dr. Norall described that, in addition to the foregoing tests, her assessment would include parent, teacher and Student interviews,

and classroom observations. She explained that the teacher interviews and classroom observations would take place in the fall. Dr. Norall ended her email by stating that she was available if anyone had any questions, and that it was best to reach her by email.

42. The District did not receive the signed assessment plan from Mother until October 12, 2010. Mother's delay in returning the signed assessment plan stemmed from her belief that the District would not assess Student over the summer break.

43. On October 12, 2010, Dr. Norall received the signed assessment plan from the District. Also on October 12, 2010, Mr. Parker instructed her to contact Mother to schedule the assessment.

44. On October 15, 2010, Dr. Norall called Mother to schedule the agreed upon assessment. Dr. Norall received a voicemail message from Mother in response to her phone call. Following this return call from Mother, neither Dr. Norall nor Mother made any follow up attempts to schedule the assessment. Consequently Dr. Norall's assessment of Student was never started or completed.

#### DR. NORALL'S TESTIMONY

45. Dr. Cynthia Norall testified as an expert witness on behalf of the District. Dr. Norall is a credentialed school psychologist and a licensed educational psychologist. She received her M.A. in counseling, with a school psychologist credential, in 1987, and she has a Ph.D. in education. Dr. Norall is an autism specialist who is the Director of Comprehensive Autism Services and Education, Inc., an agency that provides services to county regional centers for autistic children. Dr. Norall has provided training for school districts. She has been employed by school districts in autism-related positions in the past. She is not a credentialed teacher or a licensed SLP. Dr. Norall has never met Student.

46. On June 24, 2010, Mr. Parker contacted Dr. Norall regarding assessing Student to determine whether Student had Asperger's Disorder. Mr. Parker inquired

whether she could complete her assessment of Student over the summer break. Dr. Norall described that while she had, on occasion, assessed pupils during the summer break, she typically assessed students during the school year. For Student, Dr. Norall advised Mr. Parker that she would need to conduct in-class observations, which would take place during the fall semester.

47. Dr. Norall testified that, if Parents had immediately signed their consent to the June 2010 assessment plan, the in-class observation would have taken place approximately one month after the new school year began, sometime in October 2010. Dr. Norall described the importance of conducting an observation after a student had time to adjust to the new school year, that such was best practice to ensure that the observation yielded an accurate picture of Student after she had time to adjust to her new classes. Dr. Norall described that her assessment reports are generally 15 pages long, and are provided to school districts for their review prior to being provided to pupils. A school district's review could take as long as one week, possibly longer. She testified that after a school district's review, the report would then be provided to the pupil's parents for their review. Following the parents' receipt of her assessment, the school district would then schedule an IEP meeting to review her assessment. Given these requirements, Dr. Norall speculated that an IEP meeting to discuss her assessment would likely have been held, at the earliest, in late October 2010.

48. Dr. Norall described which testing would have been included in her assessment. She described that, although her testing includes a parent inventory and parent check list regarding a student's pragmatic and social communication skills, her testing was not intended to be used in lieu of an S/L evaluation. She does not provide standardized testing in the areas of speech or language, or test in all areas related to a language deficit.

49. Dr. Norall is not directly familiar with Student. She has not assessed or



observed Student and has not reviewed Student's school records. Dr. Norall described the general characteristics of children with Asperger's, including their difficulties with behavior, communication, and social skills. She described how children with Asperger's have social language deficits, eye contact and nonverbal communication deficits, and are easily overwhelmed by directions and deadlines. She testified that Student's severe anxiety could be related to behavior issues and/or speech and language needs. She described how the manifestation of anxiety disorders, including a social anxiety disorder, is common with Asperger's.

50. Following her phone call to Mother on October 15, 2010, Dr. Norall has had no contact with Student or her family. Dr. Norall testified in a straightforward and credible manner.

#### THE OCTOBER 14, 2010 IEP

51. Student's anxiety disorder grew worse over the summer break and she was unable to return to school for the fall semester of the 2010-2011 SY. On several occasions, Mother attempted to drive Student to HTH, but she refused to leave the car. Due to these absences, the District convened a meeting without Parents in September 2010, wherein the District discussed providing Student a home instruction program. By the time of Student's next annual IEP meeting, which was held in October 2010, Student had missed seven consecutive weeks of school.<sup>4</sup>

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<sup>4</sup> There are three versions of the October 14, 2010 IEP. The three versions of this IEP are entitled Student's exhibits 68 and 95, and District's exhibit two. Student's exhibit 95 has the word "Draft" hand written on the first page of the IEP document. Ms. Amato authenticated that she had handwritten the word "Draft" on this document. Mother credibly testified that she had not been provided District's exhibit two, until she received the District's evidence packet for the due process hearing. Given the foregoing, only the

52. The District convened Student's next, annual IEP meeting on October 14, 2010, which pertained to Student's senior year. The following people attended this IEP meeting: Robert Parker; Rachel Amato; Jade Mohr, who is a general education math teacher; Kim, a District tutor; Marcus Bell; Amy Callahan, another general education math teacher; Mother; Student; and, Sister. Dr. Baker-Ericzen attended part of this IEP meeting by telephone. The District provided Mother a draft IEP prior to the meeting.

53. The District began the IEP meeting by first discussing their offer for a home instruction program. Due to Student's inability to attend school, a change in placement was needed for Student's educational program. The District further explained that the basis of the District's placement offer was to address the District's senior year requirements, which were necessary for Student to graduate timely with her class. The District required that Student complete four courses, English, math, arts and science, during her senior year.

54. The home instruction program would include math and/or English. The District offered to provide Student an internet-based math course, which she could access from her home. The math course would be taught to her through a District tutor, who was a college student. The District offered to provide the math course for an hour daily, at Student's home via an on-line program. In the alternative, the course could be provided twice weekly, in two, two hour and 30 minute blocks. The District would provide a tutor, who is a college student, either at Student's home or at an unspecified library. The District would provide additional support by having a credentialed math

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version of the IEP entitled Student's exhibit 68 will be considered as the final version of the October 14, 2010 IEP.

Each party submitted an audio recording of the October 14, 2010 IEP meeting, which helped inform the court as to what transpired during this meeting.

teacher, either Ms. Mohr or Ms. Callahan, available to Student via email. If Student wished, she could meet the teacher once every week or two, at HTH and during the teacher's lunch break, if the teacher was available. There was no set time or frequency established for the teacher's involvement.

55. The District discussed that the most likely math course would be a web-based study program entitled Assessment and Learning in Knowledge Spaces (ALEKS), for math tutoring, which Student had utilized while at home, with tutor support, during the 2010 extended school year (ESY). The math teacher stated she was not directly familiar with ALEKS, but had utilized similar, on-line math programs. Mother complained that she was dissatisfied with the ALEKS program because it had addressed basic, freshman level math skills during the ESY program, which was far below Student's abilities. The District described that the ALEKS program was designed to begin instruction at a basic level, which was below Student's aptitude level, and that Student would, nonetheless, have to follow the pre-programmed course.

56. The October 14, 2010 IEP team also discussed providing Student an English course. The District explained that an English course could be provided in a similar fashion as the math program, as an on-line program taught by a tutor, with access to a credentialed teacher via email. The District discussed that it was unsure whether it would provide the English course concurrent to the math course, or at a later point, such as during the spring 2011 semester; or possibly offer the English course in a subsequent IEP.

57. Mr. Parker described that the home instruction program would continue until an unspecified date during the spring 2011 semester. He described that he was hopeful that, at some point, Student would return to HTH, either on a full time or part time basis. If Student was unable to return during the spring semester due to her anxiety, the District would "carve out a new plan then," to meet Student's needs.

58. In addition to missing all school days for the present, 2010-2011 school year, Student had a significant amount of absences for the prior school year as well. Mother inquired whether the absences included the various times Student went to school but was unable to exit the car due to anxiety and panic. Ms. Amato acknowledged her familiarity with these incidents, and that "after enough cajoling, we would just send her home."

59. During the October 2010 IEP meeting, Dr. Baker-Ericzen advised the team that Student had severe anxiety and depression. She stated that these particular deficits impacted Student's school attendance and her school-work. However, Dr. Baker-Ericzen participated telephonically and only briefly at this IEP meeting; she left the meeting early to attend to other matters. She did not provide any opinion pertaining to the District's offer of a home-study program, nor did Dr. Baker-Ericzen make any recommendations regarding the October IEP.

60. The IEP team offered Student the same duration and frequency of S/L services as was included in her last two IEP's of December 2008 and November 2009. The District also repeated the same S/L goal from the prior three IEP's. Mr. Parker described that the S/L service could not be provided at Student's home, but that she could avail herself of the services at any District school. The District did not provide an SLP at this meeting.

61. The October 14, 2010 IEP stated that Student would be mainstreamed in general education for 100 percent of the school day, and the IEP provides Student the following related services:

- a. Individual and Small Group Instruction, 60 minutes daily; and
- b. S/L, 30 minutes weekly.

62. The IEP also provided the following two goals:

- a. By 9/ 21/2011, [Student] will be able to communicate verbally with teachers in 2/5 trials; and
- b. By 9/21/2011, [Student] will talk with each of her teacher at least twice per week to understand the assignments and get clarification.

63. The October 14, 2010 IEP contained an individualized transition plan. Ms. Amato described that the responses listed in the transition plan, which would typically be provided directly by Student, were based on assumptions made by Ms. Amato. These responses reflected Student's choices pertaining to transition goals, such as what she planned to do following high school, where she planned on residing, and whether she would go to college or obtain employment,.

64. Student was present throughout the IEP meeting; however, she was non-verbal and did not initiate or respond to any communication during the meeting. Similar to the prior IEP meeting, any questions posited to Student were responded to by either Mother or Sister.

65. The District informed Mother that Dr. Norall would contact her to make arrangements for her assessment. Mr. Parker added that an additional assessment plan would be sent home at a future time, which would include an S/L assessment. He explained that the District speech pathologist, not Dr. Norall, would be responsible for conducting the S/L assessment.

66. Towards the end of the October 14, 2010 IEP meeting, Mother described that she was unsure of the District's placement offer and would have to discuss this IEP with her husband. Mother added that she desired a nonpublic school (sometimes NPS) for Student, and that she would be retaining her rights to seek reimbursement for a NPS placement.

67. Ms. Amato concluded the IEP meeting by acknowledging that details of the home instruction program still needed to be determined, but that further discussion

would occur at a follow up IEP meeting, which would be held in mid-December 2010, following Dr. Norall's assessment of Student. Parents did not provide their consent to the IEP offer during the IEP meeting.

#### CONDUCT FOLLOWING THE IEP MEETING

68. On October 14, 2010, following the IEP meeting of the same date, Mother hand delivered the following note to Ms. Amato:

Based on plan presented we will seek placement at a nonpublic school and will retain our rights to seek reimbursement from HTH.

69. The District did not respond to Parent's notice of dissent to the IEP and intent to seek reimbursement from the District for a private school placement. The District did not contact Parents or Student in any manner following the October 14, 2010 IEP meeting, up to contact required for the present due process hearing.

70. Following the October 14, 2010 dissent letter, Parents did not contact the District in any manner, until Student filed her present complaint for due process on February 2, 2012. Student did not return to HTH during the fall semester, or at any time thereafter. Beginning in February 2011, Student began attending The Balboa School (Balboa), which is a certified nonpublic school located in San Diego, California.

#### RACHEL AMATO'S TESTIMONY

71. Rachel Amato testified as a witness on behalf of the District. Ms. Amato described that she has been an RSP teacher at HTH since September 2005, and has been Student's RSP teacher since her freshman year at HTH in 2007. She facilitated each of Student's IEP's at HTH, and was directly responsible for ensuring the implementation of these IEP's. Ms. Amato was the service provider for the Individual and Group instruction

listed in each of Student's IEP's. The District implemented this particular service, individually, to Student in Ms. Amato's RSP classroom. Prior to 2004, when her license expired, Ms. Amato was a Texas Licensed Social Worker for several years.

72. Ms. Amato is very familiar with Student and was personally involved in every aspect of Student's educational development while she attended HTH. By all accounts, the District utilized Ms. Amato to address almost all of Student's needs, including academic, mental health, language and social development.

73. Ms. Amato testified that she has been a credentialed RSP teacher since 2005. She described that a RSP teacher must have a special education teaching credential, along with a general education teaching credential. Ms. Amato represented the District as a RSP teacher or special education teacher in each of Student's IEP's at HTH, and she was part of the assessment team which completed the District's 2007 MDA of Student, wherein she was described as a RSP teacher. However, during cross examination, it was elicited that Ms. Amato had misrepresented her teaching background; Ms. Amato possessed no teaching credential whatsoever until August 2009, when she obtained an Internship Credential. Internship programs allow individuals to complete their teacher preparation coursework concurrent with their first year or two in a paid teaching position. These programs are led by colleges, universities and by school districts and county offices of education. To qualify for an internship program, an individual must possess a bachelor's degree, satisfy the basic skills requirement, and meet the subject matter competence. Completion of an internship program results in the same credential as is earned through a traditional teacher preparation program. The credential is a collaboration between the teacher preparation program and the local educational agency, with both parties having responsibilities for support of the intern while they are employed and on the credential.

74. Ms. Amato testified that she was unaware that Student's absences were related to anxiety. However, her comments audio recorded during the February 9, 2010 IEP meeting, that Student's anxiety was the cause of her absences, that Student's absences were increasing, and that Student's anxiety was getting worse, evidenced her knowledge that Student's absences were related to an anxiety disorder. (Factual Findings 27-37.)

75. Ms. Amato testified that the February 9, 2010 IEP meeting was not actually an IEP meeting; she explained this as the reason there is no written IEP document for this meeting. Ms. Amato later retracted this testimony, and described the February 9, 2010 meeting as an IEP meeting. Ms. Amato later described that she had personally, and timely, facilitated the scheduling of the February meeting in response to Mother's request for an IEP meeting.

76. Ms. Amato testified that, as of the February 9, 2010 IEP meeting, there was no reason to re-assess Student, to assess Student for mental health, or to modify her educational program. Ms. Amato testified that the District's program was working and that Student had been receiving all passing grades as of the February meeting. Her testimony regarding Student's educational program was contradicted by her own statements recorded during the February 9, 2010 meeting, where she openly acknowledged that Student's IEP was not appropriate and required modification. (Factual Findings 27 - 37.)

77. Ms. Amato's description that Student had received passing grades in each class for the fall 2009 semester, which occurred immediately prior to the February 9, 2010 IEP meeting, was contradicted by the District's grade transcripts, which show that Student had earned failing grades (F's) in American Literature, Biology, and U.S. History and Geography during the fall 2009 semester. Ms. Amato's testimony regarding Student's grades was also contradicted by her own comments recorded during the



February meeting, wherein she described that Student had received failing grades for the fall semester, and was receiving failing grades for the spring semester. (Factual Findings 27 - 37.)

78. Ms. Amato provided testimony that Student's S/L skills at school were average and on par with her typically developing peers. She further testified that Student had not received an S/L assessment prior to receiving S/L as a related service in her IEP's because S/L was not an area of suspected deficit for Student. Ms. Amato explained that the IEP's provided S/L services merely to appease Mother's request that Student receive S/L services, not because these services were needed to meet Student's unique needs.

79. Ms. Amato's testimony pertaining to the S/L assessment was inconsistent. She first explained that the District had never provided Student an S/L assessment because Student had not manifested S/L as an area of deficit. However, she later testified that the District had in fact provided Student an S/L assessment, which was part of the District's 2007 MDA, where Ms. Amato is a listed assessor. This testimony was contradicted by the District's SLP, Allison Cordes, who testified that the District has never assessed Student in the area of S/L. Ms. Amato's testimony was also contradicted by the 2007 MDA itself, which did not include an S/L component or the participation of a SLP.

80. Ms. Amato's description of Student's S/L skills is also incongruent with her prior statements, testimony and conduct. For example, during the February 2010 IEP meeting, Ms. Amato commented that Student had regressed in her ability to initiate communication. She also testified that Student's communication deficits required her to personally accompany Student to each S/L therapy session. Ms. Amato testified that she was needed at these sessions because Student would refuse to communicate directly with the District's SLP, Allison Cordes. Ms. Amato's presence during the S/L therapy was

required to facilitate communication between Student and the SLP; Student would often “shut down” during these sessions if Ms. Amato was not present during the therapy session.

81. Ms. Amato described that she was not aware of Student’s anxiety disorder or that such a disorder had manifested while Student was at school. However, this description was inconsistent with her prior statements and related testimony which was also provided by Ms. Amato. For example, Ms. Amato discussed Student’s anxiety disorder in detail and at length during the February 9, 2010 IEP meeting. Ms. Amato’s recorded comments during this IEP meeting, whereby she compared Student’s anxiety to a person who suffers from arachnophobia, also belie Ms. Amato’s awareness of Student’s emotional problems. Finally, Ms. Amato testified that she would frequently keep Student in her RSP classroom for the entire school day due to her anxiety. This testimony itself seriously undermines her description that she was unaware of Student’s anxiety disorder or that this disorder had not manifested while Student was at school.

82. Regarding mental health services, Ms. Amato explained that she deferred wholly to Dr. Baker-Ericzen to meet Student’s mental health needs. Ms. Amato testified that if Dr. Baker-Ericzen had not been present at Student’s IEP’s, she would have referred Student for District provided mental health services.

83. Ms. Amato described that she was responsible for facilitating Student’s assessments. However, she elaborated that she had chosen not to refer Student for a mental health assessment because she believed that Dr. Baker-Ericzen was solely responsible for addressing this area of deficit.

84. Ms. Amato was over-tasked regarding Student’s educational program. The District placed squarely on her shoulders the responsibility of identifying and addressing Student’s significant mental health needs, her impacted academic needs, and even Student’s language deficits. Yet, Ms. Amato was required to remediate these difficult

and convoluted areas without assessments or proper training. Ms. Amato is not a mental health professional or SLP; and she did not possess the experience as a teacher to be solely responsible to meet all of Student's unique and serious educational deficits.

85. Ms. Amato was notified by Mother and aware of Student's anxiety disorder, her subsequent absences as a result of her anxiety disorder; and her failing grades as a result of her inability to attend regular classes. In making this determination, the court finds that Ms. Amato's testimony is not credible. Ms. Amato's attempts to downplay the extent of Student's mental health and language disorders were impeached by her own admissions recorded during the February 9, 2010 IEP meeting. It is also unreasonable to believe that a parent, who is very concerned with the welfare of her child and therefore requested an IEP meeting, would not inform the IEP team the basis of her concerns. The District never attempted to rebut the contents of the IEP meeting audio recording. Ms. Amato did not attempt to refute her knowledge of Student's anxiety disorder, following the submission of the audio recording.

#### STUDENT'S GRADES

86. The District also tasked Ms. Amato with changing Student's failed grades with passing grades. From February 2010, Ms. Amato described how the particular accommodation in Student's IEP, which permitted Student to receive extra time for assignments, allowed the District to change Student's failing grades to passing grades. The District would facilitate the grade change by obtaining "alternative educational assignments" from teachers of classes which Student had failed. Ms. Amato or a tutor, a college student employed by HTH, would then assist Student during the regular school day, but in the RSP classroom, to complete these assignments. Because HTH's universal teaching modality of project based learning requires an in-class, collaborative and team approach to completing school assignments, the alternative assignments could not

replicate the project based assignments which Student missed due to her significant absences.

87. This fluid grading process resulted in the existence of two sets of report cards for the same time frame, which contain contradicting grades. In sum, the grades included in Student's report cards do not necessarily reflect Student's grades, or abilities, at the time they were issued, and are therefore not reliable evidence. Rather, a more accurate review of Student's grades can be found in school transcripts for each class which detail the particular assignments completed, and missing, for each course at particular dates throughout the school year.

88. Per these school transcripts, by the end of the 2009-2010 SY, June 14, 2010, Student had received failing grades in Biology for both the fall (58 percent) and spring (52 percent) semesters, and for Humanities, fall (55 percent) and spring (52 percent). Student also received failing grades in the fall Semester in American Literature and U.S. History and Geography. Prior to the 2009-2010 SY, Student had received only passing grades, usually A's and B's.

89. Due to her anxiety disorder, Student missed all of the fall semester for the 2010-2011 SY, and did not receive any grades from HTH following the 2009-2010 SY.

#### ROBERT PARKER'S TESTIMONY

90. Robert Parker serves as the Director of Special Education for HTH. Mr. Parker testified as a witness on behalf of the District. He received his bachelor's degree in psychology from California State University of Long Beach where he also earned a master's degree in educational psychology. In his 30 plus years in public education, Mr. Parker has been employed as a school psychologist, school principal and a District office administrator. Most recently, he was a Program Manager for Due Process and Procedural Safeguards for the Desert/Mountain SELPA in San Bernardino County. He holds California life credentials in school psychology and school administrative services.

He also has been granted life credentials for community college authorization in psychology coursework and counseling services.

91. Mr. Parker first met Student when she began attending HTH in September, 2007. He has attended the majority of Student's IEP meetings, and he is personally familiar with Student and her family. Mr. Parker participated in the February 9, 2010 and October 14, 2010 IEP meetings. He also directly met with Student and Mother on June 21, 2010, to discuss Student's educational program and to offer Mother the District's proposed assessment plan.

92. Mr. Parker described that HTH is a local educational agency and is therefore directly responsible for Student's IEP's. He also described that, as a Charter School, attendance at HTH was voluntary and based on an application process whereby parents requested that their children attend HTH. Student's family had completed this process and had voluntarily chosen to send Student to HTH. Parent's chose HTH because of her above average cognitive abilities and her desire to attend college immediately following high school; HTH is a highly regarded college preparatory high school.

93. Mr. Parker attended the February 9, 2010 IEP meeting. As such, Mr. Parker was aware of Student's significant absences, that her absences were related to an anxiety disorder, and that, for the first time in her educational career, Student was receiving failing grades. However, Mr. Parker's participation in the February 9, 2010 IEP meeting was minimal. He deferred primarily to Ms. Amato to represent the District at this meeting.

94. Mr. Parker described meeting with Mother on June 21, 2010, and the proposed assessment plan. As of June 21, 2010, he anticipated that Dr. Norall would complete her assessment, and the District would convene an IEP meeting to discuss her assessment, within the next 60 days; thereby having a new IEP in place for Student prior

to the start of the 2010-2011 SY. This timeline was interrupted by Parents' failure to consent to the assessment plan until October 12, 2010. He did not clarify whether this timeline included the school observations, which Dr. Norall intended to conduct following the start of the fall semester.

95. Mr. Parker described the October 14, 2010 IEP offer. Mr. Parker discussed that the home instruction offered to Student is different than home and hospital instruction (HHI), which would have required the recommendation of a medical doctor. Mr. Parker justified this distinction by pointing out that the HTH IEP pre-written form has a code for "Home Instruction based on IEP team Determination," which is different than the code used for HHI. Other than this code differentiation, Mr. Parker was unable to explain any other differences between HHI and the District's offer of home instruction to Student.

96. Mr. Parker explained how the home program would include daily instruction provided by a tutor, who he described as a college student with no teaching experience or credentials, or special education experience. He described how a credentialed math teacher would be available to Student via email. He testified that the District is able to provide credentialed teachers directly and in a student's home for home instruction, and has provided such for other students. He also described that he was familiar with NPS placements, and that HTH had, on occasion, provided NPS placements for other IEP students.

97. Mr. Parker testified that the October 2010 IEP failed to include any goals for transitioning the Student out of the home program and back to a school based placement. The IEP also failed to include any counseling services or remediation for Student's psychological needs, such as anxiety. In part, Mr. Parker felt that Student's concerns would be addressed either in Dr. Norall's assessment, or when Student returned to school.

98. Mr. Parker's testimony did not reveal whether the October 14, 2010 IEP offered Student any course other than math, such as the English course which is mentioned in the IEP document. Mr. Parker was uncertain of the IEP's offer as it related to the English course.

99. During the October 14, 2010 IEP meeting, the District agreed to send Mother a revised assessment plan which would delineate an S/L assessment. Mr. Parker testified that the District has not sent Parents an assessment plan of any sort following the October 14, 2010 IEP meeting.

100. Mr. Parker was uncertain how many S/L sessions Student missed while at HTH. He described that HTH does not maintain logs or records relating to S/L services, and HTH has no records of any sort pertaining to the S/L services provided to Student. Rather, he had relied upon the nonpublic agency which provided the S/L services to maintain these therapy logs.

101. Following the October 14, 2010 IEP meeting, the District did not contact Student or her family in any manner. Mr. Parker believed that Parent's written notice dissenting to the IEP offer and intent to seek reimbursement from the District for private school placement, coupled with Student's lack of attendance at HTH and enrollment at Balboa, indicated that Student had withdrawn her enrollment from HTH. Given these facts, Mr. Parker did not believe that any further contact with Student, or the continued formulation of IEP's, was required.

#### DR. JAY VAVRA'S TESTIMONY

102. Dr. Jay Vavra testified on behalf of the District. Dr. Vavra graduated from Stanford University and has a Ph.D. in marine biology from USC. Dr. Vavra also has experience working as a biologist in the fields of biotechnology and zooarchaeology, and as an environmental consultant. This is his 11th year teaching biology at HTH.

103. Dr. Vavra is a highly qualified teacher who has a love for education and teaching. He provides his students a high quality learning experience that is similar to a college-level course. Along with conventional subject-matter tests, Dr. Vavra presents a classroom with expectation in critical thinking, planning, problem solving, and presentation skills, which require ongoing project-specific performance evaluations and deadline completion check-offs. He employs the project based learning modality in his classroom and has exposed his students to environmental research projects which are timely and relevant to the San Diego Bay.

104. Dr. Vavra taught Student's 11th grade biology class during the 2009-2010 SY and he is personally familiar with Student. He described Student as an exceptionally bright student who received a B grade in his class. In particular, Dr. Vavra described an introductory college biology course, entitled Bio 131-Introduction to Biotechnology (course), which Student had taken during his 11th grade class. Dr. Vavra explained this course with great enthusiasm, including how the majority of students were either unqualified to take this college level course, and those who did fared much worse than Student. He described how Student had passed with a C in this course. Given that Student received a B in his grade level Biology course, and a C in the college level course, Dr. Vavra was pleased with Student's progress during the 2009-2010 SY.

105. Dr. Vavra described Student as very quiet. He does not recall seeing her dialogue with other students, and he does not recall her initiating any conversations during his class. Dr. Vavra stated that Student had significant absences in his class, which impacted her ability to benefit from the project based learning which is an essential part of his curriculum. Student also missed his class field outings to the San Diego Bay, which is a substantial component of his class and which cannot be replicated through alternative assignments.



106. Dr. Vavra presented as a sophisticated and caring teacher. However, his description of Student's grade performance in his class does not reflect her actual performance. School transcripts dated June 14, 2010, reveal that Student received a 58 percent during her first semester Biology class, and a 62 percent for the second semester Biology class; which are far lower scores than the B grade described by Dr. Vavra. School records dated June 23, 2010, reveal that Student received a D-, not a C, for the Introduction to Biotechnology course.

#### TOM FEHRENBACHER'S TESTIMONY

107. Tom Fehrenbacher testified on behalf of the District. He earned a degree in psychology from the University of Notre Dame, and a masters in anthropology from San Diego State University in 1985. After graduation, Mr. Fehrenbacher entered State's student teaching program, and then worked the next 14 years at Hoover High School. Mr. Fehrenbacher joined the faculty of HTH in 2003, where he currently teaches 11th grade Humanities.

108. Mr. Fehrenbacher was Student's 11th grade Humanities teacher. He described Student as very quiet, yet bright and likable. Similar to the other HTH witnesses, Mr. Fehrenbacher described the project based learning modality utilized in his classroom, which requires in-class participation. He stated that Student's significant absences in his class impacted her ability to benefit from this important component of his class curriculum. Nonetheless, he felt that Student did well in his class and he described her active participation in a moot court project performed by his class.

109. Mr. Fehrenbacher recalled that Student initially earned an F in his class, but she was able to increase that grade to a C. He described that this grade change occurred several months after the completion of his class, and was based upon Student completing alternative assignments, with a tutor and in the RSP classroom. He was unable to describe what these assignments entailed or when they were completed.

110. Mr. Fehrenbacher presented as a highly qualified and enthusiastic teacher. However, he was unfamiliar with Student IEP's, IEP goals, and IEP area of eligibility. He incorrectly stated that Student's area of IEP eligibility was "accommodations."

111. Similar to Dr. Vavra, Mr. Fehrenbacher's reflection of Student's grades was inconsistent with school transcripts. District records dated June 14, 2010, show that Student received a 55 percent and 52 percent cumulative score in his class for the fall and spring semesters, respectively, which is far lower than the C grade described in Mr. Fehrenbacher's testimony.

112. Moreover, following the June 14, 2010 school transcripts, the District did not provide Student support for her Humanities class of any sort. Therefore, Mr. Fehrenbacher's description that Student improved her F grade to a C grade following the completion of his class is not possible, because it is premised upon alternative assignments and tutoring which did not occur following June 2010.

113. The foregoing problems diminished the persuasiveness of Mr. Fehrenbacher's testimony pertaining to Student's in-class performance, grades, and the appropriateness of Student's IEP's.

#### MARCUS BELL'S TESTIMONY

114. Marcus Bell testified on behalf of the District. Mr. Bell is HTH's Dean of Students. Mr. Bell has 10 years of experience working with urban youth at the Middle school and High School levels. In Cambridge, Massachusetts, he worked as a counselor, where he helped supervise and develop activities for teens and pre-teens at risk. Soon after, he became a Youth Counselor Coordinator and then an administrator for Student Affairs at the Cambridge Rindge and Latin High School. Mr. Bell has no teaching credentials and no formal mental health training. His role as Dean of Students at HTH is similar to a high school guidance counselor.

115. Mr. Bell attended the February 9, 2010 IEP meeting. As of this IEP meeting, Mr. Bell was aware that Student was missing school due to her anxiety disorder and was receiving failing grades in various classes. He described that the basis of the IEP meeting was to revise Student's educational program into a "more workable plan to support [Student]." He described that, at the time of this meeting, simply getting Student comfortable enough to enter the school and potentially go to a class would have been an improvement. Mr. Bell was unable to describe what changes were offered in the February 2010 IEP.

116. While Mr. Bell is considered a counselor at HTH, he does not provide mental health counseling of any sort, and he has never provided any direct services to Student.

117. As Dean of Student's, Mr. Bell has referred various HTH students for a mental health assessment from the county department of mental health, or from the District, but did not refer Student for a mental health assessment of any sort. He has referred various students for school based counseling services as well, but did not do so for Student.

118. Since February 2, 2010, Mr. Bell was aware of Student's serious anxiety disorder and school based panic incidents, and her inability to her access her regular classes due to these disorders. However, Mr. Bell recounted that he used his best judgment to determine that HTH should first try to address Student's problems "in house," before referring her for a mental health assessment or counseling.

119. Mr. Bell described that HTH is a college preparatory school and, accordingly, Student's grades, not mental health needs, were the focal point of HTH's attempts to support her. In this regard, HTH focused on changing Student's failed grades to passing grades. Mr. Bell described that HTH offered Student up to a year

following a failed course to complete make up assignments, to change her grades to passing scores.

120. Mr. Bell is not a trained or qualified therapist, or an educator. He has never assessed Student or formally observed her, nor is he qualified to comment on her educational needs. Nonetheless, his testimony provided a coherent reflection of what occurred while Student attended HTH.

#### STUDENT'S LANGUAGE DEFICITS

121. The District has never assessed Student in the area of speech and language. Speech delays are characterized by articulation deficits, while language delays are generally characterized by communication deficits. By all accounts, Student does not have a speech delay. Each witness who was familiar with Student testified that, when she did speak, Student was articulate and understandable. However, the evidence substantially showed that Student manifested significant language delays.

122. The District first began providing Student S/L as an IEP related service in December 2008. This IEP provided individual S/L services at 30 minutes per week, and provided an S/L goal. This same duration and frequency of S/L service, and same goal, was repeated in the November 3, 2009, February 9, 2010, and October 14, 2010 IEP's. The IEP's do not indicate whether Student had made progress towards this same goal.

123. On June 21, 2010, Ms. Amato sent an email to Mother and Robert Parker wherein she stated, in relation to Student's language deficits and the District S/L services, "I can't say much progress has been made..."

124. Although Mother has frequently requested the attendance of the District's SLP at IEP meetings, or to meet directly with the SLP, the District's SLP has never attended an IEP meeting for Student or met Parents.

## The District's SLP

125. Allison Cordes, MA CCC-SLP, is the District's SLP and she testified during the hearing on behalf of the District. Ms. Cordes obtained a bachelor of sciences in communication disorders from the University of Cincinnati, Ohio, and a masters in speech and hearing from Washington State University in 2001. She then provided school based S/L services in San Diego before being employed as an SLP with Specialized Therapy Services, Inc. (STS), a nonpublic agency, since 2008. The District contracted with STS to provide Student S/L services.

126. Through STS, Ms. Cordes provided Student IEP based S/L services from March of 2009 through June 2010. She has never assessed Student and she has not seen Student since June 2010.

127. Ms. Cordes struggled to provide Student S/L services. From February 2, 2010 through June 2010, Student missed many sessions due to anxiety-related absences, and Ms. Cordes also missed several therapy sessions. Ms. Cordes could not recall how many sessions were missed due to her absences, and she has not provided Student any make-up therapy sessions. She testified that STS maintained Student's therapy logs for over a year following the completion of her services. Per its protocol, STS then confidentially destroyed the service logs sometime in 2011. The District failed to maintain any S/L therapy logs; therefore there is no record of how many S/L sessions STS provided to Student.

128. When Ms. Cordes was able to meet with Student, Student would frequently "shut-down" and refuse to communicate with her. She described that this communication refusal occurred approximately once per session and could last as long as the entire session. Although she is an experienced SLP, Ms. Cordes was unable to effectively implement Student's S/L services. Rather, she often relied on Ms. Amato to prompt Student during the therapy sessions; Student generally shut-down during the

entire session if Ms. Amato was not present. Ms. Cordes testified that Ms. Amato was present during approximately half of the S/L sessions.

129. Ms. Cordes was unable to recall whether Student progressed as a result of her therapy. However, she agreed with the content of the June 21, 2010 email authored by Rachel Amato, which indicated a lack of progress had been made in regard to Student's S/L. She described that when an IEP team sees that a student is not progressing on her goals, it is incumbent on the team to investigate why the child is not progressing and adjust the goals and/or services.

130. Ms. Cordes has never observed Student in class. She was therefore unable to comment whether Student had made progress towards her repeated IEP goal to "communicate verbally with her teachers in 2/5 trials." Ms. Cordes did not appear particularly familiar with this goal and could not explain its baseline, or how progress towards this goal was measured. Nor has she ever discussed this goal, or Student in any manner, with Student's teachers.

131. Ms. Cordes testified that she has provided services to dozens of students in several school districts, yet she has never provided S/L services to a pupil who, like Student, had not been first assessed in the area of S/L. She stated the District's conduct of providing S/L services without first assessing the Student was highly unusual. The District has never requested that Ms. Cordes, or STS, assess Student.

132. Ms. Cordes described that she regularly attends IEP meetings for her students, where she is responsible for crafting S/L goals and formulating S/L services. Here, Ms. Cordes did not participate in any manner at Student's IEP meeting or in the development of Student's S/L goals or services. Moreover, she has never met with Parents to discuss Student's S/L needs, or to review the efficacy of her services.

133. While the formulation, monitoring and provision of Student's S/L services appear problematic, Ms. Cordes testified in a forthright and credible manner.

## The Student's SLP

134. Geri Brown, MA CCC-SLP, testified as an expert on behalf of Student. Ms. Brown has been a licensed SLP since 1983. She earned a master's in speech pathology from the University of Nebraska and a Special Day Class Authorization, Resource Specialist Certification, from San Diego State University. She has worked as a public school SLP, SDC teacher, and RSP teacher for the San Diego Unified School District. While at the public school, Ms. Brown also supervised school SLP's, their assessments and provision of services. She presently provides independent assessments and services through Total Learning Concepts, a nonpublic agency.

135. In March 2012, per Parent's request, Ms. Brown conducted a comprehensive S/L assessment for Student. The assessment took place over six days and included the following: behavioral observations; records review; classroom observation (at Balboa); the Clinical Evaluation of Language Fundamentals- 4 (CELF-4); The Pragmatics Profile Checklist; the Test of Problem Solving (TOPS-2); the Test of Language Competence-E; Informal Assessment of Receptive and Expressive Language; Informal Assessment of Conversational Skills/Pragmatics; Informal Assessment of Problem Solving; Executive Functioning, and; Written Narrative Work Samples.

136. Per her March 2012 assessment, Ms. Brown found that Student has very limited conversational skills, difficulty with problem solving, and poor functional use of language. Ms. Brown observed that Student did not ask any questions during interactions and that she was unable to use repair strategies when conversation broke down. Student does not voluntarily communicate with others, does not seek friendships or activities outside of her family, and does not possess self-advocacy skills. She does not make eye contact when speaking, does not initiate conversations or greetings, and lacks expression.

137. Ms. Brown described that Student does not have a speech disorder, in that she is articulate and comprehensible when she does speak. Rather, Student has a language delay, in that she has delayed communication skills and pragmatic language deficits. She does not comprehend abstract language, is unable to interpret non-verbal cues and, despite her above average intelligence, uses basic sentence structures to communicate.

138. Ms. Brown found that Student's language deficits have impacted her academically, socially and emotionally. Student is unable to ask questions of a teacher when she does not understand a class assignment. She is unable to build friendships or to participate in the community, or to initiate conversations of any sort, including asking for directions of any kind.

139. Ms. Brown has attended over a 100 IEP meetings as an SLP. She has written S/L IEP goals, directly provided S/L services, and monitored the provision of S/L services by other providers. Ms. Brown was critical of the District's conduct and described that it is contrary to public school policy to provide S/L services without first assessing a student in this area of deficit. She also testified that it was inappropriate to have an RSP teacher formulate goals and services for the SLP, or to attend an IEP meeting in lieu of the SLP. Ms. Brown criticized the District's IEP goals as repetitive, difficult to measure and inadequate.

140. Ms. Brown is unsure whether communication or anxiety is Student's primary delay, however, she believes that there is a direct correlation between these two areas of deficit.

141. Ms. Brown recommended an intensive S/L service program which consists of 45-50 hours of individual S/L therapy, to be utilized, intensively, over a three month period.



142. Ms. Brown is a highly qualified SLP who presented informed and credible testimony. Student's unique needs required that she be assessed in the area of speech and language. In this regard, Ms. Brown performed a competent assessment of Student. Ms. Brown's assessment cost Parents \$1,750.

#### DR. JILL WECKERLY'S ASSESSMENT

143. Jill Weckerly, Ph.D., testified as an expert witness on behalf of Student. Dr. Weckerly has a B.A. and M.A. in linguistics, a Ph.D. in cognitive science and linguistics and a second Ph.D. in clinical psychology. She has been a licensed psychologist since 2001. She has maintained a private clinical psychology practice since 2001, has been an assistant adjunct professor at the University of California, San Diego School of Medicine since 2002, and a clinical psychologist at the Mental Health Resource Center of the San Diego City Schools since 2002.

144. At the request of Parents, Dr. Weckerly conducted Student's assessment over four days in May, June, August and September, 2011. She reviewed Student's school records and prior assessments, observed Student at Balboa, interviewed Mother, Student's school counselor, and several of Student's teachers at Balboa. Dr. Weckerly utilized a number of well recognized test instruments, including the following: Comprehensive Test of Nonverbal Intelligence, 2<sup>nd</sup> Edition (CTONI-2); Wechslers Individual Achievement Tests-3 (WIAT-3); Gray-Oral Reading Test-4th Edition (GORT-4); Nelson-Denny Reading Test; Test of Word Reading Efficiency (TOWRE); Wide Range Assessment of Memory and Learning, 2nd Edition (WRAML-2); Test of Problem Solving, 2nd Edition (TOPS-2); Behavior Rating Inventory of Executive Function (BRIEF); parent and teacher checklists from the Adolescent Symptom Inventory (ASI), and; Youth Inventory (YI); Social Responsiveness Scale (SRS);

145. Per her assessment, Dr. Weckerly found that Student's performance was quite variable with scores that ranged from moderately impaired to very superior.

Student demonstrated weaknesses in interpreting perspectives of others, word reading fluency, math fluency, focused visual attention, identifying ambiguity, understanding nonliteral language, and determining solutions. Student has issues in anxiety, depression, and some aspects of executive functioning.

146. Dr. Weckerly diagnosed Student with Asperger's Disorder, Generalized Anxiety Disorder, Major Depressive Disorder (in partial remission), and a Learning Disorder in academic fluency.

147. Dr. Weckerly described Student's greatest challenge to be an anxiety disorder, of a severity that has significantly impacted her school attendance and participation. Student also struggles with perfectionism. If Student feels that she may not be able to perform well, Student will become anxious, withdraw and refuse to engage. Student's primary coping skill is to retreat and she has considerable difficulty communicating with others and taking initiative. Dr. Weckerly testified that Student exhibits symptoms of depression.

148. Dr. Weckerly described Student as very intelligent, yet she struggles with many aspects of social information processing, such as pragmatic skills, interpreting social language, understanding the perspective of other, and problem solving.

149. Dr. Weckerly surmised that Student's deficits in pragmatic language significantly contribute to her emotional struggles, such that the language delays "fuel" Student's anxiety disorder.

150. Dr. Weckerly testified that school absences, especially at the level attributable to Student, are "red flags" in a child's behavior which indicate a need for a mental health assessment. She described that Student's absences were substantial enough to have alerted the District to assess Student in the area of mental health. By February 2010, the District knew, or reasonably should have known, about the need to provide Student a mental health assessment. Dr. Weckerly opined that Student would

have qualified for at least an outpatient level of mental health services as of the February 9, 2010 IEP meeting.

151. Dr. Weckerly recommended that Student receive a small, highly structured educational setting, with access to on-site counseling and opportunities for small group and/or individual instruction. Dr. Weckerly described that Balboa met this placement description, in that it provided Student a small but structured classroom, with access to age level peers and a highly trained counselors with experience treating students with anxiety disorders.

152. As part of her assessment, Dr. Weckerly observed Student at Balboa. She testified that she is very familiar with Balboa, from observations of Student and due to her work with several other students who have attended Balboa. Dr. Weckerly described that Student has made incremental, yet steady, progress while at Balboa. She described that Balboa is uniquely designed to meet Student's anxiety needs, while providing for her grade level skills. Dr. Weckerly described Student's progress as being slow, even while at Balboa, due to the high degree of Student's anxiety disorder. She described that she has only assessed four students who, like Student, have manifested selective mutism due to an anxiety disorder.

153. In addition to a small structured and therapeutic placement, Dr. Weckerly described that Student requires S/L services to remediate her communication delay, and mental health services to address issues in anxiety, mood, problem solving, and social interaction.

154. Dr. Weckerly is a highly qualified assessor who presented useful and persuasive evidence pertaining to Student's disabilities, placement requirements, and therapy needs.

#### THE BALBOA SCHOOL

155. Dr. Stephen Parker is the founder and Director of the Balboa school. Dr.

Parker testified as a witness on behalf of Student. Dr. Parker has a master's degree in theological studies and a Ph. D. in clinical psychology. He has over 30 years of experience working with students with educational disabilities. In his practice, he has worked with a broad range of students including those who are highly gifted and those who are gifted and have educational delays. He has written numerous articles on education, nutrition and behavior, developing social skills, SAT preparation and is a frequent speaker on special and gifted education topics.

156. Balboa is a nonpublic school which is located in San Diego, California. Balboa caters to a unique demographic of pupils who are intelligent and capable of attending a four year college, but who have deficits such as anxiety or a learning disability. Balboa does not accept students with overt behaviors that would be disruptive to the education of other students. Rather, Balboa is designed to address a population of students who, like Student, have high cognitive abilities but who may internalize disorders such as anxiety or depression.

157. Balboa provides a small and structured learning environment, with classes that vary from four to 14 students. Balboa's curriculum is equivalent to a public high school. Balboa also offers college preparatory courses along with active transition plans to assist its student base in applying for, and transition into, post-secondary education. Yet, Balboa has therapy imbedded throughout each component of the school. Balboa provides each student individual and group counseling, specified at frequencies which are individualized to each student's unique needs.

158. Dr. Parker first met Student sometime in the fall of 2010. He soon began a series of observations to informally determine Student's needs and ability to benefit from Balboa. Parents enrolled Student at Balboa on February 1, 2011. After enrollment, Student was reticent about attending Balboa and her difficulties getting out of the car to attend school continued.

159. Dr. Parker oversaw a direct, cognitive based therapy for reducing anxiety applied to Student during an intensive transition period. When necessary, counselors at Balboa provided therapy to Student while she was in Mother's car. Balboa continued providing intensive, cognitive based therapy to treat Student's Generalized Anxiety Disorder throughout her tenure there. Dr. Parker explained that the therapy provided at Balboa is peer reviewed and has worked consistently to reduce symptoms of Generalized Anxiety Disorder. Student responded positively to the therapy implemented by Dr. Parker and the counselors at Balboa.

160. Balboa implemented an intensive transition plan for approximately three months, which was followed by Student successfully transitioning into classes as a full-time student, by early March 2011. Student's grades increased while at Balboa, and she made Balboa's Honor Roll. She successfully earned a High School Diploma and graduated from Balboa at the end of the 2011-2012 school year.

161. Dr. Parker described Student's level of anxiety as being in the high end of students he has counseled. Consequently, Balboa provided Student with greater levels of counseling than it provides most of its pupils, including students with anxiety disorder.

162. Dr. Parker was critical of the District's October 14, 2010 IEP offer. He described that a home instruction program would reinforce Student's school phobia, and increase her anxiety when she was confronted with opportunities to leave her home. Dr. Parker was also critical of the District's policy of providing substantial components of Student's academics through tutors. Rather, Dr. Parker believes that Student required instruction provided by credentialed teachers and in a classroom forum, albeit a small, structured classroom; and with access to communicate daily with same-aged peers.

163. Dr. Parker is pleased with Student's progress while at Balboa. However, he would have liked to have had an additional year to work with Student to further

remediate her anxiety disorder. Dr. Parker is confident that with additional therapy, Student will be able to successfully attend college, and be an independent and self-sufficient member of society. Dr. Parker presented as an informed and credible witness, and he showed that, with direct intervention, Student's delays could be remediated.

164. While Balboa provided Student levels of counseling which exceed its base tuition, it did not charge Parents for any additional services. Rather, Parents incurred only costs associated for tuition at Balboa from February 2010 through June 2010, of \$7,777; and costs associated for tuition at Balboa from September 2011 through June 2012, of 15,750.

#### DR. BAKER-ERICZEN'S TESTIMONY

165. Dr. Baker-Ericzen testified as an expert on behalf of Student. She received her B.A. in psychology, with honors, from the University of California, Santa Barbara, in 1993. She received her M.A. in 1996 in counseling psychology, with an emphasis on children and families, and her Ph.D. in 1999 in clinical psychology, as well as a post-graduate doctoral level degree in human development, all from the University of California, Santa Barbara. She is licensed as a clinical psychologist by the State of California, and has had a private practice as a child clinical psychologist in San Diego since 2001. She has extensive experience as a researcher, writer, instructor, and presenter regarding issues affecting children with autism, developmental, emotional, and mental health disabilities, including social-emotional and behavior issues. Since 2001, she has been a research scientist for the Child & Adolescent Services Research Center at Rady, and a program evaluator at the Exceptional Family Resource Center at the San Diego State University Foundation. Since 2009, she has served as an adjunct instructor in the Special Education Advocacy Certificate program in the Continuing Education Department at the University of San Diego, where she teaches a half-day course on psychological assessment two semesters a year.

166. Dr. Baker-Ericzen has been providing Student counseling services since Student was in the eighth grade. She has attended several of Student's IEP meetings, including the February 9, 2010 and October 14, 2010 meetings. Although she is personally familiar with Student, she has never assessed Student or observed her at school.

167. Dr. Baker-Ericzen described Student as withdrawn and very quiet. She described that Student, when anxious, will manifest selective mutism, and be unable to communicate with others when stressed. She testified that Student's anxiety disorder is very severe, and that selective mutism impacts less than one percent of children with an anxiety disorder. Dr. Baker-Ericzen believes that Student's anxiety disorder is separate from Asperger's Disorder, but that the Asperger's Disorder exacerbates Student's anxiety disorder. Dr. Baker-Ericzen described Student as withdrawn, having poor posture, visibly shaken, and cries often.

168. Dr. Baker-Ericzen described that certain classes, such as math, and often the concept of school itself, are triggers to Student's anxiety disorder. Student's anxiety must be remediated through small, structured steps in a therapeutic forum. Dr. Baker Ericzen testified emphatically that home instruction, as offered in the October 14, 2010 IEP, was inapposite to meeting Student's unique needs and would act to reinforce her school-avoidance.

169. Dr. Baker-Ericzen has observed other students at Balboa, and is familiar with the structure of its classrooms, curriculum and therapy. She testified that the small, structured and therapeutic environment at Balboa was appropriate to meet Student's unique needs.

170. Dr. Baker-Ericzen has never been hired by the District to provide for Student's psychological needs. She has only attended Student's IEP's on behalf of Student, not the District.

171. She believes that Student required a referral for a mental health assessment since at least 2009, and that Student required intensive, school-based counseling services at that point in time. While she has provided Student private counseling, Dr. Baker-Ericzen testified that it is not contraindicated for the District to have provided its own counseling services for Student.

172. Dr. Baker-Ericzen testified that Student still requires intensive counseling services. She recommended that Student receive continuing mental health and counseling services.

173. Dr. Baker-Ericzen provided helpful testimony pertaining to the District's conduct at the IEP meetings and in areas concerning Student's anxiety disorder. However, she was circumspect when detailing her own services. Dr. Baker-Ericzen has been providing Student counseling for several years, during which time Student's anxiety disorder increased and her ability to access her school decreased. Although she participated in Student's IEP's at HTH, and during the most difficult time in Student's educational history, Dr. Baker-Ericzen's participation was mostly superficial. She never took it upon herself to request that the District assess Student in any area of deficit. She never requested for the District to change Student's placement to a smaller, structured and therapeutic program, as she recommended during her testimony. Nor did she request for the District to add any related services for Student, such as school counseling. Rather, the audio recordings, and even Dr. Baker-Ericzen's notes stemming from the February and October 2010 IEP meetings, reflect that she requested only minor accommodations on Student's behalf.

174. Dr. Baker-Ericzen has never assessed Student, and she has never attempted to observe Student outside of her office. She was unable to recall whether she had provided individual or family therapy to Student, nor was she able to explain in any detail what her therapy entailed. While Student was eventually able to access the



Balboa school, this progress coincided with Balboa's participation in Student's educational program, and not due to any changes in Dr. Baker-Ericzen's therapy. Ultimately, Dr. Baker-Ericzen was unable to describe what benefit her services have provided to Student. Her inability to describe her own therapy to Student diminished her persuasiveness as a witness for this matter.

DR. BRYAN BRUNS

175. Dr. Bryan Bruns testified as an expert witness in this matter.<sup>5</sup> He specializes in psychiatry and child psychiatry in San Diego, California. Dr. Bruns has had a private practice in San Diego since 1984. He trained at University of California at San Diego (UCSD) Medical School and the UCSD department of psychiatry, and at Yale University. He is an instructor on the UCSD department of Psychiatry. He sees both children and adults for psychoanalytic therapy, psychopharmacology, and psychoanalysis. He is certified by the American Board of Neurology and Psychiatry in adult, child, and forensic psychiatry. He is an adult and child psychoanalyst. He is past president of the San Diego Psychoanalytic Institute and the San Diego branch of the American Academy of child and adolescent psychiatry.

176. Dr. Bruns provided Student psychotherapy from August 2009 through December 2011. During this time, he prescribed Student various types of anti-anxiety medication, including Lorazepam. Dr. Bruns described Student as a shy, withdrawn girl, who has a serious anxiety disorder and significant communication delays. He described Student's communication delays as obvious and pervasive, and symptomatic of Asperger's Disorder. He has diagnosed Student with Asperger's Disorder, panic disorder and agoraphobia. Dr. Bruns described Student's anxiety disorder as unusually high.

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<sup>5</sup> Although Dr. Bruns was an independent, treating psychiatrist for Student, he was called as a witness by the District.

177. Dr. Bruns last observed Student in December 2011. He recalled that, at that time, Student's anxiety disorder had decreased somewhat, and that she had progressed in her ability to attend school at Balboa.

178. Dr. Bruns has never attended an IEP for Student, and he was not particularly familiar with Student's IEP's or school records. Primarily, Dr. Brun's role was limited to providing Student intermittent psychotherapy and prescriptions for medication. Nonetheless, his testimony was credible in describing Student's delays during the time frame in question.

#### MOTHER'S TESTIMONY

179. Mother testified on behalf of Student. She has always been an integral part of Student's education and has been actively engaged in every aspect of Student's development. She has observed Student at HTH and Balboa on dozens of occasions, and she is personally familiar with Student's teachers and most of her therapists. Mother was a vocal part of Student's education and frequently communicated with the staff at HTH, both in person and by email.

180. During the fall semester of the 2009-2010 SY, Mother described that she had alerted various employees at HTH, including at least Ms. Amato, Mr. Bell and Mr. Parker, that Student's anxiety was causing her psychosomatic symptoms. Mother frequently communicated with HTH staff regarding her concerns that Student was unable to go to school, or classes once at school, due to her anxiety disorder.

181. During the November 3, 2009 IEP meeting, Mother described that the District acknowledged her concerns by first eliminating all of Student's homework, and then increasing her time in the resource room. Mother described that Student's absences increased markedly during the first semester of 11th grade even with these accommodations.

182. Mother described that, following the November 2009 IEP meeting but prior to the winter break in December 2009, Mr. Bell had sent Student home from school due to an emotional meltdown. As of the February 9, 2010 IEP meeting, Student's anxiety and absences had increased, Student had missed 36 percent of the first semester of the 11th grade due to absences, compared with Student missing just 2 percent of middle school due to absence. Mother reported to the IEP team the reason Student was not at school was due to an increase in her anxiety, which was literally making her sick. Mother described frequent episodes, which she referred to as emotional meltdowns, of Student being unable to get out of her car, thereby being unable to attend school. She complained that the District has never included a single goal or service to address Student's anxiety, social-emotional deficits, or her school avoidance.

183. Mother frequently requested to meet with the District's SLP, and she had requested the attendance of the District's SLP at each IEP meeting. Mother has never met or discussed Student's services with the District's SLP, and she was confused by what the District was working on during the S/L services. She described that she had frequently requested information regarding the S/L sessions, including therapy logs; yet the District has never provided her any written documents pertaining to the S/L services.

184. Student has a brother (Brother) who also attended HTH, and who also received IEP services. In Mother's experience working with HTH regarding Brother, HTH does not routinely perform assessments over the summer, even when an assessment plan is signed prior to the summer break. Similarly, when she was presented the June 21, 2010 assessment plan, Mother believed the District was not expecting her consent to the assessment plan until the fall.

185. Mother testified that during the meeting with Robert Parker on June 21, 2010, he informed her it was not urgent for her to sign the proposed assessment plan. Rather, Mr. Parker explained that the assessment plan related to Student's triennial

assessment, which was not due until December 2010. Mother described her belief that, based upon this discussion, Dr. Norall's assessment would not be completed until December 2010, regardless when she signed her consent to the assessment plan.

186. Mother recounted the October 14, 2010 IEP meeting. Mother complained that the home instruction program lacked the support of any assessment, or recommendation from a physician or psychologist. She was also concerned that the District's offer failed to include a projected date for Student to return to school. Mother was further concerned that the home instruction program would be taught by a college student rather than by a credentialed teacher.

187. Although Mother attended the October 14, 2010 IEP, and has reviewed the IEP documents, she is uncertain whether the District offered an English class as part of this IEP.

188. Other than the October 14, 2010 IEP, Mother has consented to every IEP the District has offered for Student. She stated that she would have agreed to any assessment, including a mental health assessment or S/L assessment, and any services whatsoever, had such been offered by the District.

189. However, Mother disagreed with the October 14, 2010 IEP offer. Following the IEP meeting, Mother hand delivered a letter to the District which described Parent's dissent to the IEP and their intent to seek reimbursement from the District for a nonpublic school. Mother initially believed the District would respond to this letter with an offer for another IEP meeting and/or a different IEP offer. She was surprised when the District failed to respond in any manner to this letter.

190. Based upon her experience with HTH for both Brother and Student, Mother described that pupils are automatically re-enrolled at HTH for each consecutive school year. Once enrolled, there are no additional steps that HTH requires to re-enroll a student for the following school years, up through the student's graduation. Mother

never dis-enrolled Student from HTH. Consequently, despite Student's subsequent enrollment at Balboa, Mother believes that Student remained enrolled at HTH, through her graduation from high school.

191. Mother presented as a diligent, yet cautious, advocate for Student. Up through the October 2010 IEP, Mother cooperated almost fully with the District's delivery of Student's educational program. The only flaw in Mother's cooperation was her delayed consent to the June 21, 2010 assessment plan. However, she consented to the assessment plan in October 2010, and she credibly explained the basis of her delayed consent. Mother's testimony was often corroborated by audio or documentary evidence, which assisted in establishing her as a reliable witness.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. In a special education administrative due process proceeding, the party seeking relief has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed 2d 387]) In this case, Student has brought the complaint and has the burden of proof.

### OAH JURISDICTION

2. The Office of Administrative Hearings has the authority to hear and decide special education matters pertaining to the identification, assessment or educational placement of a child with a disability, or the provision of a free appropriate public education to the child. (Ed. Code, § 56501, subd. (a).) In this case, the Request for Due Process raises issues relating to the appropriate identification, evaluation and placement of Student. OAH has the authority to hear and decide these issues. (*Compton Unified School Dist. v. Addison* (9th Cir. 2010) 598 F.3d 1181, 1184; *Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029.)

## FRAMEWORK FOR DECISION

3. Under the Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, which meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

4. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the school district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 - 207.)

5. In *Rowley*, the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. (*Rowley, supra*, 458 U.S. at p. 201.) *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Ibid.*)

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

*Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) 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.*)

7. There are two principal considerations in claims brought pursuant to the IDEA; substantive denial of FAPE and procedural denial of FAPE. Unlike substantive failures, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation is subject to a harmless error analysis and constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484; *M.L., et al., v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, 653.)

#### The IEP

8. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each individual with exceptional needs. (Ed. Code, § 56340.)

9. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

## Formal, Written Offer of FAPE

10. An annual IEP must materially meet the content requisites of IDEA and the California corollary to IDEA, both of which require the IEP to be in writing and contain: a statement of the student's present levels of academic achievement; a statement of measurable annual goals; a description of the manner in which progress toward the goals will be made; a statement of the special education and related services, and supplementary aids to be provided to the student; an explanation of the extent, if any, to which the pupil will not participate with non-disabled pupils in regular classes and activities; a statement of individual appropriate accommodations necessary to measure a student's academic achievement and functional performance on state and district assessments; projected services start dates, duration, frequency, location of services and modifications; and, if 16 years or older, measurable post-secondary goals and appropriate transition services to help the student achieve those goals. (20 USC § 1414(d); Ed. Code, § 56345, subd (a).)

11. After the annual IEP meeting for the school year has resulted in an IEP, amendments to the existing IEP can be made without convening the whole IEP team, and without redrafting the entire document. An amendment created in this manner requires only that the amendment be reduced to written form and signed by the parent. The IEP and its amendment are viewed together as one document. (Ed. Code, § 56380.1.)

12. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1526 (*Union*).)



## Related Services

13. A school district must include "related services" in an IEP if those services may be required to assist a child with a disability to benefit from special education. (20 U.S.C. §§ 1401(26)(A), 1414(d)(1)(A)(i)(IV); Ed. Code, §§ 56345, subd. (a)(4)(B), 56363, subd. (a).) Related services are:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, *and medical services, except that such medical services shall be for diagnostic and evaluation purposes only*) ...

(20 U.S.C. § 1401(26)(A)(emphasis supplied).) State law adopts this definition of related services, which are called "designated instruction and services." (Ed. Code, § 56363, subd. (a).) The regulation that defines "mental health services" for the purpose of Chapter 26.5 includes psychotherapy. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

## The LRE

14. Both federal and state law require a school district to provide special education in the least restrictive environment (LRE) appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a) (2006); Ed. Code, § 56040.1.) This

means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii) (2006); Ed. Code, § 56040.1.)

15. In light of this preference for the LRE, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit Court of Appeals, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, adopted a balancing test that requires the consideration of four 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 would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student.

#### Assessments

16. Before any child can be found eligible for special education, a school district is required to assess the child in all areas of suspected disability. (20 U.S.C. § 1414(a); Ed. Code, § 56320.) Once a child has been found eligible for special education, a school district must reassess the child at least every three years, unless the parents and district agree otherwise. (Ed. Code, § 56381, subd. (a)(2); 34 C.F.R. § 300.303(b)(2) (2006).)

DETERMINATION OF ISSUE 1: WHETHER THE DISTRICT DENIED STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) FOR THE 2009-2010 SY, BEGINNING FEBRUARY 2, 2010, DUE TO THE FOLLOWING:

- a. By failing to refer Student for an AB2726 mental health assessment or assessing Student in the area of mental health.<sup>6</sup>

17. Student contends the District should have assessed Student in the area of mental health or, in the alternative, the District should have referred Student to the county department of mental health for a mental health assessment. By the time of the February 9, 2010 IEP meeting, Student asserts that the District should have referred her for a mental health assessment, or provided its own mental health assessment. The Student complains that at times prior to the February 9, 2010 IEP meeting, Student's mental health needs were apparent and the District knew, or reasonably should have known, that this area of deficit was negatively impacting her educational development.

18. At times applicable in this case, Chapter 26.5 of the California Government Code (referred to by the parties as AB 2726 for the legislative Assembly Bill that originated the law), set forth a comprehensive system by which a local education agency could refer a special education pupil suspected of being in need of mental health treatment to a local county mental health agency. On October 8, 2010, former California Governor Arnold Schwarzenegger vetoed a legislative funding appropriation for Chapter 26.5 educationally related mental health services and announced that the mandate to comply with Chapter 26.5 was "suspended." In February 2011, an appellate court upheld the funding veto, holding that even though the Governor could not unilaterally suspend

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<sup>6</sup> Mental health services provided to special education-eligible students under the IDEA are frequently referred to by the Assembly bills that created the law that governs the interagency responsibilities for the provision of such mental health services (AB3632 and AB2726).

the law, the funding veto relieved local county mental health agencies of the obligation to implement the services. (*Government School Boards Ass'n v. Brown* (2011) 192 Cal.App 4<sup>th</sup> 1507.)

19. Here, during the time frame at issue, from February 2, 2010 through October 14, 2010, there was no record of any discussion of the Governor's actions or their impact, if any, on Student's mental health services. Rather, Robert Parker affirmed that the District was responsible for providing a FAPE to Student during the time frame in dispute. (Factual Findings 92.)

20. The District does not dispute that it has never referred Student for a mental health assessment. Further, the District does not dispute that it failed to offer Student a District based mental health assessment from February 2, 2010, up to its provision of the June 21, 2010 assessment plan. Rather, the District contends it was not required to refer or provide Student a mental health assessment, primarily because Student failed to request this assessment during the February 9, 2010 IEP meeting. The District points out that this meeting was attended by Mother, Sister, and Dr. Baker-Ericzen, all on behalf of Student. Yet none of these participants requested any form of mental health assessment, or referral for mental health assessment from the District. While it would have been helpful had Dr. Baker-Ericzen recommended that the District obtain a mental health assessment for Student, ultimately, the District's argument fails as the duty to assess falls squarely on the District, not the Student, her parents, or even private therapists. Although Dr. Baker-Ericzen was a vocal participant at the IEP meeting in dispute, she was not a District provided participant and did not represent the District in any manner. Further, as there is no written document for the February 9, 2010 IEP, it is not possible to ascertain whether the District adopted Dr. Baker-Ericzen's recommendations into Student's IEP.

21. Here, by the time the February 9, 2010 IEP meeting was convened, it had become apparent that Student was suffering from an increasing mental health disorder and her educational program was suffering as a consequence. The IEP team met at Mother's request, and met specifically to address Student's increasing anxiety disorder, increasing absences, and resulting failing grades. At this time, the District had sufficient knowledge of Student's disorder and its impact on her education to have offered a District provided mental health assessment. Mr. Bell and Ms. Amato both testified they were aware of the need to refer students to the county department of mental health for mental health assessments when a student manifested signs of an emotional disorder. Each testified that they have made such referrals for other HTH pupils. Similarly, during the February 2010 IEP meeting, both Ms. Amato and Mr. Bell openly acknowledged that Student was suffering from a serious anxiety disorder, which was causing her panic attacks and illness, and this was the basis of her absences and failing grades. (Factual Findings 27-37.) Yet neither Ms. Amato or Mr. Bell, or anyone from the District, has acknowledged the District's responsibilities to refer or assess Student in this identified area of deficit. The District's failure to offer assessment in an identified area of deficit procedurally denied Student a FAPE.

22. Student continued to do poorly in school despite having average to above average cognitive abilities. Dr. Parker and Dr. Weckerly each testified that the District's failure to assess and remediate Student's anxiety disorder contributed to her increase in absences, to the point of being unable to attend school whatsoever, during the fall, 2010 semester. Student also continued to receive failing grades after the February 2010 IEP meeting. Evidence shows that Student was a positive candidate for educationally based mental health based services. Following Balboa's provision of school based counseling and a therapy rich program to directly address Student's anxiety disorder, Student was able to attend school, make honor role, and graduate with a high school

diploma. (Factual Findings 160). The District's failure to assess led to an IEP which failed to include school based counseling therapy, which denied the Student an educational benefit.

23. Consequently, the evidence substantially shows that the District's failure to refer, or provide its own, mental health assessment and related services, deprived Student an educational benefit, thereby denying Student a FAPE both procedurally and substantively.

b. Failing to assess Student in the area of speech and language prior to developing a speech and language goal and providing speech and language services:

24. Student asserts that the District denied her a FAPE because it has never assessed Student in the area of S/L, yet has been providing S/L goals and services throughout the time frame in dispute. In particular, Student asserts that the S/L goals and services were inappropriate because they were not based upon an assessment of Student's individual needs in the area of speech and language.

25. The District first asserted that it was under no duty to assess Student in S/L because this was not an area of suspected deficit. District argued that it had provided S/L services not because Student required this type of related service, but merely because Mother had requested S/L services on Student's behalf. However, when substantial evidence revealed that Student had a serious communication delay, the District modified its defense to an assertion that it had assessed Student for S/L, as part of its 2007 MDA. However, this argument was also contradicted by substantial evidence, including the District's SLP's admission that the District had never assessed Student in the area of S/L; and the 2007 MDA itself, which does not include an S/L component. (Factual Findings 8.) Finally, in its Closing Brief, the District argues that it was not legally required to assess Student in S/L prior to providing S/L services. As support, the District

points to *Student v. Etiwanda Unified School District*, OAH Case no. 2006050577 (*Etiwanda*). However, in *Etiwanda*, the assessment in dispute, occupational therapy, was deemed unnecessary by the ALJ because the Student's suspected disability was an auditory processing disorder, and not a deficit covered under occupational therapy. Contrary to the student in *Etiwanda*, here, Student had a communication deficit, which is an area of deficit routinely assessed within a speech and language assessment.

26. Moreover, *Etiwanda* does not trump *Rowley* or the Education Code. Here, the issue at hand is that the District failed to assess Student in an area of suspected deficit, specifically, a suspected disability in the area of language, which is assessed in a speech and language evaluation. The District's failure to assess Student in S/L is therefore a violation of the Education Code. (Legal Conclusions 16.) Moreover, by failing to assess in Student's area of suspected deficit, the resulting S/L related services were arbitrarily formulated, and not based upon Student's individualized needs. The Supreme Court has held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] Simply, by failing to provide a speech and language assessment to identify Student's unique deficits, the District was unable to provide special education services which were *individually designed* to provide an educational benefit to Student.

27. Ancillary state law also supports the proposition that a pupil with special needs must be assessed prior to the delivery of related services. The related section states in pertinent part:

A child shall be assessed in all areas related to the suspected disability by those qualified to make a determination of the

child's need for the service before any action is taken with respect to the provision of related services or designated instruction and services to a child, including, but not limited to, services in the areas of occupational therapy and physical therapy.

(Gov. Code, § 7572, subd. (a).)

28. Based upon Factual Findings 27 - 37, and 121 -124, the District provided S/L services that were re-offered in the February 9, 2009 IEP were ineffective and Student's language delays grew worse while she attended HTH. As of the February 9, 2010 IEP meeting, the District had knowledge regarding Student's language deficit and knowledge that the present S/L services were ineffective. The IEP team discussed problems attributable to the lack of foundation for the S/L services during this IEP meeting. It was incumbent upon the District, at this point in time, to refer Student for an S/L assessment. The District's failure to modify the S/L goals and services based upon an assessment of Student's individual needs resulted in an IEP which was not reasonably calculated to enable the child to receive educational benefits.

29. Additionally, at the February 9, 2010 IEP meeting, Mother requested, and was denied, basic information pertaining to the Districts provision and formulation of S/L services. The District failed to respond to these inquiries, in part because the formulation of Student's S/L services was not based upon an assessment. Exacerbating this problem, the District failed to include an SLP, or otherwise qualified person, at the IEP meeting to explain the basis and nature of Student's language needs and related services. (Factual Findings 27 – 37.) The District's failure to make this information available to Mother significantly impeded her ability to participate in the IEP decision making process regarding this provision of FAPE.



30. Based upon Legal Conclusions 24-30, the District's failure to assess Student in the area of speech and language denied Student a FAPE on both procedural and substantive grounds.

c. Failing to provide appropriate speech and language services in Student's IEP:

31. Student complains that the S/L services were inappropriate because they were not based upon an assessment in the area of S/L. Student further complains that the S/L services were not based upon measurable annual goals designed to meet the Student's unique needs.

32. The District argues (1) Student did not have an actual S/L deficit, so therefore it was under no legal obligation to provide any S/L services, and; (2) in its Closing Brief, the District asserts that the IDEA does not require that an IEP must contain measurable, annual goals.

33. The District's first argument fails for the same reasons cited in Legal Conclusions 25- 30 and Factual Findings 121 - 124, which show that Student did, in fact, have a serious communication delay which falls squarely under the umbrella of a language deficit.

34. The District's second argument, that there is no legal requirement for an IEP to include annual, measurable goals, also fails because it is directly contrary to applicable law. Rather, a pupil's IEP must contain a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs resulting from the disability to enable the child to be involved in and make progress in the general education curriculum, and that meet each of the child's other educational needs resulting from the disability. (20 U.S.C. §1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(2006); Ed. Code, § 56345, subd. (a)(2).)

35. Although the February 9, 2010 IEP meeting was an addendum IEP meeting, the District was under a duty to modify, as necessary, Student's education program based upon the information that was available to the IEP team at that juncture of time. Based upon the IEP discussion recorded at the February 9, 2010 IEP meeting, it was evident to the District that the S/L services had not been efficacious in addressing Student's language delay. The IEP team agreed that modification of the S/L service was necessary. (Factual Findings 27 - 30.) However, the District failed to act upon this IEP team discussion and failed to modify the S/L services in any manner following the February 9, 2010 IEP meeting. The District's conduct deprived Student the educational benefit of appropriate S/L services. Thus, the District failed on both procedural and substantive grounds to provide Student a FAPE.

d. Failing to implement agreed upon speech and language services.

36. Student complains that the District failed to consistently implement her S/L services. While Student missed a substantial amount of school due to her anxiety disorder, evidence shows that when Student was present at school, the District's SLP failed to provide several of Student's S/L sessions, and failed to make up these sessions.

37. Student further complains that the District failed to maintain records pertaining to Student's S/L services. Student bases a significant part of her concern that she was denied agreed upon S/L services on the fact the District failed to monitor the S/L sessions or maintain logs reflecting the frequency of the services provided. Student alleges that her progress in S/L was seriously compromised by the District's failure to consistently and effectively implement S/L services.

38. The District does not deny that it failed to provide all of Student's S/L services. The District SLP, Ms. Cordes acknowledged that there were times she was not available to provide the scheduled S/L sessions. Rather, the District asserts that because

Student did not have an actual S/L deficit, she was not harmed by District's failure to provide a consistent level of services.

39. A failure to implement a student's IEP will constitute a violation of the student's right to a FAPE if the failure was material. There is no statutory requirement that a school district perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a student with unique needs fall significantly short of the services required by the student's IEP. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811.)

40. The District's argument fails for reasons specified in Legal Conclusions 25 - 30. However, Student failed to show by a preponderance of the evidence that the District's provision of the S/L services fell significantly short of the services required by Student's IEP. Student failed to specify with any detail the amount of sessions which were missed due to the fault of the District. While the District failed to maintain S/L therapy logs, the NPA hired to provide the services maintained the logs for over a year following the completion of the service, then confidentially disposed of these records (Factual Findings 127.) Therefore, Student had sufficient time, had she felt this was an area of concern, to have requested the records.

41. Consequently, Student failed to show by a preponderance of the evidence that she was denied a FAPE due to a significant deprivation of agreed upon S/L services.

ISSUE 2: WHETHER THE DISTRICT DENIED STUDENT A FAPE PURSUANT TO THE OCTOBER 14, 2010 IEP MEETING BY (A) FAILING TO APPROPRIATELY ADDRESS STUDENT'S UNIQUE NEEDS IN THE AREAS OF (I) PRAGMATIC LANGUAGE, (II) SEVERE ANXIETY, AND (III) SOCIAL-EMOTION; (B) FAILING TO PROVIDE A SPECIFIC, WRITTEN OFFER OF PLACEMENT AND TO OFFER AN APPROPRIATE PLACEMENT, AND; (C) FAILING TO OFFER APPROPRIATE TRANSITION GOALS AND SERVICES.

42. In this case, Student has raised a number of objections to the process that culminated in the October 14, 2010 IEP for her. In particular, Student complains that the home program was not appropriate to meet Student's unique needs.

43. Placement in the home is one of the most restrictive placement options for a special education student. Special education and related services provided in the home or hospital are limited to eligible students for whom the IEP team recommends such instruction or services. (Cal. Code Regs., tit. 5, § 3051.4, subd. (a).) Before placing a student on home instruction, the IEP team must be assured that a student has a medical or psychological condition that prevents the student from receiving special education and related services in a less restrictive environment.

44. When recommending placement for home instruction, the IEP team shall have in the assessment information a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the student from attending a less restrictive placement. The report shall include a projected calendar date for the student's return to school. The IEP team shall meet to reconsider the IEP prior to the projected calendar date for the student's return to school. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).)

45. The October 14, 2010 IEP fails on several grounds. As discussed, the District could not have appropriately addressed Student's unique needs in the area of communication or pragmatic language without having first assessed Student in these

areas of deficit. (Legal Conclusions 24 - 30.) Moreover, the District merely repeated the same present level and S/L goal in this IEP, as what had been included in the two previous annual IEP's. Ms. Cordes testified that repeating the same IEP goals year after year generally indicates that a student has not progressed. (Factual Findings 129.) Ms. Cordes' lack of participation, or the participation of any person qualified to discuss Student's S/L needs, at the October IEP meeting further complicated Parents' ability to participate in the development of this aspect of the FAPE offer. Even absent an assessment, Ms. Cordes could have provided information regarding Student's present levels of performance and, based upon her direct observations, assisted the IEP team in formulating S/L goals. In this vein, Ms. Cordes' testimony was particularly damaging to the District, whereby she described that when an IEP team sees that a student is not progressing on her goals, it is incumbent on the team to investigate why the child is not progressing and adjust the goals and/or services. (Factual Findings 129.) The District failed to do either, or to take proper steps to address Student's individual S/L needs.

46. The District also neglected to include a single goal, or any services, to address Student's anxiety, social-emotional deficits, or her school avoidance.

47. Counseling and school based mental health services can be included in IEP designated instruction and services if required to assist an individual with exceptional needs to benefit from special education. (Legal Conclusions 13.)

48. Based upon Factual Findings 27 - 37, the District was aware that Student's anxiety was prohibiting her from accessing her regular classes. Further, the District testified that it routinely addresses mental health disorders through IEP based assessment and services. (Factual Findings 117.) Yet, the October 14, 2010 annual IEP failed to offer Student related services, such as counseling or direct therapy, or remediation of any sort for these serious areas of deficit. (Factual Findings 51 - 67.)

49. The District argues, in part, that it was unable to address Student's unique needs because Parents had delayed their consent to the June 21, 2010 assessment plan. However, this argument requires the court to speculate that the related assessment would have been completed by the October 14, 2010 IEP meeting. It also requires the court to speculate what the District may have offered had Dr. Norall's assessment been completed prior to the IEP meeting. This form of open-ended speculation is not required. Rather, the District was required to address Students unique needs based upon a snapshot of what it knew Student's abilities, and deficits, to be as of the October 2010 IEP meeting. In this regard, a snapshot of Student's unique needs included a serious anxiety disorder, school avoidance, social and emotional delays, and language delays. The October 14, 2010 IEP fails to include any goal or service to address Student's anxiety disorder, school avoidance, and social emotional delays. (Factual Findings 51 – 67.) Similar to the District's knowledge of Student's individual needs of the February 2010 IEP meeting, a snapshot of Student's individual needs at the October 14, 2010 IEP meeting would necessarily include the Student's language deficit and anxiety disorder. Consequently, the October 14, 2010 IEP failed to adhere to the requirements set forth in *Adams*, which required the District to formulate the IEP based upon information available at the time it was developed. (*Adams, supra*, 195 F.3d at pp. 1149-1150.) The District's failure to provide any support services designed to remediate her individual needs, such as counseling DIS, failed to take into account a snapshot of Student's unique needs at the time of the IEP, and deprived Student of a FAPE.

50. Next, the District's placement offer of homebound instruction fails on multiple grounds. Given the restrictive nature of home instruction, the District should have considered lesser restrictive placements such as a small, structured classroom. Yet, at this IEP meeting, there was no discussion regarding a continuum of lesser restrictive placements, nor did the District discuss how home-instruction would reduce Student's

school phobia. The District also failed to obtain an assessment or statement from a treating physician or psychologist which recommended home instruction, and failed to include a projected date for Student to return to school. (Factual Findings 51 - 67.)

Based upon the foregoing, the District violated the procedural requirements for home or hospital instruction as codified in the California Code of Regulations. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).)

51. The homebound program was also not therapeutically or educationally indicated in view of Student's severe anxiety and school avoidance. Drs. Parker, Baker-Ericzen and Weckerly each testified that a homebound program would reinforce Student's school avoidance and exacerbate her anxiety, instead of remediating the disorder. Moreover, the single course offered, math, was being provided at a far lower academic level than what was suited for Student. Ultimately, the home instruction program failed to offer Student anything other than a de minimis educational benefit. (Factual Findings 51 - 67.) The homebound program was also contradicted by evidence that Student progressed while in Balboa's small, structured classes, coupled with direct on-campus counseling, while utilizing a grade level curriculum. (Factual Findings 155 - 164.) Consequently, the District's offer for home instruction denied Student a FAPE.

52. The District's placement offer is also confusing on its face. The District premised the October 14, 2010 IEP offer on the belief that Student was unable to attend school due to her anxiety disorder. Yet, the District offered to provide the S/L services only at an unspecified school, with no mention how Student would access these services. More significantly, it is impossible to ascertain whether the District's placement offer included an English course; Mother and Robert Parker both testified they were uncertain whether the IEP offered Student an at-home English course. (Factual Findings 98 and 187.) The October 14, 2010 IEP, also details that Student will receive 100 percent of her education in general education. However, the IEP offer for home instruction fails

to provide any component of the school day in general education. (Factual Findings 51 – 67.) These errors create a confusing and vague IEP offer, and an IEP that would be difficult to implement or enforce.

53. The Ninth Circuit, in its decision in *Union*, explicitly stressed the importance of a written, formal offer of FAPE. In *Union*, the school district believed that a specific placement was appropriate for the student in the case. However, it had never made a specific offer of that placement because it believed that the student’s parents would never agree to it. The Ninth Circuit found that school districts are required to make specific written offers of placement in a student’s IEP and that failure to do so is not just a technical violation:

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in “present[ing] complaints with respect to any matter relating to the ... educational placement of the child .”  
20 U.S.C. § 1415(b)(1)(E).

(*Union, supra*, 15 F.3d. at p. 1526.)

54. For the foregoing reasons, the District’s IEP offer of October 14, 2010, failed on both procedural and substantive grounds to offer Student a FAPE.



55. Finally, Student complains that the District failed to offer an appropriate transition plan, including failing to offer appropriate goals and services to transition Student successfully into college, in the October 14, 2010 IEP.

#### The Individualized Transition Plan

56. "Transition services" are defined as a coordinated set of activities designed within an results-oriented process, focused on improving the academic and functional achievement of the individual to facilitate movement from school to post-school activities, including post-secondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation. Transition services are to be based upon individual needs, taking into account individual strengths, preferences, and interests. Transition services include instruction, related services, community experiences, development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. Transition services may be special education or related services. (Ed. Code, § 56345.1, subd. (a); 20 U.S.C. § 1401(34); 34 C.F.R. § 300.43(b).)

57. The analysis of whether FAPE was offered is not altered by the fact that "transition services" are at issue. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938.) "Transition services," like "special education" and "related services" are sufficient when a student was offered a FAPE under *Rowley*. (*J.L. v. Mercer Island School Dist., supra*, 592 F.3d 938.)

58. The failure to properly formulate a transition plan may be a procedural violation of the IDEA that warrants relief only upon a showing of a loss of educational opportunity or the denial of a FAPE. (*Board of Education v. Ross* (7th Cir. 2007) 486 F.3d 267, 276 [despite transition plans being a mandatory component of an IEP, notation in IEP that the transition plan would be "deferred" was a procedural violation]; *A.S. v.*

*Madison Metro School Dist.* (D. Wis. 2007) 477 F.Supp.2d 969, 978 [allegation of inadequate transition plan treated as a procedural violation].)

59. Here, the October 14, 2010 IEP included an Individualized Transition Plan (ITP). The ITP included Student's interests and preferences in attending college following graduation from HTH. The ITP included present levels of performance, and a transition goal. The ITP included Student's employment interests and community experiences. The ITP also included a description of Student's independent living skills and a transition goal for independent living. In addition, the ITP included a statement of present levels regarding Student's functional vocational performance. (Factual Findings 63.)

60. Student complains that the information contained in the October 14, 2010 ITP was based upon assumptions made by Ms. Amato. In fact, Ms. Amato testified that the ITP information was based upon her assumptions. However, these assumptions were predicated upon Ms. Amato working directly with Student for several years.

61. Student also complains that the ITP was not based on recent assessment of Student. While this complaint is correct, it is based, in part, on the Student's failure to timely consent to the District's individualized assessment plan. Given the lack of assessment data available at the time of the October 14, 2010 IEP meeting, it is reasonable that Ms. Amato would have used her extensive experience working with Student to ascertain her needs for the ITP. As Student's resource teacher, Ms. Amato was qualified to provide the information contained in the ITP. Moreover, Student, Mother, Sister, and Dr. Baker-Ericzen were present during the October 2010 IEP meeting; yet each failed to supplement the ITP in any manner during the meeting.

62. Student also complains that the ITP failed to address Student's pragmatic speech delays. While this failure impacts the entirety of the IEP offer, Student failed to provide any legal support that the ITP component was required to provide direct, related services.

63. For the foregoing reasons, the District's ITP of October 14, 2010, did not deny the Student a FAPE either procedurally or substantively.

**ISSUE 3: WHETHER THE DISTRICT DENIED STUDENT A FAPE FOR THE 2010-2011 SY DUE TO THE FOLLOWING:**

a. By failing to timely conduct triennial assessments:

64. On June 21, 2010, the District offered Student an individualized assessment plan which included a comprehensive psychoeducational assessment to be conducted by Dr. Norall. Per Mother's testimony, she believed the June 2010 assessment plan was provided in preparation for Student's triennial assessment and triennial IEP, which were due in December 2010. It was this basis of understanding which caused Mother to delay her consent to the June 21, 2010 individualized assessment plan until October 12, 2010. (Factual Findings 185.) Regarding this individualized assessment plan, Mr. Parker and Dr. Norall each testified that HTH contracted with Dr. Norall to assess Student in late June 2010. While there is some dispute when the related assessment would have been completed had Mother consented to the assessment plan in June 2010, each witness agreed that the assessment would have been completed at some time prior to December 2010.

65. On October 15, 2010, Dr. Norall telephoned Mother, and left a voicemail message, regarding scheduling Student's assessment. On this same date, Mother telephoned Dr. Norall, and left message regarding scheduling the assessment. Neither Student nor the District followed up in any manner following this point and the triennial assessment was never started or completed. (Factual Findings 44.) Mother had various methods for contacting Dr. Norall, including her email and telephone number. While the District could have taken greater steps to facilitate the scheduling of this assessment, it is puzzling that Mother failed to take any additional steps to obtain this assessment, which was to be provided by a highly qualified, independent assessor.

66. Based upon the forgoing, while the District failed to conduct Student's triennial assessment, the District took sufficient steps to provide this assessment. The reason the assessment was not completed timely, or at all, is in some part attributable to the conduct of Parents.

67. Based upon Legal Conclusions 64 - 66, the District did not deny Student a FAPE by failing to provide a triennial assessment.

b. Failing to timely convene an IEP meeting;

68. Student complains that the District failed to timely convene an annual IEP meeting for Student's 2010-2011 SY. Special education law requires that a school district convene an IEP meeting at least annually for eligible students. (20 USC § 1414(d); Ed. Code, § 56345 subd. (a).)

69. Based upon the Factual Findings 20 - 26, Student's prior, annual IEP meeting was held on November 3, 2009. Student's subsequent annual IEP meeting was the one convened on October 14, 2010, which is less than one year following the Student's last, annual IEP meeting. Thus, Student has failed to substantiate this claim.

70. Based upon Legal Conclusions 68 and 69, the District did not deny Student a FAPE by failing to have an annual IEP meeting for the 2010-2011 SY.

c. Failing to assess Student's speech and language needs in the area of pragmatic language.

71. Student complains that the District failed to assess Student's S/L needs in the area of pragmatic language, and the District's failure to assess her in the area of language denied her a FAPE for the 2010-2011 SY.

72. The District has never assessed Student in the area of S/L.

73. The District has never presented Student an assessment plan for S/L. During the October 14, 2010 IEP meeting, the District confirmed that the testing

included in the June 2010 assessment plan did not include a S/L assessment. Mr. Parker stated he would send Parents an additional assessment plan which would include assessment in the area of S/L. However, the District failed to send Parents this assessment plan. (Factual Findings 99.)

74. As found in Legal Conclusions 25 - 30, Student manifested a serious language delay while at HTH, and therefore S/L was an area of suspected deficit which the District was lawfully required to assess.

75. Based upon Factual Findings 121 - 132, the District provided S/L services were ineffective and Student's language delays grew worse while she attended HTH. As of the October 14, 2010 IEP, the District's failure to formulate the S/L goals and services based upon an assessment of Student's individual needs deprived Student of an educational benefit.

76. Based upon Factual Findings 27, 124, and 183, Mother frequently requested, and was denied, basic information pertaining to the District's provision of S/L services. The District's failure to make this information available to Mother significantly impeded her ability to participate in the decision making process regarding this provision of FAPE.

77. Based upon Legal Conclusions 71 -76, the District's failure to assess Student in the area of speech and language denied Student a FAPE, both procedurally and substantively.

**ISSUE 4: WHETHER THE DISTRICT DENIED STUDENT A FAPE, PROCEDURALLY AND SUBSTANTIVELY, FOR THE 2011-2012 SY BY (A) FAILING TO HAVE AN IEP IN PLACE AT THE BEGINNING OF THE SY, AND; (B) FAILING TO CONVENE AN ANNUAL REVIEW IEP MEETING BY OCTOBER 14, 2011.**

78. Student also complains that the District failed to offer Student an IEP for the 2011-2012 SY. Student asserts that District's failure to have an IEP in place at the

beginning of the SY, and to convene an annual IEP meeting by October 14, 2011, constitutes a per se denial of FAPE. Student claims that, although she was attending Balboa during this timeframe, she never disenrolled from HTH or the District. Student contends that once a student enrolls at HTH, parents are not required to reenroll their children each subsequent school year to maintain their child's enrollment status. Therefore, the District had an ongoing duty, in perpetuity, to formulate IEP's for Student through Student's graduation from high school. Student presented no legal authority to support this claim.

79. The District asserts that Student's conduct of enrolling at Balboa automatically acted to disenroll Student from HTH and the District. In this vein, the District argues it was not required to continue scheduling IEP's for a student who was privately placed.

80. Case law shows that "[a] school district is only required to continue developing IEP's for a disabled child no longer attending its schools when a prior year's IEP for the child is under administrative or judicial review." (*M.M. v. School Dist. of Greenville* (4th Cir. 2002) 303 F.3d 523, 536.) It is the pendency of review that creates the need to maintain and update the IEP. (*Amann v. Stow School System* (1st Cir. 1992) 982 F.2d 644, 651, fn. 4.)

81. Here, Parents dissented to the October 14, 2010 IEP, and privately placed Student at a private school, Balboa, in February 2011, for the remainder of the 2010-2011 SY. Parents continued to privately place Student at Balboa for the entirety of the 2011-2012 SY. Yet, Student did not file her complaint for due process until February 2, 2012. (Factual Findings 70.) Consequently, the District was not required to have an IEP in place at the beginning of the 2011-2012 SY, in September 2011, because this predated Student's request for administrative review of this matter. Similarly, the District was not required to continue developing Student's IEP's, including convening an annual IEP

meeting in October 2011, because this date also predated the February 2012 Student request for administrative review

82. For the reasons cited above, the District's failure to have an IEP in place at the beginning of the 2011-2012 SY, and to convene an annual IEP meeting by October 14, 2012, did not violate the IDEA or otherwise deny the Student a FAPE.

#### REMEDIES

83. Student has requested several remedies, including reimbursement for independent educational evaluations conducted by Dr. Weckerly and Geri Brown, compensatory education services in the areas of mental health and counseling, compensatory S/L services, reimbursement for tuition associated with the Balboa school, and transportation costs.

84. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].)

85. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at pp. 369-71.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. (C.B. v. Garden Grove Unified School Dist. (9<sup>th</sup> Cir. 2011) 635 F.3d 1155, 1159.) However, the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 13-14. [114 S.Ct. 361, 126 L.Ed.2d 284.])

86. Ultimately, ALJ's in special education cases have broad equitable powers. The latest Supreme Court iteration of this authority is found in *Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230 [129 S.Ct. 2484, 174 L.Ed.2d 168].

87. Based on Legal Conclusions 23, 30, 35, 55, and 77, the District denied Student a FAPE for one and one-half school years. As equitable compensation for this denial of FAPE, Parents are entitled to relief for Student's one and one-half school years spent at Balboa. Based upon Factual Findings 164, costs associated for tuition at Balboa for one and one-half school years was \$23,527. Balboa is located proximately close to HTH. Based upon this proximity, coupled with Student's failure to show that she required transportation as a special education related service, Student's request for transportation costs is denied.

88. Based on Legal Conclusions 30 and 77, the District denied Student a FAPE by failing to assess in the area of speech and language. As compensation for this denial of FAPE, the Parents are entitled to reimbursement for the costs of the speech and language evaluation conducted by Geri Brown. Per Factual Findings 142, the cost associated with this evaluation was \$1,750.

89. Based on Legal Conclusions 41, 63, 67, 70, and 82, all other claims for relief are denied.

## ORDER

1. Within 60 days of the date of this Decision, the District shall reimburse Parents in the amount of \$23,537, for the cost of tuition associated with Student's placement at Balboa City School for one and one-half years.

2. Within 60 days of the date of this Decision, the District shall reimburse Parents in the amount of \$1,750, for the cost of the speech and language evaluation conducted by Geri Brown.

3. Student's remaining claims for relief are denied.



## PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on the issues heard and decided. (Ed. Code, § 56507, subd. (d).) Here, Student prevailed on issues 1(a), 1(b), 1(c), 2(a), 2(b), and 3(c). The District prevailed on issues 1(d), 2(c), 3(a), 3(b), 4(a), and 4(b).

## RIGHT TO APPEAL DECISION

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

Dated: January 2, 2013

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PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearings