

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

COLTON JOINT UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2017060750

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on June 15, 2017, naming Colton Joint Unified School District. The matter was continued for good cause on July 25, 2017.¹

Administrative Law Judge Chris Butchko heard this matter in Bloomington, California, on October 10-12, 17-20, and 30, 2017. One day of telephonic hearing was had on October 23, 2017.

Alexis Casillas, Attorney at Law, represented Student. Student's parents attended all days of hearing in Bloomington. Student's advocate Taylor Casillas also attended all but the second day of hearing in Bloomington. Taylor Casillas and Father took part in the telephonic hearing.

¹ This case was previously consolidated with District's case, OAH case number 2017081086. District's issue for hearing was settled on the morning of the third day of proceedings and District withdrew its case.

Deborah R.G. Cesario, Attorney at Law, represented District. Janet Nickell, Pupil Personnel Services Director, and Rick Homutoff, Program Manager for the East Valley Special Education Local Plan Area, attended all days of hearing in Bloomington on behalf of District and the SELPA. They did not attend the telephonic hearing day. Stephanie Baril attended days one and three of the hearing.

A continuance was granted for the parties to file written closing arguments and the record remained open until November 14, 2017. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES²

Issue 1: Did District commit procedural violations which denied Student a free appropriate public education during the 2014-2015 school year by:

- a. Failing to conduct a full and complete psychoeducational assessment in response to the family's October 27, 2014 referral;
- b. Failing to convene an individualized education program team meeting within

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) The issues have been renumbered to better reflect the chronology and the order of analysis. Issue three from the Pre Hearing Conference Order has been renumbered as two, and what was issue two is now issue three. Issues five and six are now issues four and five, and issue four is now issue six. Upon settlement of District's case, Student withdrew subissues that were numbered 2d, 2e, 4c, 4d, 4e, 5a, 7a, and 7b in the PHC order. The subparts of remaining issues were renumbered to reflect the changes. In addition, Student removed reference to occupational therapy services from what is now subissue 7a.

legal time frames provided for in California Education Code, section 56043, after the family's October 27, 2014 referral; or

- c. Failing to convene a procedurally appropriate IEP team meeting or to consider all suspected areas of disability at the February 9, 2015 IEP team meeting?

Issue 2: Did District's offer of services at the February 9, 2015 IEP team meeting deny Student a FAPE because:

- a. The offer of speech and language services was insufficient;
- b. No other services were offered; or
- c. District failed to provide an appropriate placement?

Issue 3: Did District commit procedural violations that denied Student a FAPE during the 2015-2016 school year by failing to:

- a. Develop an assessment plan within 15 days of the family's August 21, 2015 referral;
- b. Convene an IEP meeting to review assessments within legal time frames provided for in California Education Code, section 56043, after the family's August 21, 2015 referral;
- c. Report progress on goals at the November 13, 2015 IEP meeting;
- d. Appropriately respond to the family's request for independent educational evaluations in the areas of occupational therapy, speech, and behavior; or
- e. Respond to Parents' March 9, 2016 educational records request within five days?

Issue 4: Did District's offer of services in the November 13, 2015 IEP deny Student a FAPE by:

- a. Offering insufficient speech and language services and specialized academic instruction to meet Student's needs; or
- b. Failing to offer other required services to meet Student's needs?

Issue 5: Did District's offers of FAPE made at the February 5, 2016, and March 9, 2016 IEP team meetings deny Student a FAPE because:

- a. District's offers of speech and language services, individual and group counseling, and specialized academic instruction were insufficient;
- b. District did not assess or offer Student other needed services, such as occupational therapy or behavioral intervention; or
- c. District did not address Student's claims of continued bullying?

Issue 6: Did District commit procedural violations that which denied Student a FAPE during the 2016-2017 school year by:

- a. Failing to timely convene an IEP meeting in response to the family's September 7, 2016, September 23, 2016, and November 13, 2016 requests;
- b. Failing to convene an IEP team meeting in response to the November 18, 2016 findings of severe and pervasive bullying; or
- c. Predetermining that no aide would be offered in response to the family's outstanding request?

Issue 7: Did District's offer of FAPE at the April 17, 2017 IEP team meeting deny Student a FAPE because:

- a. District did not offer Student needed services, such as behavioral intervention;
- d. District did not offer to provide Student with a one-to-one aide; or
- e. District did not address Student's claims of continued bullying?

SUMMARY OF DECISION

Student did not establish that he was prevented from discovering his causes of action because District concealed or misrepresented facts, and this decision is therefore confined to those claims pled within the two-year statute of limitations. District did not deny Student's right to a free appropriate public education through the procedural violations it committed in the 2015-2016 school year. District failed to adequately

respond to bullying Student suffered in the 2015-2016 and 2016-2017 school years and denied Student a FAPE by materially impeding Parents' participation in the decision-making process regarding Student's educational program. District denied Student a FAPE in the 2016-2017 school year by failing to timely convene the IEP team meeting which materially impeded parental participation. Student failed to meet his burden of persuasion on all other issues he presented for hearing.

FACTUAL FINDINGS

BACKGROUND

1. Student is a seven-year-old male who was born prematurely and suffered from a lack of oxygen when he failed to breathe after birth. Student spent over a month in a neonatal intensive care unit before being released home. Parents were concerned about Student's slow development as an infant but were told by their pediatrician that it would take time for him to catch up, perhaps two years. Student did not so catch up.

2. Student was evaluated for a speech delay by his health insurer at three years of age. In February of 2014 Student began receiving speech services provided by insurance. The speech provider planned to reevaluate him every six months to assess his progress, and suggested to Parents that they should enroll Student for preschool. Parents were told by District that they did not qualify for preschool because their income was too high, although Father argued that Student's speech impairment should make him eligible. Instead, Parents enrolled Student in a private preschool program.

3. In the fall of 2014 Student was four years old and still not talking. On or about October 24, 2014, Parents requested that District assess Student for eligibility for speech services. Father said that Student mostly pointed at objects and that he was so inattentive that it seemed like he was having seizures. District designated Srivathsan Nallur to do the assessment.

PRE-KINDERGARTEN SPEECH AND LANGUAGE ASSESSMENT

4. Mr. Nallur was an independent contractor who did work for District as part of a preschool team. He holds a bachelor's degree in speech pathology from the All India Institute of Speech and Hearing and a master's degree in the same field from the College of Speech and Hearing. He worked as a speech and language pathologist in India and the United States for approximately eight years, and then earned a doctorate degree in Audiology from the University of Florida in 2014. Mr. Nallur has worked as a speech and language pathologist in the public school setting for approximately eight years.

5. Mr. Nallur prepared an assessment plan after talking to Father on the phone, and Father signed the plan on October 27, 2014. Mr. Nallur conducted his assessment in three sessions, on October 27, November 5, and December 12, 2014. He would attempt to put Student at ease and then work with him for as long as Student participated. Each session lasted approximately 30 minutes. Student was not in school so it was not possible to do a school observation.

6. The testing led Mr. Nallur to conclude that Student had a need for speech and language services. He reported that Student had fair attention and was cooperative, despite spells of lethargy and inattention. Mr. Nallur did not find that Student had articulation problems, as his errors were either age-appropriate or caused by missing or emerging teeth. Mr. Nallur reported that Student would use two to three word phrases or sentences during testing, a developmental stage usually occurring between 18 and 24 months of age. He found that Student had inadequate communications skills, which could interfere with successful participation and social interaction. On that basis, Mr. Nallur concluded that Student should receive speech and language services from

District.³

7. Student's behavior during testing did not raise any concerns for Mr. Nallur that Student might have autism. Student warmed up to Mr. Nallur and interacted with him. He did not find that Student had impaired eye contact, was echolalic, or used jargon, and he believed Student had an age-appropriate level of language use. Mr. Nallur tests between five and seven students who have autism in an average year.

FEBRUARY 2015 IEP TEAM MEETING

8. The results of the speech and language assessment were presented at an IEP team meeting on February 9, 2015. The IEP team found Student eligible for services due to a speech and language disorder, and offered him 30 minutes per week of speech and language support. The team drafted two goals: a receptive language goal to have Student follow age-appropriate speech without gestures and an expressive language goal to have him lengthen his responses to what and where questions to three to four words. Parents were disappointed by the services offered, as they hoped that District would place Student in a preschool program. Parents consented to the IEP.

9. Despite the IEP offer of speech services, Student received only six or seven sessions in the 2014-2015 school year. Student was not yet attending school and was receiving speech services through Parents' insurance, so the majority of District's offered service went unused. In checkboxes on the first page of the report, the responses "School was on official break for more than 5 consecutive days" were marked in response to requests asking why the initial IEP was after Student's third birthday and to

³ At hearing, Mr. Nallur initially stated that he concluded Student should have received a preschool placement because of this delay. He clarified on examination by District that he meant that Student should have received speech services.

why the initial evaluation was beyond the 60-day timeline. Mr. Nallur caused those boxes to be checked. The parties have stipulated that the February 2015 IEP team meeting was held 16 days late.

2015-2016 SCHOOL YEAR: KINDERGARTEN

10. Student's formal education began when he started kindergarten in District in August 2015. He attended Rebecca Garrett's class, who was then in her 19th year teaching for District. Ms. Garrett holds a bachelor's degree in Liberal Studies and a master's degree in Curriculum and Instruction, both from Azusa Pacific University. The majority of her teaching experience has been in kindergarten and first grade classes. Ms. Garrett also has direct family experience with autism spectrum disorder.

Concerns about possible Autism Spectrum Disorder

11. Ms. Garrett knew that Student had an IEP and was receiving services. She began keeping a log of Student's behavior from the first day of school. From the first day she noted behaviors which alarmed her, such as laughing without cause, mimicking others, and perseverating in clapping and singing. She discussed Student's speech and attention issues with Mother during back to school night and had a conference with both Parents on August 7, 2015. At the conference, Ms. Garret expressed concern that Student might have autistic characteristics. Father requested additional testing of Student. Ms. Garrett then began filling out the paperwork to request a Student Study Team intervention.

12. On August 19, 2015, Ms. Garrett discussed Student with the speech aide who provided services to Student. The aide agreed that additional testing was justified to see if Student had issues in areas other than just speech and language. Student appeared to be adjusting to school routines until the first full week of October 2015. From that point, Ms. Garrett believed that he began regressing in his behavior,

becoming more inattentive, distractible, and prone to laughing, mimicking, and making noises. He had difficulty sustaining attention, and had to be redirected to his work as often as every minute.

13. Parents sent a letter to District on August 21, 2015, expressing concern that Student had “other learning disabilities that have not been identified.” Ms. Garrett subsequently met with Parents and learned that they wanted an aide to help Student with his difficulty paying attention in class. Ms. Garrett initially thought that they were requesting a classroom aide to help her teach, and was supportive of the idea. No assessment plan was generated in response to Parents’ request during back to school night or to Parents’ letter.

September 2015 Addendum IEP Team Meeting

14. District held an addendum IEP team meeting on September 15, 2015, to “address parent’s concerns with [Student’s] academics and social interaction.” The notes report that Father believed Student was displaying behaviors characteristic of autism. The team decided that Student should receive a psychoeducational assessment. Father signed an assessment plan that day, which was supplemented by another plan on October 13, 2015. The second assessment plan added a new speech and language assessment to update the earlier assessment and to look at Student’s social language skills. Parents consented to the addendum report, but believed that the IEP team process had become less collegial at this point.

15. Parents took Student for an assessment by their health insurer after the September 15, 2015 IEP team meeting. While chaperoning a school field trip on October 23, 2015, Father informed Ms. Garrett that Student had been diagnosed with autism by their health insurer. Father noted that Student was being excluded by the other children. Student began receiving Applied Behavioral Analysis therapy, including an ABA aide in the home, and occupational therapy services for one hour per week as well as an hour

per week of speech service through insurance. About a week after the field trip, Ms. Garrett took maternity leave and was absent from school for several months.

District Speech and Psychoeducational Assessments

16. District staff began work on the assessments. The psychoeducational assessment was conducted by Nora Zeller. Ms. Zeller received a master's degree from Humboldt University in Psychology in 2010 and has been a licensed educational psychologist since 2015. She has worked as a school psychologist for seven years, the last three with District. She does between 60 and 80 psychoeducational assessments per year, and five percent of those involve students who have or are suspected of having autism.

17. Ms. Zeller's assessment found that Student met the criteria to qualify for special education services as a child with autism. She found that he struggled to sustain attention, had deficits in adaptive skills, and had social skills deficits. The assessment report noted that Student clearly met six of the seven statutory characteristics of autism. He exhibited behaviors that might mark him as different from his peers, such as echoic or scripted speech, lack of eye contact, mimicry of others, excessive proximity, preoccupations, insistence on routine, and peculiar gestures, including flapping his arms. Ms. Zeller's report recommended modelling of behavior, use of charts and schedules, removal of distractions in Student's workspace, and prompting and praise to shape his behavior.

18. Mr. Nallur conducted a new speech assessment, which found that Student's speech and language difficulties could negatively affect his educational performance both academically and socially. Mr. Nallur noted that Student could maintain eye contact "briefly," would respond when called, and answer simple questions. Student could not, however, initiate conversations or requests for help, respond to regret, or use appropriate greetings. The report recommended services to improve

Student's receptive language, expressive language, and social skills.

The November 2015 IEP Team Meeting

19. An IEP team meeting took place on November 13, 2015, to discuss the assessment reports. Mr. Nallur and Ms. Zeller recalled discussing Student's progress on his language goals, but no report of the discussion appears in the report's notes. The report found that Student was strongest in math, but had some areas of weakness there, as well as in reading and writing. A new matter was the recognition that Student had social skills deficits. Goals were added for social skills, on-task behavior, as well as in each academic area. As a result of the meeting, Student was offered 120 minutes per week of collaborative specialized academic instruction in addition to his current level of speech service. Parents agreed to the offer, although they still wanted a one-to-one aide for Student.

Bullying

20. On February 9, 2016, Parents wrote to District complaining that Student had been bullied at school for five months and that it was worsening. They reported that Student was being taunted, pushed, intimidated, and ostracized. Parents reported that Student would come home with unexplained injuries and that they saw another student readying to strike Student before a staff member intervened. Parents believed that the bullying started around October of that year, when the other students began to recognize that Student was different. They reported that a psychologist had told them that Student was displaying symptoms of depression secondary to bullying. Parents believed that making this complaint further soured their relationship with District.

21. Ms. Garrett returned from maternity leave in February 2016 and resumed teaching. She found towards the end of the year that Student could now work independently with some prompting, and only needed redirection every 15 minutes.

During her maternity leave, Ms. Garrett had monitored Student's work and noted that he had progressed from not being able to write his name to writing two-word sentences.

22. Ms. Garrett believed Student was performing acceptably by the end of kindergarten. By the end of the year, Student knew all his letters and the numbers from one to 20. He was grade-level proficient in math, although he had difficulties with subtraction and decomposition. He had difficulty with phoneme awareness, and was at mid-year kindergarten level in reading. His writing abilities were at grade level. She believed he was on a par level overall with his peers. He did not display disruptive behaviors, and she never observed anyone bullying him.

February 2016 IEP

23. Student's next IEP team meeting was scheduled for February 5, 2016, but cancelled due to Parents' unavailability. The District IEP team members then held a brief session to discuss "demographics." The IEP team meeting commenced on March 9, 2016.⁴ The IEP report's notes record that Parents voiced concerns about bullying and their disagreement with the assessments done for the November 2015 IEP team meeting. They also disagreed with Student's placement and the services he was receiving.

24. The IEP team found that Student was still eligible for services due to autism and speech and language impairment. District's offer of FAPE consisted of the same level of speech and specialized academic services previously received, but added 240 minutes per year of individual counselling and 240 minutes per year of group

⁴ The two sessions will jointly be referred to as the February IEP 2016 IEP team meeting.

counselling. Ms. Zeller added the counselling because she believed Student had “plateaued” in his social skills progress. She had also heard at that time that Student was being bullied, which, together with Student’s social skills deficit, suggested to her a need for counselling service. She never observed Student being bullied.

25. Ms. Zeller understood the 240 minutes of individual counselling not to represent a full year’s service, but instead a module of social skills instruction and counselling to be provided to him. After that was completed, Ms. Zeller intended that Student be evaluated for further services. She did not, however, explain that intention at the IEP team meeting or to Parents.

26. Student’s previous goals were adjusted and four new goals added to Student’s IEP. The new goals were in mathematics, on-task behavior, receptive language, expressive language, and social language. Some goals were poorly fitted to Student. The writing goal projected that by the June 2016 checkpoint Student would be able to write a response that could earn a 1.5 score on the grading rubric. In the IEP comment page, Ms. Garrett is cited as informing the IEP team that Student was currently achieving 2.0 scores on his writing assignments. The mathematics goal was updated by increasing Student’s target success rate in making calculations by five percentage points for each benchmark. In addition, the goal added a ‘fudge factor’ allowing Student’s answer to be off by 5, 8, and then 10 at each benchmark.

27. The comments also note that Parents “shared that he has been bullied and can be targeted because he doesn’t have the social skills.” Parents requested an “ABA therapist” to help him. According to the comments, Parents were informed that there was a district bullying complaint they could fill out. No other reference to that issue appears in the IEP team meeting report. Parents did not consent to the IEP.

28. District sent a letter on March 15, 2016, responding to a report made by Parents on March 14, 2016, that Student was the victim of bullying or harassment. The

letter stated that the reported incident was isolated or that there was a lack of evidence. As a result, the letter stated that there had been a finding that there was no severe or pervasive bullying.

2016 Requests by Parents

29. Parents' counsel sent a letter on March 9, 2016, requesting all of Student's psychological and school records. The parties stipulated that the records should have been provided by March 16, 2016, but were not produced until March 24, 2016.

30. Parents sent a letter on March 9, 2016, requesting independent educational evaluations in psychoeducational functioning, occupational therapy, speech and language, and behavior.⁵ District agreed to fund the assessments, writing letters dated April 6, 2016, (psychoeducational and speech and language) and April 13, 2016. District did not formally approve the Speech or OT assessors until June 22, 2016, because of concerns it had about the qualifications of the assessors and the cost of the assessments. Despite that, both assessors completed their in-person evaluations of Student before that date.

SPEECH AND LANGUAGE IEE

31. Because the assessments were performed by independent contractors, District did not have control over the dates of completion. The independent speech and language assessment was conducted by Michelle Adams of SenseAbilities on May 25, 2016. She found that Student had normal ability in receptive language, but had a moderate deficit in pragmatics and a severe deficit in expressive language. He also had

⁵ No assessment of occupational therapy needs or functional behavior analysis had been made by District at the time of Parents' request. Parties used the terms 'assessments' and 'evaluations' interchangeably, and the same is done herein.

a moderate deficit in speech production, caused by a moderate deficit in articulation at the single word level. Her report did not contain a recommendation for services, but only found Student's continued eligibility under speech and language impairment.

OCCUPATIONAL THERAPY IEE

32. The independent occupational therapy assessment was done by Dawn Arias, who also worked for SenseAbilities. Ms. Arias stated her findings in a report dated October 18, 2016. The assessment found that Student had visual-motor deficits that manifested in his handwriting. His sensory profile was coordinate with his autism. The report stated that Student had self-help needs in the classroom, as he needed assistance with opening his lunch and in maintaining his workspace. This report stated that Student needed occupational therapy services to assist him in class.

FUNCTIONAL BEHAVIOR IEE

33. Parents chose Autism Spectrum Therapies to do the independent functional behavior analysis. Chelsea Abercrombie Huynh performed the assessment under the supervision of Trishia Lorimer. The report was completed on August 25, 2016. The report stated that Student did make eye contact, could respond to questions posed by an adult, and was able to transition between activities. His areas of need included difficulty engaging with peers, asking for help, and dealing with off-task behavior. The report stated that Student was off task for one-third of the instructional time. The report recommended a behavior intervention plan including visual supports, communication training, and a 'token economy' for motivation. The report recommended provision of a one-to-one aide for 1,750 minutes per week to teach Student "specific goals and classroom routines."

MR. DI SALVATORE'S PSYCHOEDUCATIONAL IEE

34. Giorgio Di Salvatore was assigned Student's independent psychoeducational assessment. Mr. Di Salvatore had a private practice as an educational psychologist at the time he was contracted to do the assessment and when he presented the report in April of 2017, but at the time of hearing he had taken a position with Upland School District as a school psychologist. Mr. Di Salvatore holds a degree in Special Education from Utah University and a master's degree in school psychology from Azusa Pacific University. Mr. Di Salvatore conducted testing of Student on May 20 and 23, 2016, but, as discussed below, did not produce a final report until after April 13, 2017.

2016-2017 SCHOOL YEAR: FIRST GRADE

35. Student's first grade teacher was Steven Putman. Mr. Putman had 14 years of teaching experience for District. He has an undergraduate degree from California State University at San Bernardino and received his multiple state CLAD teaching credential from Chapman University. He has taught exclusively in kindergarten and first grade.

36. Mr. Putman found that Student entered his class at grade level in math and reading, but below his expectation in writing. Student's writing samples were incomplete and choppy. Over the course of the year Student's progress slowed, which Mr. Putman assumed was due to the greater rigor of the work. Because Student was extremely slow at producing work, Mr. Putman reduced the volume of his assignments but did not adjust the curricula studied. At the end of the year, Student was a 2-basic in most academic areas, which is below 3-proficient.

37. Student did have attention problems in Mr. Putman's class, which he estimated required Student to be redirected six times every 30 minutes. This was more

than the other students in the class, although a few others were close to that. Mr. Putman estimated that toward the end of the school year Student only needed to be redirected two times per half hour. Mr. Putman believed that he was able to redirect Student's attention as part of his normal teaching duties.

Parent's September 2016 Request for the IEP Team to Review the IEEs

38. On September 7, 2016, Parents sent a letter to District requesting an IEP team meeting "before the end of the month" to discuss the four independent assessments that had been granted in April of 2016. Parents requested that each assessor attend the meeting. Parents followed up that request by email on September 23, 2016, and were told that District was contacting the assessors to get their reports and determine their availability for the meeting. Parents again wrote to request a meeting on November 15, 2016.

39. District responded the next day, stating that they had received all the independent assessment reports except Mr. Di Salvatore's psychoeducational assessment. District hoped to hold the IEP meeting in December. Student's counsel responded, noting that one of the assessors wanted to conduct supplemental observation and testing to keep their report valid.

40. Kathy Walck, District's Special Education Coordinator, contacted Mr. Di Salvatore by email on September 12, 2016, asking that his report be sent to her by email. She followed up with another request on October 7, 2016, and her assistant made another request on October 28, 2016. Mr. Di Salvatore wrote back on Wednesday, November 2, 2016, thanking her for her patience and telling her "I will have that report to you by this weekend." No report was sent.

41. Not having received the report, she wrote again on November 8, 2016. On November 16, 2016, Ms. Walck wrote to Mr. Di Salvatore because she was trying to schedule the IEP team meeting to discuss the independent evaluations on the week of

December 12, 2016. She noted that they could not do so without him having completed his report. She wrote again on November 28, 2016, to ask if the report was available. Mr. Di Salvatore did not respond.

November 2016 Finding of Severe or Pervasive Bullying

42. On November 15, 2016, Father submitted to District a bullying/harassment complaint form reporting that Student was being verbally and physically abused. Student told Father that another pupil at the school was calling Student "the annoying kid" and had gotten other students to do the same. Father went to school and observed other students excluding Student from their play by pushing him away when he attempted to participate. Father reported that Student no longer wished to go to school because the other students were mean to him. District investigated and verified the complaint, and noted that the bully admitted that he "pushed the same student down and stepped on his foot, and bumped into him. This has happened on multiple occasions over the past few weeks."

43. On November 18, 2016, District sent a letter to Parents. The letter stated that as a result of a report on November 15, 2016, District had investigated and found that Student had been a victim of "severe and/or pervasive bullying or harassment." The report noted that Student had experienced "one or more" of "fear of harm, substantially detrimental effects to his/her physical or mental health, substantial interference with academic performance, or substantial interference with his/her ability to participate in services or activities provided at school." The letter noted that "appropriate disciplinary measures" would be implemented. Student was offered the opportunity to transfer to another school "contingent on space availability," but that he was not required to do so. The letter noted that as Student was the victim of persistent bullying, transferring might help Student feel safer.

Occupational Therapy IEE is updated

44. The parties arranged for Dawn Arias to update her occupational therapy report, which she did by observing Student in Mr. Putman's classroom on February 14, 2017. The new report did not state that Student had visual-motor deficits, nor did he have self-help needs in the classroom. The report no longer recommended that Student receive occupational therapy services, but suggested that the IEP team consider and determine whether he had a need for them.

45. Ms. Walck again reached out Mr. Di Salvatore to find out when he would provide his report. Contacting him was difficult, because Mr. Di Salvatore would not take phone calls and requested all communication take place through email. He told Ms. Walck in the winter of the 2016-2017 school year that he wanted to observe Student in his new class. Parents would not agree to the observation because they were unwilling to wait additional time for the report after waiting eight months.

Mr. Di Salvatore produces a draft report to Parents and District

46. Mr. Di Salvatore finally presented a draft report to Parents by email in December 2016, which he said was incomplete and an early draft, and sent it to Parents. According to Father, Mr. Di Salvatore told him after he observed Student in May that Student needed a one-to-one aide. Parents discussed the report and its observations with Mr. Di Salvatore. They recalled that the report included a recommendation that Student receive a one-to-one aide, which they very much desired for their son.

47. Mr. Di Salvatore submitted the draft report to District by email on January 9, 2017. In the email, Mr. Di Salvatore reported that this was a draft report lacking detail in a number of areas. He included questions for District highlighted in blue and issues left for his further consideration highlighted in yellow. He noted that he wanted to see Student's grades and that he was planning on adding material about Student's communication and socialization issues "as this is the student's primary area of concern

for the family and the school.” Once he got that material input, he indicated he would finalize and submit the report. No updated report was provided until April 15, 2017.

48. Mr. Di Salvatore forwarded Parents the email he sent to District with the draft assessment report attached two minutes after he sent it to District. He wrote to Parents: “I sent the email below before I blind cc:d you. We will talk soon after they get me the information I need to finalize the report. Giorgio.”

49. On Tuesday, January 24, 2017, Ms. Walck wrote to Parents to clear dates for an IEP team meeting in February. On January 31, 2017, she wrote with specific dates, suggesting that the meeting be held on February 6, 2017, with time for continuation on February 22, 2017. Mother replied that Parents were available either date, but wanted the meeting completed in one day. The IEP team meeting was scheduled for February 6, 2017. On February 3, 2017, Ms. Walck wrote that the occupational therapy independent assessor would not be ready to meet on February 6 and asked if Parents wanted to continue with the meeting on that date. Mother replied that Parents wanted all the assessors present at the same time and asked that another date be found.

District Staff meet with Mr. Di Salvatore

50. A meeting was held at Student’s school without Parents on February 6, 2017. Mr. Putman was called out of class that day to meet on Student’s matter with District members of the IEP team and Mr. Di Salvatore. He attended the meeting for approximately 45 minutes before being sent back to his class. Mr. Putman did not recall discussing at that meeting whether Student should have an aide, but would have been adamantly against it. He had decided long before that he opposed giving Student an aide. Mr. Putman believed that he was capable of redirecting Student’s attention and did not want an aide in his class. Both Ms. Walck and Mr. Di Salvatore denied discussing Student’s need for a one-to-one aide at this meeting. Mr. Di Salvatore stated at hearing that he did not review his recommendations with Parents or District prior to the IEP

team meeting in April 2017.

51. Following the meeting with District staff, Mr. Di Salvatore sent a letter on April 13, 2017, to District stating that he had been suffering medical ailments for the last two months and had limited vitality and strength. As a consequence, he asked if he could attend the IEP meeting telephonically. The letter included the following: "Also, I do not know if parent has a copy of the report or not, but since my last observation of [Student] was the previous school year, I do not feel comfortable providing a recommendation for a 1:1 aide at this time. I would like to modify the wording on the recommendation that mentions an aide. Am I able to do so?"

The April 2017 IEP Team Meeting

52. District convened an IEP team meeting on April 17, 2017. Although he had met with District staff in person in February 6, 2017, Mr. Di Salvatore presented his psychoeducational assessment by telephone at the IEP team meeting. He did not recommend that Student be provided a one-to-one aide. This disappointed and surprised Parents. Ms. Lorimer, who supervised the functional behavior assessment, believed that the assessment should have been updated before being presented at the April 2017 IEP team meeting. Nevertheless, Ms. Huynh presented the team with her agency's recommendation that Student be provided with a full-time aide to support his goals and teach him class routines. Despite the advocacy of Parents and Ms. Huynh, the District IEP team members decided not to offer aide services.

53. The offer of FAPE at this meeting was substantially similar to that offered in the February 2016 IEP. The offer maintained 120 minutes per week of specialized academic instruction and 120 minutes per month of speech and language services, but reduced both the group and individual counselling to 180 minutes per year. Added to Student's services were 30 minutes per month of pull-out specialized academic instruction. Parents did not agree to the offer.

Mr. Di Salvatore's Psychoeducational IEE Report

54. Mr. Di Salvatore's report went through multiple revisions, and the different versions do not contain dates or version numbers. District was in possession of two versions of his report. Regarding Student's need for an aide, the draft received by Parents states:

For the offer of FAPE, should the team decide that the direct supervision of an assistant is required at any point in time for educational and social benefit, it is the recommendation [sic] that team consider the use of a temporary assistant primarily for social activities in- and out-side of the classroom setting. Given this evaluator has not observed [Student's] functioning on-site in approximately a year, a finite recommendation for a personal assistant cannot be offered at this time.

The version presented at the IEP meeting was submitted by email to Ms. Walck on April 15, 2017, and replaces the above with:

To minimize social stigma and dependency, a personal assistant for [Student's] social integration should only be considered after all school-based therapeutic resources have been exhausted via [sic] the speech/language pathologist, the school psychologist, behavior specialist, mental health psychologist, and occupational therapist, and school efforts to minimize bullying victimization (e.g. student and staff training) have been implemented.

Further Report of Bullying

55. On May 9, 2017, Parents' counsel informed District that Student was still being bullied by being socially ostracized and being put on "time out" by his classmates for the recess periods. District again investigated. District Staff interviewed Student, who told her that the bullies were not classmates. Student was asked if he would point them out to her. He "got quiet and said nothing." The investigator then spoke with a playground supervisor who said that she had put Student on a two to three minute time out for pushing other students one time the previous week. District then closed the inquiry and issued a letter dated May 19, 2017, stating that an incident had occurred but that it did not amount to severe or pervasive bullying. Parents were informed that "implementation of appropriate means of correction" was being done.

2017- 2018 SCHOOL YEAR: SECOND GRADE

56. Peter Stoefel teaches Student's second grade class. Mr. Stoefel found Student to have difficulty in reading, where fluency was a struggle. His fluency was so low that it could not be assessed by the Dynamic Indicators of Basic Early Literary Skills, a test used by elementary school teachers to measure a student's reading progress. Student's writing skills were at the "minimal level of expectation" for an incoming second grader.

STUDENT'S EXPERT WITNESS

57. Student presented Jan Blacher as an expert witness regarding the effects of bullying on students with autism. She is faculty chair of the Departments of Education and Psychology at the University of California at Riverside. She also holds a joint appointment as a professor of psychology at the University of California at Los Angeles. She received her bachelor of arts degree with honors in psychology from Brown University and her Ph.D. from the University of North Carolina at Chapel Hill. Her

dissertation was on social cognition in early childhood. Dr. Blacher was a postdoctoral fellow and visiting associate professor at Harvard Medical School. She holds fellowships with the American Institute for the Advancement of Science, the American Association for the Scientific Study of Intellectual Disability, the American Association on Mental Retardation, and the American Psychological Association. She has had numerous articles published in peer-reviewed journal and a long list of honors received. In addition, she was part of the group that established the board certified behavior analyst credential. Dr. Blacher bears impressive credentials and was a persuasive and highly credible witness, being quick to acknowledge weaknesses in some of her positions while explaining why they were nevertheless justified.

58. Dr. Blacher was retained on a capped fee to provide her expertise to Student's family. She has focused on children with autism for the last 25 years and takes particular concern about students with disabilities who are bullied. She observed Student at his school during recess and stated that she had never seen a child so alone. He was being excluded from all play and ignored by the adults supervising the yard. Although she acknowledged that there may have been an immediately prior event that put that distance between Student and his classmates, she did not think that was likely given the degree of his isolation. She saw Student in class and noted that he was often inattentive or off-task, but did not feel his need for redirection was beyond what could be expected of his classroom teacher, even given the need to teach the entire class. She believes that social exclusion is more significant than physical bullying. Her personal observation of Student was brief, but she detailed two graduate students who did additional observations and added detail to her report.

CREDIBILITY

59. Ms. Garrett, Student's kindergarten teacher, was forthright and economical in her testimony, although her absence from school during a significant portion of the

year reduced her ability to observe events. Mr. Putman, the first grade teacher, was honest, direct, and radiated a sincere desire to help Student. He introduced the fact that he had a meeting with District staff and Mr. Di Salvatore without Parents present to discuss Student on the seventh day of the hearing, a matter that had not been disclosed before then. Father was also an impressive witness, and appeared honest and measured.

60. Ms. Adams, the independent speech assessor, was not a strong witness. Her credibility was impaired by her habit of frequently looking toward District staff at counsel table to check their reaction after giving an answer. Ms. Smith, the principal of Student's school who testified regarding District's response to the bullying allegations, was not a persuasive witness, as her demeanor was guarded and she parsed her words carefully while constructing her answers.

61. Mr. Di Salvatore stated that he was unable to testify in person because of fragile health. His testimony was taken telephonically, so his demeanor and attitude were not observable. His reticence to testify, the stilted nature of his answers, and the conflicts between his testimony and his written statements in the record did not enhance the credibility of his testimony.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁶

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20

⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁷ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

4. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA in 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases were applied to define the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. The Supreme Court’s recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.____ [137 S.Ct. 988] reaffirmed that to meet its substantive obligation under the IDEA, a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. The Ninth Circuit further refined the standard in *M.C. v. Antelope Valley Unified School Dist.*

(9th Cir. 2017) 858 F.3d 1189, 1194, 1200-1201, stating that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so as to enable the child to make progress in the curriculum, taking into account the child's potential.

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56 62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student, as the complaining party, bears the burden of proof in this case.

ISSUES ONE AND TWO: THE STATUTE OF LIMITATIONS

7. The statute of limitations in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) An action must be filed within two years from the date a party knew or had reason to know of the facts underlying the action. (Education Code section 56505, subdivision (l), see also title 20 United States Code section 1415(f)(3)(C) ("knew or should have known about the alleged action that forms the basis of the complaint.") The law contains exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational

agency's withholding of information from the parent that was required to be provided to the parent. (20 U.S.C. § 1415(f)(3)(D)(i) and (ii); Ed. Code, § 56505, subd. (j)(1) and (2).) The Ninth Circuit recently reaffirmed this rule. (*Avila v. Spokane School Dist.* 81 (2017) 852 F.3d 936.) Otherwise, the statute of limitations for due process complaints in California precludes claims that occurred more than two years prior to the date of filing the request for due process. Cal. Educ.Code § 56505(l); 20 U.S.C. § 1415(f)(3)(c). (*M.M. v. Lafayette School District* (9th Cir. 2014) 767 F.3d 842, 309.)

8. Student contends that District misrepresented material facts concerning Student's disability and withheld required information, thus preventing Student from filing suit to enforce his rights. Student contends that the checked boxes on the February 9, 2015 IEP team meeting report constitutes misrepresentation of the law or withholding of required information. The boxes indicated that the reason the IEP was not held before Student's third birthday and why the speech and language report was not completed within 60 days of the approval of the assessment plan was because "School was on official break for more than 5 consecutive days."

9. Student's third birthday was on August 2, 2013. Parents approached the school District for the initial assessment on approximately October 22, 2014, almost 15 months after Student's third birthday. Parent signed Mr. Nallur's assessment plan on October 27, 2014, meaning that the assessment would be due 60 school days from that date, excepting holiday periods of more than five days. District was out of session for approximately four weeks for Thanksgiving and winter breaks. Mr. Nallur's report was delivered at the February 2015 IEP team meeting, 16 days after the date it was required to be delivered. Student contends that the failure to timely convene an IEP meeting and review Mr. Nallur's assessment entitles him to avoid application of the statute of limitations.

10. The argument is unpersuasive. The checked boxes did not impair Student's

ability to understand and act upon his rights regarding his disability. It is not a credible argument to suggest that a 15-month delay in approaching District about obtaining an assessment would be forgotten because of the checked box. Parents knew that Student had a speech delay after their insurer had him evaluated at the age of three. The checkmark did not cause or conceal the fact District was not brought into this matter until October 2014. Similarly, Student asserts that District concealed the fact that the IEP was seven days late by checking the box which reported that the delay was caused by school breaks. Other than the sub-claim that the IEP team meeting was held late, this allegation does not relate to any other underlying facts or affect any other claims within the complaint.

11. The exemption from the statute of limitations is narrow and applies where misrepresentation or concealment of facts regarding a pupil's disability prevents her or him from understanding underlying facts. Student has contended the District misrepresented or concealed facts regarding technical violations of timeliness rules, not facts related to his disability or the steps needed to support his areas of weakness. Student, Parents, and their health insurer were all at least equally aware as the District of the underlying facts relating to Student's speech needs and potential position on the autism spectrum. The exceptions to the statute of limitations do not operate to turn an undisclosed technical violation into an unlimited opportunity to raise stale claims.⁸ Accordingly, Claims 1a, 1c, 3a, 2b, and 2c are barred by California's statute of limitation for claims under the Education Code and Federal statutes.

⁸ Similarly, Student argues that a failure to respond to Parents' request for Independent Educational Evaluations in March 2016 somehow operates to exempt claims concerning the February 2015 IEP team meeting and report from the statute of limitations. It does not.

12. In marking the box, Mr. Nallur correctly reported that the IEP was not held within 60 school days of the approval of the assessment plan because of intervening school holidays. However, those holidays did not explain the additional delay of between six and sixteen days beyond the statutory period. Assuming arguendo that this is concealment, and not admission, of a violation of the timeliness rules, it is a technical violation of the law, and relief cannot be ordered for a technical violation of the law unless it is shown that the violation impeded the child's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

13. Having proved a technical violation of issue 1b, Student argues that he was denied a FAPE because he went without services for the period of time equal to the delay in holding the IEP team meeting. Student was offered 30 minutes per week of speech and language services, meaning he missed an hour to 90 minutes of speech services because of the delay in offering the service. Given that Student either did not fully avail himself of District speech services in the period between the IEP team meeting and the start of school for the 2015-2016 school year or that District, without objection by Parents, did not provide them, it cannot be said that the delay in making the offer had any material effect. Student had only six to seven of the weekly speech sessions he was entitled to between February and the end of the school year. The potential loss of up to three additional half-hours of service did not deny Student a FAPE or otherwise justify granting relief for the violation. Student has proven that District committed the procedural violation alleged in issue 1b, but has not demonstrated that it resulted in a denial of FAPE.

ISSUE THREE: PROCEDURAL VIOLATIONS IN THE 2015-2016 SCHOOL YEAR

14. Student contended that District denied him a FAPE during the 2015-2016 school year by failing to prepare an assessment plan and hold an IEP team meeting to review the assessments within the required timeframe following Parents' request for assessments on August 21, 2015; by failing to discuss Student's progress on goals at the February 2015 IEP team meeting; by failing to timely grant independent assessments or file to defend District's assessments after Parents' March 9, 2016, request for IEEs; or by failing to produce Student's educational records within five days of the request.

Issues 3a and 3b: Failure to timely prepare assessment plan and review assessments

15. District did not timely respond to Parents' assessment requests made orally on August 7, 2015, and by letter on August 21, 2015. The assessment plan presented at the September 15, 2015, IEP team meeting was approximately either one week or three weeks late. Likewise, the IEP team meeting to review the assessments was due 60 days following Parents' execution of consent to the assessment plan on September 15, 2015. District argues that the delay did not injure Student because Ms. Garrett's testimony reports that Student made adequate academic progress in his kindergarten year. As he did in relation to issue 1b, Student counters here that the delay deprived him of interventions for a corresponding period of time. Although Student's argument is stronger here, the delay is again minor and, in light of Student's progress, any injury is hypothetical. Student did not demonstrate how the slight delay prevented Parents from meaningfully participate in the educational decision making process. Student has proven the violations alleged in issues 3a and 3b, but cannot show that they resulted in a denial of FAPE.

Issue 3c: Failure to report on goals

16. The parties dispute whether Student's progress on his goals from the February 2015 IEP was discussed at the November 2015 IEP team meeting. District staff recall doing so, but the meeting report does not recount the conversation, although it notes that Student would use three-word phrases with prompting. District notes that the meeting was not Student's annual IEP team meeting, and thus a progress discussion was not due.⁹ As the only goals were speech goals, the fact that a new speech assessment was generated for the meeting by Mr. Nallur, the person responsible for directing Student's speech services, suffices to inform the members of the IEP team about Student's progress in speech. For issue 3c, Student has proven a technical violation but failed to show that it resulted in a denial of FAPE.

Issue 3D: Delay in Offering Independent Evaluations or Filing to Defend Assessments

17. Student contends District unnecessarily delayed its decision whether to fund independent assessments or to file suit to defend the validity of its assessments.

LEGAL AUTHORITY

18. Under certain conditions, a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, §

⁹ Student cites Ed Code, § 56345(a)(2) and (3) and 20 U.S.C. § 1414(d)(1)(A)(i)(II) and (III) for the proposition that progress must be discussed at each IEP team meeting. However, those sections require only that there be a statement of annual goals (subsection (2) or (II)) and period progress reports be scheduled (subsection (3) or (III)).

56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].)

“Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

19. When a student requests an independent evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

20. Whether a district filed its due process hearing request without “unnecessary delay” is a fact specific inquiry. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289 (*Pajaro Valley*), a student requested an independent evaluation. The district waited three weeks and then demanded that the pupil renew the request, warning that it was “prepared” to go to due process to defend its assessments. After the student complied, the district waited another eight weeks before filing for due process. In total, the district waited three months after the student first requested an independent evaluation to file to defend the assessment. The court found that the school district’s “unexplained and unnecessary delay in filing for a due process hearing waived its right to contest Student’s request for an independent evaluation at public expense, and by itself warranted entry of judgment in favor of Student and [parent].” (*Id.* at p. *3.)

21. The term “unnecessary delay” as used in title 34 Code of Federal Regulations part 300.502(b)(2) is not defined in the regulations. It permits a reasonably

flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an independent evaluation. (*Letter to Anonymous*, 56 IDELR 175 (OSEP 2010).) Some delay in acting is reasonable if the school district and the parents are engaging in active communications, negotiations or other attempts to resolve the matter. (*J.P. v. Ripon Unified Sch. Dist.* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 2009 WL 1034993 (*Ripon*).) In *L.S. v. Abington School Dist.* (E.D. Pa. Sept. 28, 2007, Civil No. 06-5172) 2007 WL 2851268 (*Abington*), the court found that a 10 week period before the school district filed its due process complaint was not an unnecessary delay, given the school district's ongoing efforts to resolve the matter during that period, including the exchange of numerous emails, as well as the convening of a resolution session. (*Id.* at pp. *8-10.)

22. School districts may establish criteria to ensure that publicly funded independent evaluations are not unreasonably expensive. (*Letter to Wilson*, 16 IDELR 83 (OSEP October 17, 1989).) Public agencies should not be expected to bear the costs of independent evaluations where those costs are clearly unreasonable. (*Letter to Kirby*, 213 IDELR 233 (OSEP 1989).) To avoid unreasonable charges for independent evaluations, a district may establish maximum allowable charges for specific tests. (*Ibid.*) If a district does establish maximum allowable charges for specific tests, the maximum cannot be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. (*Ibid.*) The maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. (*Ibid.*) (See *A.A. v. Goleta Union School Dist.* (C.D. Cal. Feb. 22, 2017, Case No. CV 15-06009 DDP (MRWx)) 2017 WL 700082.)

23. School districts must provide parents with information about where the independent evaluation may be obtained, as well as the school district criteria applicable for independent evaluations. (34 C.F.R. § 300.502(a)(2); see *Letter to Bluhm*, 211 IDELR

2237A (OSEP 1980).) A district may provide parent with a list of pre-approved assessors, but there is no requirement that the parent select an evaluator from the district-created list. (*Letter to Parker*, 41 IDELR 155 (OSEP 2004).) When enforcing independent evaluation criteria, the district must allow parents the opportunity to select a qualified evaluator who is not on the list but who meets the criteria set by the public agency. (*Ibid.*)

24. A district's violation of its obligation to assess a student is a procedural violation of the IDEA and the Education Code. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

ANALYSIS

25. Student requested independent evaluations on March 9, 2016, and District informed Student that it was granting two of the requests on April 6, 2016, and the remainder on April 13, 2016. District would not approve the assessors requested by Student for the occupational therapy assessment and the functional behavior assessment until after June 22, 2016, when Student supplied information about his proposed assessors qualifications and fee structures. Student asserted that District "violated the spirit of the IEE laws and District's own policies" by not doing its own "due diligence" to investigate the credentials and cost of the assessors requested by Student.

26. No specific length of time is set under the IDEA in which a District must completely agree to or reject a student's request for an independent evaluation. The lack of a definition of "undue delay" is intended to encourage the parties to work out any disputes without the threat of immediate suit because of a hard deadline. Here, the parties were in active contact between the March request and the June 22, 2016 final approval of Student's requested assessors. By April 13, 2016, District had essentially agreed to provide the independent evaluations, meaning an elapsed period of approximately one month and one week from the request. It remained to the parties to

work out the details of the assessments and assessors, and they did this in the following two months. The work of the assessors was not delayed by that dispute, as three of the assessors completed their observations of Student before that date. As in *Ripon* and *Abdington*, supra, District continued to consider and negotiate the request and finally acted without undue delay. Claim 3d is therefore denied.

Issue 3E: Response to Educational Records Request

27. District production of Student's educational records in response to counsel's request was delayed eight calendar days or six business days. The records should have been provided by March 16, 2016, but were not produced until March 24, 2016. In general, issues regarding production of educational records are a compliance matter to be raised with the California Department of Education. Raised as a procedural violation of the law here, Student needs to show, as discussed above, that either he was denied a FAPE, suffered a loss of educational benefit, or that his Parents' right to participate in his IEP process was significantly impeded. Student produced no such evidence at hearing, and does not discuss the issue following a two-line entry at page six of his closing brief. Student never discussed or described the contents of the records or their importance. No significant event appears to have taken place between March 16 and March 24, 2016, or anytime shortly thereafter at which these records could have been utilized. Student demonstrated that District provided the records late, but has not shown that it impeded his right to FAPE, deprived him of educational benefit or prevented Parents' meaningful participation.

ISSUE FOUR: SUBSTANTIVE DENIAL OF FAPE AT THE NOVEMBER 2015 IEP

28. Student asserts in issue four that District's offer of speech and language services and specialized academic instruction made following the November 13, 2015 IEP team meeting was insufficient to meet his unique needs. In addition, he asserts that

the IEP offer failed to include other required services, such as counselling or aide services.

Legal Authority

29. As noted above, an IEP for a disabled child must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Andrew F., supra.*) The sufficiency of any educational plan is measured at the time that it was created. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Dept. of Educ., State of Hawaii* (D. Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439.) Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801.) In reviewing the sufficiency of an IEP's offer of FAPE, the snapshot rule looks at what is reasonable given the information available to the team at the time.

30. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) An IEP should remediate and, if appropriate, accommodate the child's disabilities so as to enable the child to make progress in the curriculum, taking into account the child's potential. (*Antelope Valley, supra.*)

Analysis

31. Student's teachers believed that he was capable of grade-level work, and Student argues that therefore any shortfall on his part from achieving grade-level mastery at any time following the 2015-2016 school year establishes that the November 2015 IEP plan did not offer him a FAPE (Student's brief at 23, Ins. 13-16). Student does not and cannot provide support for this assertion. He argues that, since Parents asked for a preschool program in February 2014 and for a one-to-one aide and "more academic support" at the November 2015 meeting and those items were not provided, any failure to meet grade-level standards proves that the program was inadequate. This raises a basic floor of opportunity to a guarantee of success. That is not the IDEA standard.

32. Student contends that his goals in the November 2015 IEP plan were inadequate, defective,¹⁰ or poorly planned. Their inadequacy constitutes a procedural violation of the law, not a substantive one. Ms. Garrett gave her opinion that Student

¹⁰ Student contends that the November 2015 IEP contained a reading goal that Student had already achieved, as he already knew all 27 letter sounds. In support of that contention, Student cites the testimony of Iona Long, in a 20-minute window between 3:41 and 4:01 p.m. Ms. Long's testimony completed at 3:16 p.m. At 2:42- 2:43 in Ms. Long's testimony it was revealed that the writing goal in the February 2016 IEP report had a benchmark for June of 2016 that had already been met. However, nothing was found in that section establishing that any goals presented in the November 2015 IEP were met at the time they were established. Ms. Garrett testified that Student knew his letter sounds by the end of the year. Student has not provided support for his assertion and therefor has not carried his burden of proof.

made progress through the year and at the end was equal to his peers in his pre-academic skills, math, and writing, and at mid-year kindergarten level in reading. Student contends that his grades were inflated and that District's contention that he progressed through the course of the year is not verified or correlated by any rubric.

33. The progress of a kindergarten student is difficult to measure. Deference must be given to the classroom teacher in the absence of standardized testing or contrary expert testimony. Student contends that comparison of his "bird" work sample with his "car" work sample demonstrate lack of progress, but lay review of those samples without knowledge of the skills being drawn out renders analysis meaningless. Student's teacher was a credible and careful witness, and no reason has been presented to disbelieve her testimony, especially as she helped start the assessment process that eventually led to the autism eligibility.

34. Student has presented no evidence that he had needs that were known to the members of the November 2015 IEP and not adequately met by the services provided. Student's speech needs were addressed by regular sessions of speech therapy and the specialized academic instruction provided by the resource teacher was intended to ameliorate his difficulty in paying attention in class. Parents desired a one-to-one aide, possibly because they saw benefit to him from its provision at home, but the classroom teacher and the IEP team did not find that one was necessary or in Student's best interest in the classroom. Student has not set out any other required service that was not supplied. As such, it must be presumed that the plan was reasonably calculated to allow Student to make meaningful progress. Issue four is denied.

ISSUE 5: SUBSTANTIVE DENIAL OF FAPE AT THE FEBRUARY 2016 IEP TEAM MEETING

35. Student contends that the placement and services offered at the February 2016 IEP team meeting did not constitute FAPE because District did not assess for or

offer him occupational therapy or behavior services, because it did not address his claims that he was being bullied, and because it did not offer sufficient services to meet his needs.

Issues 5a and 5b: Failure to offer sufficient services or to assess
Occupational therapy and behavioral intervention needs

36. Student asserts in issues 5a and 5b that the February 2016 IEP offer denied him FAPE because District failed to offer sufficient levels of speech, counseling and specialized academic instruction and did not assess his need for or offer required services for occupational therapy or behavioral intervention.

LEGAL AUTHORITY

37. A school district has an affirmative, continuing obligation to identify, locate, and evaluate all children with disabilities residing within its boundaries. (20 U.S.C. § 1412(a)(3).) This duty is commonly known as “child find.” The duty is not dependent on any action or inaction by parents. A school district must actively and systematically seek out all individuals with exceptional needs who reside in the district. (Ed. Code, § 56300.) Child find applies to those children, among others, who are suspected of being a child with a disability and in need of special education and related services, even though they are advancing from grade to grade. (34 C.F.R. 300.111(a).)

38. The suspicion that a student may have an impairment that is affecting the student’s educational performance, and requires special education, is sufficient to trigger a need to assess. (*Park v. Anaheim Union High School Dist., et. al.* (9th Cir. 2006) 464 F.Supp. 1025, 1032, citing Ed. Code, § 56320.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2); 34 C.F.R. §

300.304(b)(2), (c)(4); Ed. Code, § 56320, subds. (e), (f).) A failure to assess a child in all areas of suspected disability is a procedural violation of the IDEA.

ANALYSIS

39. The same analysis applies here to the claims of insufficient service levels as was applied to issue four. Regarding the failure to assess Student, the IEP team was not presented with any information that Student had behavioral issues or occupational therapy needs that were not being met either in response to his special education eligibility or through general education interventions. Student has produced no evidence that there were apparent deficits that could be addressed by such support or expert testimony that such deficits existed at the time of the February 2016 IEP team meeting. Parent did not request an occupational therapy assessment, and Ms. Zeller and Ms. Garrett saw no need for an occupational therapy assessment or a functional behavior analysis based upon their observations, education, and experience. According to teacher and staff reports and testimony at hearing, Student did not present a behavior problem and did not have difficulty navigating the school environment. Absent cause to suspect a need, the IEP team cannot be faulted for failing to offer assessments or services.

40. Student has not carried his burden of demonstrating that the levels of service District offered following the February 2016 IEP team meeting were inadequate to meet his needs based upon the information known to the team at the time. With the exception of the facts discussed in issue 5c below, the team took in the available relevant information about Student and designed a program that was designed to remediate and accommodate Student's disabilities. According to his teachers and support staff, he made progress in the general education curriculum. The fact that his progress did not match his full potential is not the fault of the services offered in the IEP, but relates to other influences detailed in the following section related to bullying.

Issue 5c: Failure to address bullying

41. Student asserts in issues 5c that District did not offer a FAPE at the February 2016 IEP team meeting because District did not address Parent's report that Student was being bullied.

LEGAL AUTHORITY

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

43. Bullying is not defined within the IDEA. The California Education Code defines bullying for purposes of finding grounds for suspension or expulsion of a student as "any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including one or more acts committed by a pupil or group of pupils as defined in Section 48900.2, 48900.3, or 48900.4, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:

(A) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property.

(B) Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health.

- (C) Causing a reasonable pupil to experience substantial interference with his or her academic performance.
- (D) Causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school."

(Ed. Code, § 48900, subd. (r)(1).)

44. "Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time." (*Dear Colleague Letter*, OSERS (August 20, 2013) 61 IDELR 263 *1.) Confrontations between students that are not characterized by an imbalance in power generally do not constitute bullying. (*A.L. v. Jackson County Sch. Bd.*, 64 IDELR 173 (N.D. Fla. 2014) (an isolated instance of rough play between peers did not amount to bullying).) The Journal of the American Medical Association defines bullying as "a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one." (Tonja R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 JAMA 2094, 2094 (2001).) Repeated physical blows unaccompanied by intent to intimidate or harass does not constitute bullying. (*Student v. Los Angeles Unified School District* (2015) OAH Case No. 2015050710.)

45. "The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications." (Office for Civil Rights (OCR) 2010 *Dear Colleague Letter on Harassment and Bullying*, <http://www.ed.gov/ocr/letters/colleague-201010.pdf>, at page 3.) "The definition of

bullying includes a non-exclusive list of specific behaviors that constitute bullying, and specifies that bullying includes intentional efforts to harm one or more individuals, may be direct or indirect, is not limited to behaviors that cause physical harm, and may be verbal (including oral and written language) or non-verbal.”

<http://www.stopbullying.gov/laws/key-components/index.html> (United States Department of Education interagency bullying resource website.)

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

ANALYSIS

47. Parents raised their concerns that Student was being bullied at the February IEP team meeting. This was far from the first time this had been raised. Father testified that he had raised the issue to Ms. Garrett, the cafeteria staff, and the parents of the children who were bullying Student, but no time frame was given for these events. The record contains multiple references to concerns about bullying. Most particularly, the record contains a letter written by Parents on February 9, 2016, which was the original date for the February IEP team meeting. In that letter, Parents described multiple events of bullying and their effect upon Student, including physical injury, fear,

humiliation, and isolation.

48. District staff members at the IEP team meeting were aware either of this report or of the other information indicating that Student had been bullied. Ms. Zeller came to the meeting prepared to offer a counseling module that would help Student deal with the effects of bullying, although she did not explain her intent or the purpose of her proposed counseling module to Parents or the IEP team.

49. Despite its importance, bullying was not discussed at the IEP team meeting. The comments in the IEP document report that Parents raised the issue. Even if they had not, District staff were on notice from Parents' February 9, 2016 letter and should have introduced the topic themselves. They did not. The sole input from District staff on the matter is the advice given to Parents to submit a form complaint. This was not an adequate response.

50. District contends in its briefing that the March 15, 2016 letter finding no bullying in response to a March 14, 2016 report was a response to the concerns Parents raised at the IEP team meeting, but do not explain why bullying was not discussed at the IEP team meeting despite Parents' concerns raised before and during the meeting. The letter cites reports of bullying by exclusion, taunting, and ridicule dating from the start of the year, and cites specific incidents on December 16, 2015 (physical injury), February 4, 2016 (intimidation), and February 17, 2016 (striking). Even assuming that an adequate investigation of the claim was made in the one-day time period between the writing of the letters, District's response was insufficient.

51. District's response treated the bullying complaint as a disciplinary matter for the perpetrators. Whether or not the resolution of the complaint was proper, it in no way relieved the IEP team of its responsibilities in the matter to respond to the impact on Student's education caused by the bullying. The law recognizes that students with disabilities are particularly vulnerable. Their differences make them subject to bullying

and uniquely sensitive to it. Under OSERS guidance, it is not necessary to find that the bullying is related to the child's disability. It is enough to trigger a higher standard that a student with a disability has been bullied. If such bullying has taken place, a denial of FAPE occurs when a disabled student has not received educational benefit. Further OSERS guidance states that denial of FAPE is strongly likely where there has been bullying. Thus, it is important for the IEP team to discuss parental concerns about bullying to examine the possible impact on a disabled student's ability to access his or her education.

52. At hearing, Father recounted that he became aware that his child was not accepted by his peers during the October 2015 field trip he chaperoned. He saw that the other children rejected Student because he was different and closed him out of their circle. He testified that each year after about two months of school the other children would close Student out and Student would begin to be taunted, pushed away, and isolated. As a result, Student lost interest in school and became unwilling to attend.

53. It is impossible to exactly quantify the amount of lost educational benefit a disabled child suffers because of bullying. For that reason, the Federal guidance instructs that a loss of educational benefit is the likely outcome and with it a finding of denial of FAPE. It is possible here to find that bullying occurred, given Student's isolation and the subsequent finding of pervasive and severe bullying by District in November 2016, and it is also possible to find that the bullying caused Student a loss of educational benefit by isolating him from his peers and denying him enjoyment and participation in both the academic and socializing aspects of school. It is not, however, necessary to find that bullying was severe, pervasive, or on-going at the time of the November 2015 IEP team meeting to find that District members of the IEP team deprived Student of FAPE by materially impeding Parents' opportunity to participate in Student's educational decision-making process.

54. District did not react to or even recognize the fact that Student was being bullied until months after the February 2016 IEP team meeting, and in that time Student lost the desire to attend school and went from an average pupil to one performing well below grade level. It is striking that in all the time Student was at District, none of his teachers, no staff, and no administrator observed or suspected that he was being bullied, and yet one investigation in November 2016 resulted in a student admitting bullying completely in line with what Parents had been asserting for over a year. What is most significant here, however, is the lack of action taken by the IEP team at the February 2016 meeting to discuss the issue, consider its impact, or even to make a cursory investigation of the facts and circumstances.

55. Despite awareness that there were long-standing concerns that Student was being bullied, there was no discussion of the matter at the IEP team meeting. No actions were taken to adjust Student's services or provide support, if needed. Ms. Zeller intended to begin a series of therapy modules that were supposed to help Student deal with being bullied, but she did not disclose that to the IEP team. There was no inquiry into the impact of the bullying on Student's attitude or performance. The matter was ignored by the District members of the team despite their knowledge of the situation. Parents wished to discuss the bullying of their autistic son, but were shut down and told to submit a complaint form. The lack of willingness to even discuss the subject reflects deliberate indifference to Student's plight. It does not matter whether the reports of bullying were disbelieved or the team felt that they were better handled by the school's discipline process: Parents' concerns needed to be aired because of the potential impact bullying could have on his ability to access his education. By shrinking from the discussion, the team neglected its responsibility to Student.

56. The failure of the District IEP team members to address the issue of bullying, including the circumstances that caused the bullying and Student's perception

that he was being bullied, means that District failed to meet his needs related to his disability and therefore denied him FAPE.

ISSUE SIX: PROCEDURAL VIOLATIONS IN THE 2016-2017 SCHOOL YEAR

57. Student contends that District committed procedural violations in the 2016-2017 school year which denied him FAPE. Specifically, Student asserts that District failed to timely convene an IEP team meeting in response to Parents' request, that District failed to convene an IEP team meeting in response to the finding that Student suffered bullying, and that District predetermined that no one-to-one aide would be offered at the April 17, 2017 IEP team meeting.

Issue 6a: Failure to convene a timely IEP team meeting

LEGAL ANALYSIS

58. A procedural violation of the IDEA results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii).) This rule applies to relief from an unnecessarily delayed IEE. (See, e.g., *Taylor, supra*, 770 F.Supp.2d at pp. 109-110.)

59. In *Rowley*, the Supreme Court placed great emphasis on the importance of the procedural protections of the IDEA, especially those that guarantee participation by parents: "[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." (*Rowley, supra*, 458 U.S. at pp. 205-206.)

60. As noted above, when a student requests an independent evaluation, the public agency must, without unnecessary delay, either file a request for a due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); (b)(2)(i), (ii); see Ed. Code, § 56329, subd. (c).) When a district conducts an assessment, it must generally complete its assessment and hold an IEP team meeting to discuss the results within 60 days of its receipt of an assessment plan signed by parents. (Ed. Code, §§ 56302.1, subd. (a); 56043, subds. (c), (f)(1); 56344, subd. (a); see 20 U.S.C. § 1414(a)(1)(C)(i)(I).)

61. Attempting to apply the same 60-day timeline to independent evaluations is not supported by authority. If the 60-day timeline did apply, there would be no need for the additional “unnecessary delay” requirement in the federal regulation governing independent evaluations. Moreover, that same regulation prohibits the imposition by a district of any timeline on an independent evaluation. (34 C.F.R. § 300.502(e)(2).) The 60-day timeline applicable to district assessments illustrates Congress’s concern that district assessments be promptly completed, but it does not apply to independent assessments, which are conducted by independent parties who are not direct employees of the districts.

62. Whether a district’s delay is unnecessary within the meaning of the above regulation is a fact-specific inquiry. If a district can document good faith efforts to resolve a dispute over an independent evaluation, some delay can be reasonable. In *Abington, supra*, 2007 WL 2851268, * 9, the court held that a school district’s ten-week delay in filing a due process request was not a per se violation of the IDEA. The court emphasized that there was evidence of ongoing efforts during that time to resolve the matter, including numerous emails and the holding of a resolution session, and that the district, within 27 days of the request, told parents orally that the request would be

denied. (Ibid.) (see also *Ripon, supra*.)

63. Parental participation in the development of an IEP is essential to the IDEA. (*Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994]. It is “[a]mong the most important procedural safeguards” in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

64. The IEE is not just an additional tool for determining a student’s needs; it is designed to give parents essential information to use in the IEP process. The Supreme Court has stressed the importance of the IEE in redressing the relative advantages a school district has in expertise and in its superior control of information about a student:

“School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them. . . . [Parents] have the right to an independent educational evaluation of the[ir] child IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.”

(*Schaffer, supra*, 546 U.S. at pp. 60-61 [citations and internal quotation marks omitted].)

65. The nature of a district’s duty to ensure that an independent evaluation is provided without unnecessary delay once the school district agrees to fund the independent evaluation (34 C.F.R. § 300.502(b)) is not explained by existing decisions. It is also not addressed by the comments that accompanied the adoption of the

regulation. (See *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed.Reg. 46540, 46689-46691 (Aug. 14, 2006).)

66. Federal regulation requires that the district “ensure” that the independent evaluation is provided without unnecessary delay. (34 C.F.R. § 300.502(b).) The duty to make sure or certain that an independent evaluation is provided without unnecessary delay would reasonably include contracting with an assessor, requesting that Parents identify another assessor if the first refuses or delays the proposed contract, and seeing the assessment to completion within a reasonable time. (*Student v. Dixon Unified School District* (2013) OAH Case No. 2013090674.)

ANALYSIS

67. Mr. Di Salvatore took an unconscionably long time to prepare his evaluation report. According to his report, he completed his observations and testing in May of 2016. He did not generate a draft of a report until December of 2016, and that was an admittedly incomplete draft report provided to Parents. He sent a copy of his incomplete report to District on January 9, 2017, but noted that he needed additional information before he completed his report. Mr. Di Salvatore sought permission from District to revise the recommendation in his report in April 2017, more than a year after Parents requested an independent psychoeducational evaluation and almost a year to the date when District agreed to fund it. The delay was not harmless.

68. In the intervening time, Student’s educational program continued without input from the independent assessors. The last assessments, with which Parents disagreed, were discussed at an IEP team meeting held in November 2015. Parents essentially waited from that date to find out whether those assessments accurately portrayed Student’s strengths, deficits, and needs. In that time, Student progressed from the third month of kindergarten to the eighth month of first grade. Given the

importance of early intervention in education, that delay is unacceptable. There is no way to find that this interval does not constitute unnecessary delay.

69. Not only were Parents deprived of expert information about Student's psychoeducational state, but the delay rendered other independent assessments out of date and likely inaccurate. The occupational therapy assessment was updated, and in the process of updating the assessor changed several of her observations and recommendations. She found that Student had significantly changed from the time of her observation and his needs were different. Ms. Lorimer believed that the functional behavior assessment needed to be updated before it could be presented. Even Mr. Di Salvatore wanted to redo his observation, stating he no longer had confidence in its conclusion.

70. District contends that the delay and staleness of the independent assessments were to some degree attributable to Parents. Parent, after all, did not agree to let Mr. Di Salvatore observe Student again, and Parents made scheduling the IEP team meeting more difficult by insisting that all assessors be in attendance. Parents were not being unreasonable in making the demand, and any delay caused in scheduling was minor compared to the delay in getting Mr. Di Salvatore's report.

71. By design, independent assessors are not subject to direct control by school districts. School districts are prevented by law from imposing conditions or timelines related to obtaining an independent assessment at public expense. (34 C.F.R. § 300.502(e)(2).) This does not mean that a district has fulfilled all of its responsibilities once it has contracted with parents' choice of assessor. The duty to provide the assessment without unnecessary delay includes the duty to ensure the assessment takes place without unreasonable delay. Once the wait for Mr. Di Salvatore's report became unreasonable, District had to act.

72. District could not compel Mr. Di Salvatore to write up his report, but they

could have set terms with him when contracting that would have given him notice that the assessment must be completed within a reasonable time. Independent assessments invariably take longer than District assessments, which are subject to a 60-day deadline which Districts have the ability to enforce. Delays of up to six months before completion of independent assessments are not unheard-of, but the circumstances of those delays are different from that occurring here.

73. This case does not present the common cause of delay of independent assessors where the chosen assessor is overbooked and cannot begin the assessment process for many months. Mr. Di Salvatore was available to begin work immediately and did do so. He conducted his interview and testing of Student in May 2016, before approval was given to conduct the independent speech and OT assessments. Mr. Di Salvatore observed and tested Student at school, so District knew when he started the assessment. From that date, all that was required was for Mr. Di Salvatore to score his testing and write up his findings. There were no circumstances that explained or excused his delay in completing the report.

74. District staff were aware that Mr. Di Salvatore was not working diligently on his report, but did not follow up when he did not deliver as promised. From his failed promise to deliver his report on November 2, 2016, through the eventual provision of his report on April 15, 2017, Mr. Di Salvatore stalled the parties with promises and an incomplete draft, when he made any reply. An independent assessment report delivered in November, seven months late, may not have been unnecessarily delayed. A report that was not delivered for a further five months, with knowledge by District members of the IEP team of the fact that the assessor's word was not reliable, means that the IEP team meeting to discuss the assessment has been unreasonably delayed. At the least, District should have convened an IEP team meeting to address the difficult problem facing the team. An independent assessment was seriously overdue and there was no

means available to ensure its delivery. The team should pose the question: did Parents wish to retain their chosen expert, hope that the report would be delivered soon, and take the risk that it would become out of date, or did they want to choose a new assessor and restart the process? In that way parental participation in the IEP process could be preserved.

75. What District could not do is what it did here. By holding the IEP team meeting after waiting so long that there was little current, reliable, or relevant information in the independent evaluations it was providing to Parents, District rendered Parents' participation in the IEP process meaningless.

76. Parents may have participated in or even invited the error in holding the IEP team meeting so long after the initiation of the psychoeducational assessment. They did insist on having all team members present at the IEP team meeting. Further, Parents had been represented by counsel since at least March of 2016. It is dismaying that counsel allowed this to happen or did not take steps to confront and remedy the delay. If this were a case where Parents were seeking reimbursement for services they funded, equity would consider the impact of their actions and reduction of their recovery. However, the important factor here is the harm to Student's educational program because of the delay. Student is entitled to such services as are necessary to undo the demonstrated harm done by the failure to provide him with the support he needed due to his disabilities.

77. When a District has information that an independent assessment will be significantly delayed and they neither take action to cure the delay nor share their information with parents, further delay may be found unnecessary and violate the duty to timely convene an IEP team meeting. The failure to hold an IEP team meeting to discuss those assessments before so much time passed that they became unreliable prevented Parents from having information they needed to make meaningful input into

their child's educational program. This technical violation of the law, having materially impeded parental participation in the IEP process, deprived Student of FAPE from at least the start of the 2016-2017 school year to the present time.¹¹

ISSUE 7: SUBSTANTIVE DENIAL OF FAPE AT THE APRIL 17, 2017 IEP TEAM MEETING

78. Having found a procedural violation which denied Student's right to FAPE in connection with the same IEP team meeting, the question of whether the resulting IEP plan offered Student FAPE does not need to be addressed here.

REMEDIES

1. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. §1415(i); see *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) When school districts fail to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, at pp. 369-370.) Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Id.* at p. 374.)

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) These are equitable

¹¹ Having found a procedural violation that deprived Student of FAPE in the time period at issue, the remainder of the related claims in issue 6 is moot.

remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524 (*Reid*), citing *Puyallup*, *supra*, 31 F.3d at p. 1497.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid, supra*, 401 F.3d at p. 524.)

3. Staff training can be an appropriate compensatory remedy. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034 [holding student, who was denied a FAPE due to school district’s failure to implement his IEP, could most benefit by 15 having his teacher appropriately trained to do so].) Appropriate relief considering the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific student involved, or to remedy procedural violations that may benefit other students. (*Ibid.*; See also, e.g. *Student v. Reed Union School Dist.* (Cal. SEA 2008) Cal. Ofc. Admin. Hrngs. Case No. 2008080580 [requiring training on predetermination and parental participation in IEPs]; *Student v. San Diego Unified School Dist.* (Cal. SEA 2005) 42 IDELR 249 [105 LRP 5069] [requiring training regarding student’s medical condition and unique needs].)

PROCEDURAL ISSUES NOT AFFECTING STUDENT’S RIGHT TO FAPE

4. Student established procedural violations of the IDEA in issues 1b, 3a, 3b and 3c. However, Student was unable to show that these violations denied him FAPE. Accordingly, no relief can be granted for these violations.

ISSUE 5C: FAILURE TO RESPOND TO BULLYING

5. Having found that the February 2016 IEP Team did not respond to the bullying Student suffered in the 2015-2016 school year and that the bullying continued into the 2016-2017 school year, it is now necessary to fix a remedy that is appropriate to the circumstances and that is reasonably calculate to offset the harm.

6. Student has provided a general prayer for relief, and has not indicated which remedies are designed to offset which violations. In his prehearing conference statement, Student requested the following remedies: training of District employees in the areas of child-find obligations, minimal assessment requirements, assessment timelines, including for independent educational assessments, and other special education related requirements; new independent educational evaluations in the area of speech and language therapy, behavior, psychoeducational functioning; and unspecified compensatory services and education.

7. Those requests are refined somewhat in Student's closing briefing. Student there requested that he be provided with: a one-to-one ABA-trained aide to conduct data collection and to address his academic needs and social deficits; intensive reading remediation through a provider such as Lindamood-Bell; occupational therapy from a non-public agency for one hour per week from such time as District should have been aware of Student's need for occupational therapy services; speech therapy from a non-public agency for one hour per week for the number of weeks of school since the February 2015 IEP team meeting; independent evaluations in neuropsychological functioning, occupational therapy, speech, and behavior (presumably a functional behavior assessment); compensatory social skills training from a non-public agency in an unspecified amount; training to all students in behavioral differences and autism; and staff training in child find/IEP referral processes, independent evaluation processes, and IDEA mandates.

8. As noted in the Prehearing Conference order in this case, a party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Such compensatory education is intended to undo harm caused by the failure to provide services and thereby lift a student to the place he would have been in had he received timely and correct intervention. Student has provided formulas for his remedies, but has not presented evidence of his level of need.

9. Student did, however, present expert testimony that provided support for an award of compensatory services. Dr. Blacher observed Student and gauged his level of need for aide assistance for behavioral or social integration. She felt that having an aide would be helpful to Student, but she believed that Student could be successfully and sufficiently redirected by his teacher. In her view, the most important factor to restore Student to a functioning place in the school environment was finding a way to establish reintegration of Student with his peers. Although an ABA-trained aide would be helpful in assisting Student with social cues and attentiveness, and as a secondary effect reduce and possibly prevent further bullying, she believed it would not be beneficial for Student to have a one-to-one aide assigned to him full time because of the impact it would have on his ability to establish himself as a peer and a classmate. He does not need a full-time aide, but he would benefit from the presence and assistance of someone trained in ABA therapy.

10. Right now, based upon Dr. Blacher's observation and analysis, Student has a great need for this support because of the time he has lost. Although Dr. Blacher acknowledged that Student's current need for intervention was sufficiently high that it outweighed her concern that the presence of an aide would further mark Student as different, she believed a possible solution was for the aide to be a "blind shadow," meaning that it would not be known that the person in the class was Student's aide.

Further, it was not necessary that the person have a Board Certified Behavior Analyst credential. Dr. Blacher suggested that the person be in the classroom full-time at least until the next IEP team meeting, when Student's social and attentional levels could be evaluated, and, if appropriate, the assistance could be faded out.

11. Dr. Blacher's recommendation is directed toward resolving the issue of Student's bullying and isolation. It is an appropriate relief that provides a means of addressing Student's social deficits, his attentional problems, and the need to prevent further bullying. An ABA-trained person supplied by a non-public agency will be assigned on a full-time basis as a 'blind shadow' to assist Student to pay attention in class but primarily to reintegrate him into the social environment in his classroom and assist with his acquisition of social skills. The aide will continue full-time at least until an IEP team meeting is held to discuss new assessments of Student.

12. District shall retain Dr. Blacher or other person she designates to implement and supervise the shadow's assignment and duties for a minimum of eight hours' time the first month. Thereafter, Dr. Blacher or her designee shall be compensated to supervise or consult with that person or District staff for a minimum of four hours per month until such time as the aide is faded out. If the IEP team decides to fade the services of the shadow, Dr. Blacher or her designee shall set a reasonable schedule for the reduction of the service.

ISSUE 4: FAILURE TO CONVENE A TIMELY IEP TEAM MEETING

13. The IDEA does not authorize punishment of any party. The purpose of an administrative hearing is to uncover and address any deficiencies in a child's educational program. As noted above, the goal of any remedy in this proceeding must be remediating any harm Student suffered due to the errors affecting his educational program.

14. District previously agreed to provide independent assessments in

psychoeducational functioning, occupational therapy, and speech and language needs, and functional behavior. As a result of the unreasonable delay, all but the occupational therapy assessment were rendered invalid. Student requires valid assessments in order that an appropriate educational plan can be crafted. The record does not disclose that any new assessments are in progress at this time. If such assessments are not underway, District is ordered to fund independent psychoeducational and speech and language assessments. There having not been a functional behavior analysis previously conducted by District, one is ordered to be conducted.

15. Because time is of the essence in providing interventions for Student following this delay, the parties will be ordered to act quickly. Within three weeks of this order, Student shall nominate assessors for the independent speech and language and psychoeducational assessments who shall represent that they are able to complete the assessment within 90 days of their contract with District. If Student is unable to identify assessors willing to commit to that schedule within three weeks of this order, District shall conduct those assessments. An IEP team meeting to review those assessments and Student's need for services shall be held within 15 school days of the completion of the last assessment. Each assessor shall be directed to consider whether Student requires compensatory services to make up for any shortfall in or any unsupplied service for the time period following March 9, 2016.

16. As this was a procedural violation of the IDEA, Student's request that District staff be given training in compliance may appropriately be granted. In recognition of the fact that Student proved District committed numerous violations of the statutorily required timeframes which did not result in the denial of FAPE, such training is clearly appropriate. All administrative staff involved in this matter shall receive no less than four hours of training in compliance with IDEA rules, with particular attention paid to responding to bullying and compliance with statutory timelines. The

amount of errors made in this case is exceptional.

ORDER

1. District shall secure the full-time services of an ABA-trained aide from a non-public agency who shall work as a 'blind shadow' of Student in his classroom. The aide may assist in the classroom but his or her primary duty will be assisting Student to attend to classroom instruction and routine and to integrate Student with his peers. The aide will continue full-time at least until such time as an IEP team meeting is held to discuss the new independent assessments of Student. District shall retain Dr. Blacher or other person she designates to implement and supervise the shadow's assignment and duties for a minimum of eight hours' time the first month at a reasonable hourly rate for someone of equivalent credentials. Thereafter, Dr. Blacher or her designee shall be compensated to supervise or consult with that person or District staff for a minimum of four hours per month until such time as the aide is faded out. If the IEP team decides to fade the services of the shadow, Dr. Blacher or her designee shall set a reasonable schedule for the reduction of the service.

2. District shall conduct a functional behavior analysis of Student. In addition, within three weeks of the date of this order, Student will nominate speech and language and psychoeducational assessors who meet the cost and qualification requirements for independent educational evaluations for Colton Joint Unified School District. The assessors must commit to completing the assessment report within 90 days of execution of their contract. District must accept qualified assessors and tender contracts for the assessments within five business days. If Student is unable to nominate assessors to fulfill either role, District will conduct the assessments for which Student was unable to nominate an assessor. The independent assessments will be at the expense of Colton Joint Unified School District. The assessment will be comprehensive and include observation, assessment, preparation of a written report that will contain

recommendation regarding any need for on-going service and any compensatory services for service not provided from March 9, 2016. The assessors will be compensated for attendance, including round-trip travel time, at an IEP team meeting. The meeting will be scheduled within 15 school days following completion of the last of the independent educational evaluations.

3. By the completion of the 2017-2018 school year, District shall provide to all administrative staff involved in this matter no less than four hours of training in compliance with IDEA rules, with particular attention paid to OSERS compliance recommendations on bullying and statutory compliance with. Records of the training syllabus and the persons in attendance shall be provided to Student's counsel no later than 10 school days after completion.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on issues 1b, 3a, 3b, 5a, and 6a, and District prevailed on issues 1, 2, 3c, 3d, 3e, 4, and 5b. The remainder of the issues was mooted by the rulings on other claims.

RIGHT TO APPEAL

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

DATED: December 20, 2017

/s/

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings