BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. PLACENTIA-YORBA LINDA UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017051172

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on May 25, 2017, naming the Placentia-Yorba Linda Unified School District. District filed a response to Student's complaint on June 5, 2017. On July 10, 2017, OAH granted District's request for continuance to dates stipulated by the parties.

Administrative Law Judge Darrell Lepkowsky heard this matter in Placentia, California on July 26 and 27, and August 1, 2, and 3, 2017. Christian Knox, Attorney at Law, represented Parents on behalf of Student. Mother and Father attended and testified at the hearing on behalf of Student.

S. Daniel Harbottle, Attorney at Law, represented District. Renee Gray, Director of Special Education, attended the hearing on behalf of District.

On the last day of hearing, OAH granted the parties a continuance until August 14, 2017, for the parties to file written closing arguments. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES[1]

1. Did District deny Student a free appropriate public education during the 2016-2017 school year, including the extended school year, beginning on January 1, 2017, by:

(a) Failing to offer her an appropriate placement;

(b) Failing to make a legitimate placement offer;

(c) Failing to make a clear, written placement offer;

(d) Failing to offer a comprehensive transition plan; and

(e) Failing to timely convene an individualized education program team meeting and make an offer of placement and services?

2. Did District fail to offer Student a FAPE for the 2017-2018 school year by:

(a) Failing to offer her an appropriate placement;

(b) Failing to make a legitimate placement offer;

(c) Failing to make a clear, written placement offer; and,

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[1] On the first day of hearing, Student withdrew the issues identified as 1(f), 2(e), and 2(f) in the Order Following Prehearing Conference. Issues 1(f) and 2(f) contended that District had failed to provide adequate baselines and/or present levels of performance in the individualized education programs at issue in this case. Issue 2(e) contended that District had timely failed to convene an IEP team meeting for Student for the 2017-2018 school year.

The issues for hearing have been clarified based upon discussions at hearing, the cases presented by the parties, and their closing briefs. The ALJ has authority to clarify 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.)

(d) Failing to offer a comprehensive transition plan?

SUMMARY OF DECISION

The underlying dispute between the parties in this case is whether Student requires placement at a residential treatment center to enable her to access her education. Student's parents privately placed her in a residential treatment center called Heartspring on approximately May 2, 2016, and she remained there as of the time of this hearing. Parents and District settled a prior due process case filed by Student against District in which District agreed to reimburse Parents for some of their costs in funding educational expenses for Student. In exchange, Parents agreed to waive all claims against District through December 31, 2016. Student failed to meet her burden of proof as to any allegations covering the period between January 1, 2017, and the time District convened her annual IEP team meeting beginning on April 7, 2017. Based upon the settlement agreement, and Student's continued private placement at Heartspring, Student waived any issues as to her placement until her annual IEP in April 2017. Additionally, District was not obligated to hold an IEP team meeting for Student prior to April 2017 because she was a privately placed student in accordance with the terms of the settlement agreement.

However, District denied Student a FAPE by failing to make a clear, written offer of placement in Student's April 2017 annual IEP. Student is entitled to a remedy from the time the IEP was developed until Parents failed to give consent to District to release Student's educational records to the non-public school District subsequently offered as an appropriate placement for her. Student failed to prove that she required a residential placement at any time at issue in this case, and has failed to meet her burden of persuasion as to all other issues she raised.

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. Student was a 19-year-old young woman at the time of the hearing. Parents are her co-conservators. Mother resided within District's boundaries at all relevant times. Student attended Heartspring, a residential treatment center located in Wichita, Kansas. Parents privately placed her there on or about May 2, 2016.

2. Student was eligible for special education and related services under the primary disability of autism. Student's secondary eligibility was under the category of intellectual disability. Student's cognitive capacity remained at approximately the level of a three-year-old child since at least 2011. She performed slightly lower and slightly higher than that level in some areas.

3. Student also engaged in significant aggressive and self-injurious behaviors at home. Her in-home aggression was often directed at her twin sister, who also had significant disabilities. Student was a client consumer of the Regional Center of Orange County.[2] In August 2011, Regional Center placed Student in a crisis prevention intervention group home facility because Student had injured her in-home nanny. Student returned home a month later. Subsequently, Regional Center began providing in-home behavioral support for Student. It provided at least one person for four hours a day during school days and eight hours a day on non-school days. Student also received private applied behavioral analysis therapy services at home. Due to her behaviors,

[2] In California, people of all ages with developmental disabilities are entitled to receive a variety of services from state regional centers under the state Lanterman Developmental Disabilities Service Act, California Welfare and Institutions Code, section 4500, et seq.

Student required the additional behavior support provided by Regional Center even when her private behavior therapist was present.

4. Prior to September 2013, Student attended a District public school, in a self-contained special day class. She had a behavior intervention plan to address non-compliance, protesting, aggression, and crisis behaviors.

5. District placed Student at the Speech and Language Development Center, a certified non-public school in Orange County, California, through her IEP in September 2013. Parents consented to the placement. Student's IEP team determined that she required a non-public school placement due in significant part to her self-injurious and physically aggressive behaviors. Student remained at the Development Center until Parents privately placed her at Heartspring.

6. Student's aggressive behaviors included her hitting or attempting to hit others with an open or closed hand; biting and kicking others; pulling on the hair or clothing of others; and grabbing or scratching another person. Her self-injurious behavior included her hitting her right ear with an open or cupped hand; banging her head on a hard surface such as a desk or wall; and pulling her hair. When Student hit her right ear, it most often included numerous consecutive and fast hits. The hits to the ear varied in strength. The stronger hits had eventually resulted in damage to Student's ear, similar to the damage suffered by boxers.

7. Student had receptive language skills, and could respond to speech directed at her, but she was primarily non-verbal. District provided Student with an iTouch as an alternative augmentative communication device since at least 2014. The iTouch was a small device that allowed Student to use a software program with pictures to indicate her needs. Student initially required many verbal cues to navigate the program, but became more proficient with it as she learned to use it. It was interchangeably referred to as an iPod in Student's IEPs and other educational records.

8. Student's doctors prescribed medication to address her impulsive behavior and irritability, and for other health reasons. The medications were changed and adjusted through the years, including the time Student attended Heartspring.

9. District conducted a functional behavior assessment of Student in fall 2014. As a result of the assessment, in November 2014 District developed a behavior intervention plan. The purpose of the behavior plan was to reduce Student's aggressive and self-injurious behaviors, and to increase her willingness to engage in non-preferred activities. It also encouraged her use of the communication device to access and maintain adult attention as well as to access items, particularly those that provided Student with sensory input for calming purposes. District also added a goal to Student's IEP to have her to use her communication device to communicate her needs in place of engaging in her challenging behaviors. The IEP also included 60 minutes a month of behavior intervention services to monitor the behavior plan.

APRIL 3, 2015 IEP

10. On April 3, 2015, District convened Student's annual IEP team meeting. Student had met some, but not all of her goals. She made progress in all areas, including occupational therapy, speech and language, and in adaptive physical education. Her IEP team developed three new goals for her in the area adaptive physical education; three occupational therapy goals; and four speech and language goals.

11. The primary focus of the annual IEP team meeting was on Student's progress with behavior and communication. Student was progressing in her ability to use her communication device. Although she still needed prompts to use it, once Student did pick up the device to use it, she successfully navigated the software program. Student also used the device at home, but demonstrated more independence with it at school than at home. Santiaga Agranowitz was a board certified behavior analyst employed by the Development Center who worked with Student the entire time

Student was enrolled there. She was a member of Student's IEP team at this meeting. Ms. Agranowitz told Student's IEP team that the difference between Student's abilities at home and school might have been due to the fact that Student used gestures, signs and verbalizations more at home than at school, because it was more work for her to use the device. She suggested that Parents and Student's in-home providers practice referring Student to the communication device when they needed to communicate with her.

12. At school, Student's self-injurious behaviors and aggressive behaviors decreased except in March 2015, when her aggression towards others increased. Student's providers at the Development Center also noticed that she hit her ear not only when she was upset, but also when excited. The Development Center IEP team members agreed that one of the reasons for Student's behaviors was her lack of communication skills, and that the work being done to increase those skills would result in a decrease in her behaviors. Development Center staff recommended that they begin attempting to block Student from hitting herself as a response to her hitting behaviors. Because they were going to block Student's attempt to hit her ear, the Development Center IEP team members determined that they would chart each incident of Student hitting or attempting to hit her ear, rather than count each time she managed to hit it during each incidence.

13. Overall, Student made significant progress in her behavior at school. She met her goal of using her communication device or gestures at least 83 percent of the time she was upset rather than engage in challenging behaviors. Mother and Carol Overduin, the Development Center's occupational therapist, noted that Student appeared happier and more comfortable at school. Her behaviors had not been extinguished, however, so District developed a behavior intervention plan to address them.

14. Although Student's behaviors had diminished at school, they did not

diminish at home in spite of Student receiving applied behavioral analysis therapy and in-home behavior support from Regional Center. Student's problems at home occurred more when she was around her sister. Father informed the IEP team that because Student's sister's behavior was so intense, Student's needs sometimes became secondary. District IEP team members offered to provide Parents with visual materials for the home. District also offered to have Parents and Student's in-home providers observe her at school so that they could learn to implement the strategies that had been successful there.

15. Student's IEP team agreed to re-convene and finalize her IEP after District completed her triennial assessments.

JUNE 2015 TRIENNIAL ASSESSMENT AND IEP

16. District conducted Student's last triennial assessment in May and June 2015. At the time of the assessment, Student was enrolled in a high school program at the Development Center. The Development Center provided a minimum ratio of two students to every adult for instructional purposes, as well as opportunities for one-on-one instruction. Student's classroom during the 2014-2015 and 2015-2016 school years had almost one adult for every student. The Development Center assigned a full-time one-on-one aide to Student. The Development Center provided language-based instruction and behavior interventions based on positive programming. It did not use restraints as a behavior intervention.

17. Michele Bañuelos, a Development Center adaptive physical education specialist, administered an adaptive physical education assessment. She found that Student continued to function below average in all areas of motor performance, and therefore remained eligible for adaptive physical education services.

18. Ms. Overduin administered an occupational therapy assessment to Student. Student's basal level on all areas of the test, which is the highest stage in which

a student obtains scores of "regularly observed" on all items on the test, was in the two to four-year-old range. Student had been receiving occupational therapy services and made progress in a variety of areas, including in writing her name. Student also showed improvement in her bilateral coordination skills. Student had an aversion to wet, sticky substances, such as glue, but by the time of the occupational therapy assessment in June 2015, Student demonstrated improved ability to tolerate minimal exposure to those type of substances without engaging in maladaptive behaviors.

19. Frances Burt, a speech and language pathologist at the Development Center administered the speech and language assessment portion of Student's triennial. She utilized multiple testing instruments. Student became slightly agitated during the assessment, which interfered with her ability to engage in the testing. Overall, Ms. Burt found Student could comprehend simple directives and simple yes and no questions. Student best comprehended language when presented in short bits of information and on a topic of high interest to her. Although non-verbal, Student could use her communication device to communicate basic needs and wants. She also used gestures and signs to get her needs met. In the area of pragmatic language, Student could communicate greetings, requesting, and protesting using her communication device, with prompting.

20. District school psychologist Christine Marsden and Michael Baugh, Student's classroom teacher at the Development Center, administered the psycho-educational portion of Student's triennial assessment. The assessment included a review of Student's school records, interviews with Parents and Mr. Baugh, standardized testing in the form of rating scales completed by Mr. Baugh and Parents, the administration of the Southern California Ordinal Scales of Development, and observations of Student in class.

21. The Ordinal Scales are based on developmental sequences of human

reasoning described by psychologist Jean Piaget. The three areas measured are problem solving; object concept; and imitation, language and logic. Student's scores on this assessment indicated that she was functioning in the two-to-four-year-old range of cognitive development, closer to that of a three-year-old, which had not changed since her last triennial assessment in 2011. Since 2011, Student had increased her ability to use receptive language, and slightly increased her ability to understand some prepositional concepts such as "into" and "under."

22. Parents and Mr. Baugh completed the Adaptive Behavior System, Second Edition, which is a questionnaire designed to determine a student's adaptive needs. Parents and Mr. Baugh both rated Student's adaptive skills as very low. At home, she needed assistance with dressing herself, toileting, and in all areas of self-help. Student continued to demonstrate self-injurious and aggressive behavior at home. Mother indicated that Student loved school and her teacher.

23. Although Student demonstrated low adaptive skills at school, by the time of the triennial, Mother and Mr. Baugh concurred that Student had improved her behavior and functional skills. Student continued to increase her attention when doing desk work and group activities and improved in her ability to engage in non-preferred activities. Student had increased her ability to transition between activities in the classroom although she still struggled with transitioning between activities outside of class.

24. In school, Student's self-injurious behavior and aggressive behavior toward others declined. Where the behaviors had previously occurred daily, the behaviors only occurred once or twice a month as of the time of the assessment. Student's attention to task also increased. During her classroom observation, Ms. Marsden's data indicated that Student was on-task 73 percent of the time.

25. Student's IEP team re-convened on June 11, 2015, to review her triennial

assessment and finalize her IEP. The team reviewed the results of all the triennial assessments. The team, including Mother, agreed that Student demonstrated significant progress in behavior at school. Student's self-injurious behaviors reduced significantly since she was last assessed. Although Student was still hitting her ear, her head-banging behavior stopped at school. However, Student still engaged in the head-banging behavior at home.

26. In class, Student began to attach meaning to the work she was doing. Student was asking for schoolwork at home on the days she did not have class. She was becoming more tolerant of others in her environment. Student began using gloves on her hand, which decreased damage to her ear when she did hit it. Eventually, Parents provided her with a soft helmet, which further helped decrease the possibility of Student damaging her ear.

27. The team agreed that the goals developed two months earlier at Student's April 3, 2015 IEP team meeting were still appropriate based upon the triennial assessment results. District's offer of placement was for Student to receive specialized academic instruction for her full school day at a non-public school under contract with District or the Special Education Local Plan Area to which it belonged. District recommended that the Development Center remain as the non-public school placement. District continued to offer Student a full-time one-on-one aide. The IEP also offered Student 90 minutes per week of individual speech and language therapy in three, 30-minute sessions; 30 minutes a week group speech and language therapy; 20 minutes a week of occupational therapy; 180 minutes a week of adaptive physical education; 30 minutes a week of career awareness; and 60 minutes a month of behavior intervention services to monitor the April 3, 2015 behavior intervention plan. District also offered Student placement and services for the extended school year. Parents consented to all aspects of this IEP.

SEPTEMBER 3, 2015 IEP ADDENDUM

28. On July 28, 2015, two days before the end of the extended school year summer session, Student injured herself on the school bus by deliberately banging her head on the back of a bus seat. It was not the first time she had injured herself on the bus by banging her head. Student caused a significant injury to herself in spite of having an aide on the bus with her who had a cushion to place in front of Student when she tried banging her head. Father emailed District the day after the injury asking to discuss the issue. District wrote back the same day to assure Father that its transportation director had gone to the Development Center to discuss further steps to ensure Student's safety on the bus. District agreed to convene an IEP team meeting to discuss Student's safety on the bus as soon as school resumed for the 2015-2016 school year.

29. On September 3, 2015, right after the start of the new school year, District convened an addendum IEP team meeting to address Student's transportation needs. District team members included Gwen Redira,[3] who was District's Coordinator of Special Education at the time of the IEP team meeting. District presented a draft bus safety plan at the meeting, and modified it during the meeting based on input from Parents, their attorneys, and the other team members. District's plan addressed Student's safety on the bus, and included a change in the bus used and a change in the route to take her to and from school. District changed the bus route so that the bus would make fewer

[3] Ms. Redira was District's Coordinator of Special Education from 2013 to 2017. Among her many duties as the coordinator, she was responsible for supervising District's autism specialists on special assignment, overseeing classified staff, assisting with IEP teams on due process cases, and working with students placed by District in non-public schools. She became District's Administrator for Special Education in 2017.

stops, because the stops seemed to trigger some of Student's frustration. Parents consented to the bus safety plan.

30. The data on Student's behaviors was collected during summer school. The data indicated that Student's behaviors had decreased from the time District conducted its functional behavior assessment.

31. Regional Center continued to provide crisis prevention intervention to Student in the home. Although Regional Center had told Parents it was a temporary intervention, Regional Center had been providing the service for three years. Student's behavior at home was often so severe that two Regional Center staff members would sometimes have to intervene with her. The crisis intervention staff also often had to assist the private in-home behavior therapist during Student's therapy. Father was concerned that whatever advances Student might be making at school were not being generalized at home. He was also concerned that Student was not communicating well with the iTouch.

32. For the first time, Parents informed District that they believed Student's maladaptive behaviors had not improved and she required a more restrictive placement. Father had started researching out-of-state residential placements for Student because of his concerns with what he saw as her lack of behavioral progress, lack of progress in communication, and the recent injuries on the bus during the extended school year. However, Student's school records did not support Father's belief that she was not making progress at school. The records indicated that she made progress on her behavior, her communication skills, and her pre-academic and pre-vocational goals at school. Father's concerns were more centered on the difficulties Student continued to have at home and the fact that he believed Student was not generalizing her behavior gains from school at home.

33. The only school Father found that would either accept Student or that he

believed would address her needs and was certified by California Department of Education, was Heartspring, which had programs focused on the needs of highly impacted autistic students. It had programs for late teens and young adults. Parents had already applied to Heartspring, which informed them it would put Student on a waiting list because it did not anticipate having room for Student until December 2015. Parents requested that District place Student at Heartspring.

34. Dr. Perry Passaro, a licensed psychologist and licensed educational psychologist, provided private therapy to Student for several years prior to her enrollment at Heartspring. Parents asked him to review some of Student's records. Based on his review, Dr. Passaro wrote a recommendation that Student needed more intensive intervention, such as a residential placement. However, Parents did not give Dr. Passaro all of Student's records, and did not give him copies of Student's IEPs. Dr. Passaro did not testify at the hearing. His recommendation therefore was not given any weight.

35. Parents began providing a soft helmet for Student to wear to prevent some of the injuries she caused to her head. Parents had experimented with a hard helmet. However, Student kept removing it, but she kept the soft helmet on. While it prevented injuries to her ear if she hit herself, it did not prevent injuries to her head during head-banging episodes. Between September and the beginning of December 2015, Student injured herself at school on at least five instances, where she caused a bump or bruising of the skin.

36. Parents continued to request placement at Heartspring. District declined the request. On November 25, 2015, Student filed a request for due process in OAH Case Number 2015120011, alleging that District had denied her a FAPE for school years 2014-2015 and 2015-2016 because it did not offer her an appropriate placement, specifically, placement at a residential treatment center.

JANUARY 5, 2016 SETTLEMENT AGREEMENT

37. The parties settled the issues raised in OAH Case Number 2015120011 in a settlement agreement signed by Parents on December 29, 2015, and signed by District on January 5, 2016.

38. For its part of the agreement, District agreed to reimburse Parents up to a total of $120,000 for prospective educationally related expenses Parents might incur for Student through June 30, 2016, that were not covered by any other source, such as insurance. District also agreed to convene an annual IEP team meeting for Student no later than April 3, 2016, to develop an IEP for Student that would cover the period following the expiration of the settlement agreement.

39. Parents agreed that nothing in the agreement constituted stay put for Student. Parents agreed that if they disagreed with District's offer at the IEP team meeting to be held on or before April 3, 2016, Student's last agreed upon and implemented IEP would be her stay put following the expiration of the agreement. That meant that, in case of a disagreement over the new annual IEP offer, Student's April 3, 2015 IEP, as amended, would be Student's stay put IEP.

40. The terms of the agreement included that Parents would be privately placing Student. Student would not be placed pursuant to an IEP and District was not responsible for Student's placement. The agreement did not indicate any specific placement Parents had chosen for Student and did not limit them to any specific placement. Rather, District agreed to reimburse Parents for any educationally related expenses they incurred for Student during the time covered by the agreement.

41. In exchange for District's agreement to pay them a substantial amount of money as reimbursement for Parents' educational expenses for Student, Parents agreed, in pertinent part, to the following:

a. To actively pursue Regional Center funding for ongoing services for Student,

including, but not limited to residential treatment center services, to be provided before and after the expiration of the settlement agreement;

b. To permit free and open communication between District and the Regional Center and any private educational placement at which Parents might place Student; and

c. To facilitate District's ability to observe Student at any private placement Parents secured for her, during the term of the agreement.

42. Significantly, Parents also agreed the settlement specifically covered any and all District obligations to Student through June 30, 2016. Parents agreed to waive any and all claims against District, known and unknown, through that date. Based upon the terms of the agreement, they agreed this was both a waiver of all past issues through the date the agreement was fully executed, January 5, 2016, and a waiver of all claims against District going forward through the expiration of the agreement on June 30, 2016. Parents therefore waived their right to contest any dispute that they might have with the IEP to be developed at Student's next annual IEP team meeting, which was scheduled to be held on or before April 3, 2016. Parents were represented by legal counsel at the time. Their attorney signed approval of the agreement. Parents voluntarily entered into the agreement and agreed to all its terms, including the waiver of their right to contest the procedural or substantive validity of the IEP to be developed by April 3, 2016.

MARCH 23 AND APRIL 28, 2016 IEP

43. Heartspring did not have space for Student in December 2015 as it had anticipated. Student remained enrolled at the Development Center under her District IEP. She was still enrolled there when District convened her annual IEP team meeting on March 23, 2016, as provided in the Parties' settlement agreement. The IEP meeting concluded on April 28, 2016.

44. The IEP team members who attended the March 23, 2016 IEP team meeting included Parents; Courtney Trotter, a special education teacher at the Development Center who worked with Student; Ms. Agranowitz, and Ms. Redira. As of this IEP team meeting, Student made progress on her three adaptive physical education goals, but did not meet them. She did, however, meet her three occupational therapy goals. Overall, Student had vastly improved her communication skills using the communication device. The device empowered Student's ability to communicate with her peers and teachers. Based on data collected by Development Center staff, Student used her communication device 93 percent of the time to communicate her needs as observed from January to mid-March 2016.

45. Student had been working on nine classroom goals. She met her goal of participating in an on-campus job twice a week for 25 minutes. She met her goal of significantly reducing her self-injurious behavior of cuffing (hitting) her ear. Staff was able to re-direct Student's behavior to another activity with a maximum of two prompts. Student had met her goal of using her communication device to gain the attention of a person in her way to say "excuse me" with only one verbal prompt. She had met her goal of being able to participate in non-preferred activities for 20 minutes with only one verbal prompt. Student had also met her goal of being able correctly to select the photograph of each of the 12 staff members working with her at school, with only one gestural prompt. Student had made progress on, but had not met her goals of completing a four-step non-preferred activity; of matching coins to the amount of a purchase; of accessing her personal information on her communication device; or of selecting the correct time to heat her food in the microwave.

46. Although she had not met all of her goals, Student met the majority of them and made substantial progress on those she did not meet. All of her teachers and therapy providers were happy with her progress, given her low cognitive levels. Student

was generally happy at school and was interacting more with peers during group lessons. She had also established a very good rapport with the new aide working with her.

47. Student's adaptive living skills also improved. With prompts, she helped maintain the classrooms by cleaning chairs, tables, desks, and windows. Student could independently place her food in a microwave, push the start button, and remove her food when heated, although she needed prompts to set the microwave timer. Student used the restroom at school and knew to wash her hands after using it, with only occasional prompts.

48. Father acknowledged that Parents heard positive data from school about Student's behaviors and abilities but that they were not seeing the same at home. He continued to be concerned that Student's behavior at home was not decreasing as it was at school.

49. District re-convened Student's annual IEP team meeting on April 28, 2016, to complete the process of developing her annual IEP. Team members on that day were Parents; Ms. Bañuelos; Ms. Burt; Ms. Trotter; Ms. Overduin; Ms. Agranowitz; Ms. Redira; and other staff from the Development Center who had worked with Student.

50. Ms. Trotter proposed six new classroom goals for Student. Ms. Overduin, the occupational therapist from the Development Center, proposed two occupational therapy goals for Student. Ms. Bañuelos, the adaptive physical education specialist from the Development Center, proposed three goals for Student. Ms. Burt, the speech language pathologist from the Development Center, proposed three new goals for Student.

51. Student did not mind wearing the soft helmet and had substantially decreased the self-injurious behavior of hitting her ear and banging her head on hard objects at school. Ms. Agranowitz, the Development Center behavior specialist, and

other Development Center staff compiled data on Student's behavior from the beginning of January through the time of the April 28, 2016 IEP team meeting. Student had 28 incidents of hitting her ear in January 2016; four instances of hitting her ear in February; and none in March. She had self-injurious behavior of banging her head three times in January 2016, and no incidents at any time in February or March. Student had a combination of seven self-injurious incidents of hitting her ear or banging her head in April, 2016.[4] Student had not had any further incidents of hurting herself on the bus once the new bus safety plan was implemented.

52. Student's aggression toward others also had decreased. She had eight incidents in January 2016, four in February, six in March, and 15 in April. By the time of the March 23, 2016 IEP team meeting, she had increased her willingness and ability to engage in social activities and interactions with her peers and with staff. She worked well with others. She was able to work through changes or non-preferred activities without hitting or biting as she had done in the past.

53. Ms. Agranowitz developed two new behavior goals for Student. The objective of the first goal was for Student to use her communication device or gestures to communicate her need to access a preferred item or to access a person without the need of any prompts. Student presently required an average of three prompts to do so. The second behavior goal was for Student to decrease by 50 percent her self-injurious and aggressive behaviors.

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[4] For the time period between the April 2015 annual IEP team meeting and the March 23, 2016 IEP team meeting, the Development Center had started blocking Student's attempts to hit her ear when it appeared she was doing it in a forceful rather than light manner. Since staff was attempting to block the hits, data was not being collected on each hit but rather on each incidence of hitting.

54. District also developed a comprehensive behavior intervention plan for Student. The plan identified Student's self-injurious and aggressive behaviors. It described the intensity of the behaviors, as reported and observed by Student's classroom teacher, her one-on-one aide, and Ms. Agranowitz. The plan described the situations that were likely to trigger the behaviors. The plan properly identified that Student engaged in the behaviors because she relied on others for prompting to communicate her needs, used the behaviors to communicate, used the behaviors to avoid non-preferred tasks or items, and to get people to move away from her. The plan proposed several strategies for removing Student's need to engage in the behaviors, including working on increasing Student's ability to use her communication device to communicate all her wants, needs, and concerns.

55. Father told the IEP team that he was appreciative of all the work staff at the Development Center had provided to Student. He told the team he believed Student needed a residential treatment center placement because of her self-inflicted injuries on the bus. However, as of the time of this meeting, Student had not had any bus injuries since September 2015, seven months before this IEP meeting.

56. Father acknowledged to the team that Student was making good progress at school, but his concern was that the same progress was not being shown at home. He did not point to any specific behavior at school, other than Student's earlier injuries on the bus, as a basis for his request that District place Student at Heartspring. Rather, Father hoped that Student's placement at Heartspring would provide the link between school and home that he wanted. Father was not sure how long Student would remain at Heartspring; he left it to Heartspring staff to determine when she would be ready to return home.

57. District's offer of placement and services at the April 28, 2016 IEP team meeting was: a) placement 100 percent of the school day at a non-public school under

contract with District or the Special Education Local Plan Area to which it belonged, where the 16 proposed goals would be implemented; b) 90 minutes a week of individual speech and language therapy in three, 30-minute sessions; c) 30 minutes a week of group speech and language therapy; d) three, 30-minute sessions of adaptive physical education; e) one, 20-minute session of occupational therapy to be supported by consultation between the occupational therapist and classroom staff; f) provision of a one-to-one aide for Student's full school day; g) 30 minutes a week of career awareness training; and h) 120 minutes a month of behavior intervention services for the behavior specialist to monitor Student's behavior intervention plan. District also offered placement and services for the extended school year.

58. By the time of the April 28, 2016 IEP team meeting, Heartspring had a space open for Student and her last day of school at the Development Center was the day of this IEP team meeting. Student began attending Heartspring on May 2, 2016. The March 23/April 28, 2016 IEP did not contain a plan to transition Student from Heartspring back to the non-public school placement District offered in this IEP. Parents did not request District to include a transition plan at the time of the IEP, although they knew at the time that Student would be enrolling at Heartspring within a few days of the April 28, 2016 IEP team meeting. Parents did not request an IEP team meeting to amend the IEP at any time after April 28, 2016, even after entering into amended settlement agreements with District in which they waived their right to challenge this IEP.

59. Parents consented to all aspects of the IEP other than placement at a non-public school. Because Student remained at Heartspring through the time of the hearing, District never implemented the March 23/April 28, 2016 IEP.

AMENDMENTS TO THE PARTIES' JANUARY 5, 2016 SETTLEMENT AGREEMENT

June 27, 2016 Amendment

60. The original settlement agreement finalized between the parties on January 5, 2016, was due to expire on June 30, 2016. By that date, Student would have only been at Heartspring for approximately two months, rather than the approximately six months Parents had contemplated when they signed the original agreement. Parents therefore requested that District amend the settlement agreement to extend the expiration of the agreement and therefore encompass six months of Student's private enrollment at Heartspring.

61. District agreed to extend the expiration date of the settlement as long as there were no other changes to the agreement. The amended agreement stated that the parties were amending the original agreement due to Parents' delay in enrolling Student in the program they desired. The expiration date of the agreement was extended until October 31, 2016. The amended agreement also stated that District had met its obligation from the original agreement to convene an IEP team meeting and develop an IEP for Student that could be implemented following the expiration of the amended settlement agreement. The amended agreement stated Student's stay put after October 31, 2016, in the event of a disagreement as to the annual IEP that had been developed, would be Student's last agreed upon and implemented IEP.

62. Parents also retrospectively waived all claims as to Student's education through the date of full execution of the settlement on June 27, 2016, and prospectively waived all claims through the October 31, 2016 date the amended agreement would expire. By the time this amendment was executed, District had complied with the original agreement by convening an IEP team meeting on or before April 3, 2016, and by developing an IEP for Student for the period after the expiration of the agreement. Parents agreed to waive any right to dispute the validity or appropriateness of the

March/April 2016 IEP, as well as waived their right to dispute any deficiencies they might later determine it had. Parents waived any claim against District from the date of final execution of the amended agreement on June 27, 2016, through October 31, 2016, in exchange for District agreeing to extend the expiration of the agreement by four months. The amended settlement agreement enabled Parents to receive another four months of reimbursement for at least a substantial portion of their costs of placing Student at Heartspring.

November 2, 2016 Amendment

63. In November 2016, Parents again requested that District amend the settlement agreement. The parties entered into a Second Amended Settlement Agreement which extended the expiration of the settlement to December 31, 2016. District agreed to reimburse Parents up to an additional $25,000 for educational expenses they might incur for Student. Parents again agreed to waive any claim against the District, this time through the expiration of the second amended settlement agreement. This waiver encompassed any disputes with Student's March/April 2016 IEP. The parties again agreed that Student's stay put following the expiration of the second amended agreement on December 31, 2016, would be Student's last agreed upon and implemented IEP.

64. The terms of all three agreements were essentially the same. The only significant difference was the extension of the expiration date of the agreements and, in the second amended agreement, District's agreement to reimburse additional educationally related costs incurred by Parents, for a total reimbursement of $145,000.

65. At no time prior to the final expiration of the second amended settlement agreement did Parents request that any of the agreements be amended to include a provision for District to convene an additional IEP team meeting for Student. Nor did Parents ever request that the March 23/April 28, 2016 IEP be amended. All three

settlement agreements included the language in section of 9(A) of each document that Parents were agreeing to "a release of any procedural or substantive violation of IDEA or any other provision of educationally-based law, which may have occurred to date or which may occur as a result of this Agreement."

STUDENT'S ENROLLMENT AT HEARTSPRING

Preparations to Transition Student

66. Due to her disabilities, Student had difficulty transitioning between different places or locations. Given Student's dislike of transitions and difficulty in adapting to new places and situations, Parents had to engage in a long process to transition Student to Heartspring, particularly since her enrollment there would necessitate navigating through an airport and a multi-hour airplane ride. Parents prepared Student for the airplane flight by taking her on a simulated flight and taking her on trial runs to the airport. It took four trials before Student would walk through the security check point.

67. Heartspring also sent Mother a social story about going to a new school to prepare Student in advance for meeting new teachers, staff, and peers. Additionally, Heartspring sent one of its staff members to Student's home to meet her in person before her enrollment, and set up a video conference so that Student could meet her teacher and see the group home in which she would be living.

68. Mother testified that due to Student's difficulties with transitions, accessing the airport, and flying, it would not be appropriate to attempt to bring Student back and forth from Kansas for visits.

Student's First Few Months at Heartspring

69. As a residential treatment center, the program at Heartspring had two primary components: a school and group living facilities. Both were located on the

Heartspring campus. The housing units were a short walking distance from the school.

70. Eight students lived in Student's group home, four young men and four young women, aged 14 to 20. Leea Thompson was the lead home coordinator. She had worked for Heartspring for 19 years. She was responsible for overseeing the home and the staff that worked there, but was not responsible for the day-to-day operation of the home and was not present every day. Ms. Thompson did not have a college degree and had no special credentialing of any kind.

71. Student's group home had six staff members present at any given time, one of whom was always in training. In addition to overseeing the students housed at the home, the support staff was responsible for implementing the students' non-academic goals, such as speech and occupational therapy goals. Support staff generally spent about 15 minutes in the afternoons after school working on the goals. No credentialed or licensed professional was present when they implemented the goals in the housing units.

72. Student had a visual schedule to use at her group home. However, it was kept in a locked cabinet and Student could not independently access it. The schedule focused on Student's self-care such as showering and using the bathroom. Staff at the group home worked with residents, including Student, to teach them basic cooking techniques. Student also had chores to do such as cleaning tables, wiping windows, and keeping her room orderly. At some point, Heartspring added padding to the walls of Student's bedroom to keep her from injuring herself when she banged her head on the walls.

73. Student followed a routine at her group home. After returning from school, she would put her school supplies in her room and then get a snack from a basket in the communal kitchen. Student had a designated chair at the dining room table and knew it was hers. After snack time, support staff would work on Student's non-

academic goals. Student would then work on chores or go on an outing.

74. Heartspring tried to have pre-dinner and post-dinner outings where the residents would go to other group homes to greet peers there. They also arranged trips outside the facility to places like convenience stores or fast food restaurants. There were also planned outings on Saturdays and on Sundays. Student enjoyed riding in a vehicle. She was permitted to participate in the outings if she was not engaged in any maladaptive behavior immediately before the start of the trip. Student's maladaptive behaviors prevented her from participating in all outings during the week. She was generally successful in participating in one of the three daily weekend outings and about two thirds of the weekday outings.

75. Although Student had a one-on-one aide through District when enrolled at the Development Center, Heartspring did not provide her a dedicated one-on-one aide. She had a series of support staff working with her. Heartspring had significant turnover in support staff. No one stayed long. By the time of the hearing, when Student had been at Heartspring for about 15 months, all but one of the 12 group home support staff had changed since the time Student arrived at Heartspring. Ms. Thompson attributed the quick turnover in staff to their fear of many of the students, who, like Student, had aggressive behaviors.

76. Shawn Pearson was Student's teacher for most of the time she was at Heartspring. He had a master's degree in learning disabilities and was a credentialed special education teacher. Mr. Pearson taught at Heartspring for five years at the time of hearing. Student was transferred to his classroom about two months after she enrolled at Heartspring because the school determined her functioning was higher than that of the students in the first classroom to which she had been assigned.

77. Mr. Pearson's classroom generally had 10 students, aged about 16 to 21. He was supported by eight paraprofessionals, so there were generally nine adults

present for the 10 students, similar to the ratio that had existed in Student's classroom at the Development Center.

78. Student's school program consisted of working on her academic and non-academic goals, participating in physical education, and participating in an on-campus job, and participating in field trips and community outings. Mr. Pearson was often out of the classroom, often for more than half the school day, so the paraprofessionals often implemented the goals without his direct oversight. He worked with Student directly about 30 minutes a day.

79. Student demonstrated some academic progress in her 15 months at Heartspring. However, Mr. Pearson acknowledged that progress was hard to document because it was hindered by her behaviors. She did show progress in her ability to sit in a group of students and pay attention to a speaker, rather than sitting behind the group as she did when she first enrolled at Heartspring. She also showed progress in her ability to ride in vehicles and to participate in outings and field trips.

Student's Behaviors While at Heartspring

80. Heartspring assessed Student and did an intake report about six weeks after she arrived. The report was not dated and its author was not identified. None of the Heartspring staff who testified at the hearing, including Mr. Pearson and Vivian Olvera, a Heartspring behavior specialist who also worked with Student, were involved in the testing or preparing the report or knew who the author was. The report included a paragraph with a description of the results of a testing instrument called the Aberrant Behavior Checklist-Community. However, the results were attributed to a person other than Student. The report did not define whether psychological testing measures administered to Student were done when she first started at Heartspring or at the six-week mark.

81. Heartspring kept good data on Student's behavior. All staff carried an

electronic device at all times and constantly inputted data into a file for Student that was graphed and accessible to staff and Parents. The six-week intake report included a functional behavior assessment based on data collected on Student's behaviors. The report also graphed the behaviors. Data was collected in school and in Student's group home. The four behaviors it analyzed were physical aggression; self-injurious behavior; non-compliance or stalling; and dropping or refusing to move. Non-compliance and dropping to the floor were not identified as problem behaviors while Student was enrolled at the Development Center.

82. Student engaged in physical aggression, including: hitting staff and peers; pushing; pulling hair and/or clothing; grabbing; lunging; intimidating and/or other physically aggressive behavior toward others. During the six-week reporting period, Student averaged 203 instances of physical aggression a week in class. The aggressive behavior decreased by the end of the six-week reporting period. In the group home, Student average 59 instances of aggression a week. The aggression decreased by the end of the reporting period.

83. Self-injurious behavior included Student hitting her face, ears, or head with her cupped hand; banging her head against a hard surface; pulling her hair; or any other behavior to injure herself. In class, Student averaged 195 instances of self-injurious behavior a week, which decreased by the end of the reporting period. She averaged 165 instances of self-injurious behavior at home, which also decreased by the end of the reporting period.

84. Heartspring staff defined non-compliance or stalling as Student's failure to initiate a request within 10 seconds of a verbal prompt. Student averaged 14.8 instances a week of non-compliance within the classroom and 19.3 instances a week of non-compliance in the group home. Both decreased at the end of the reporting period.

85. Student's behavior of dropping to the ground and refusing to move

averaged 3.3 occurrences a week in class and 7 occurrences a week in her group home. Both also declined by the end of the six-week reporting period.

86. Student's aggressive and self-injurious behaviors during her first six-weeks at Heartspring were substantially higher than her behaviors during her last few months at the Development Center, where she had either not engaged in the behaviors or engaged in them a minimal amount of times. Student's disabilities made transitions very difficult for her. If Student's increase in behaviors had been limited to the first few months at Heartspring, the increase might reasonably be attributed to the transition there. However, as discussed below, although Student's disruptive behaviors were the reason Parents chose Heartspring for Student, Heartspring was unable to successfully address Student's behaviors, which either increased or remained at the same level as charted during her first six weeks there.

Student's Behaviors at Heartspring Through the 2016-2017 School Year

87. Heartspring staff members who testified at hearing were all candid that Student's behaviors while enrolled there had not been controlled and, if anything, increased. Heartspring held IEP team meetings for Student and developed IEPs for her during the course of her enrollment. It convened its first IEP team meeting on July 18, 2016, and reviewed Student's intake report that included the discussion of Student's ongoing behavior challenges. Heartspring also developed a student support plan for Student, much akin to District's behavior intervention plan, designed to address and decrease Student's behaviors. The plans were adjusted several times during Student's enrollment but were not successful in reducing Student's behaviors.

88. Heartspring conducted another functional behavior assessment of Student in March 2017. Based on its data collection, it determined that in a two-month period from the beginning of December 2016 to the end of January 2017, Student had engaged in self-injurious behavior an average of 1,144 times a month in the classroom

and in her group home settings, an average of 286 incidents a week. Significantly, Student's self-injurious behavior had increased from the beginning of December to the end of January.[5]

89. Student's aggressive behavior had also not abated. For the period beginning December 2016 to the end of January 2017, she averaged 1,359 combined incidents of aggression in class and in her group home, or approximately 340 incidents per week. This was an increase over her acts of aggression during her first six weeks of enrollment at Heartspring. Significantly, Student's aggression increased substantially from the beginning of December 2016 to the end of the January 2017 reporting period. More disheartening was the fact that Student's aggressive and self-injurious acts had almost been extinguished during the last reporting period she was enrolled at the Development Center.

90. Student's non-compliance decreased from what had been reported in her six-week intake report. The first six weeks' combined average of non-compliance in school and in her group home was 34 incidents a week. During the December 2016 to January 2017 reporting period, her non-compliance averaged 74 incidents a month, or 18.5 a week. For the same reporting period, Student's incidence of dropping to the floor and/or refusing to move had remained almost the same as reported during her first six weeks at Heartspring.

91. Student's behaviors at Heartspring were so intense and significant that Heartspring felt it necessary to institute a seclusion and physical restraint procedure with her, beginning when she first enrolled. Heartspring staff was trained to use what Ms. Olvera termed a "safe and positive" restraint approach that Heartspring had

[5] Heartspring tracked the hitting behavior based on each time Student struck her ear, not based on each episode of the hitting behavior.

developed. If Student's self-injurious or aggressive behavior could not be redirected or stopped, a staff person would engage Student's arm or torso, and, if necessary, another person would hold and manage Student's legs. An additional person would monitor the restraint to ensure that Student was not being injured and that her breathing was not blocked.

92. Initially, Heartspring did not place a maximum time that Student could be restrained. She was once restrained for 18 minutes consecutive minutes. Heartspring believed that the restraint method might calm Student faster and/or decrease the behaviors. Because Parents were concerned about the length of time Student was being restrained, Heartspring later implemented a maximum restraint time of up to only one minute if the procedure was necessitated at school. However, in the group home, Student would only be released if she had displayed safe behavior for at least 30 seconds without struggling or attempting aggression. Therefore, Student could be restrained indefinitely in her group home setting if she continued to struggle or be aggressive. Heartspring instituted these policies because it was seeing more aggressive and self-injurious behaviors by Student at school than in the group home.

93. Student was never harmed during the restraints. While Heartspring found it necessary to restrain Student during her behaviors, staff at the Development Center successfully redirected the behaviors and saw them decrease over time without using restraints. During the 15 months at Heartspring, Student was restrained at least 19 times.

94. Ms. Olvera hypothesized that the increases in Student's behaviors were due to changes in her medications and problems with Student's sleep schedules. However, she offered no hard data or evidence to back up the hypothesis. Heartspring could not decrease Student's behaviors at any time during the 15 months she was there up to the time of the hearing. If they blocked Student's self-injurious behaviors, Student

often became physically aggressive with others.

95. Ms. Redira went to Kansas and observed Student at Heartspring during the fall of 2016. She returned with Ms. Marsden for an additional observation on March 16, 2017. Both times, the observations lasted about eight hours. During both observations, Student engaged in several episodes of self-injurious and aggressive behaviors, particularly when asked to do a non-preferred task. There were several different Heartspring staff members working with Student. They were inconsistent in how they communicated with her and how they reinforced behavior. When Ms. Marsden asked staff during her observation what the triggers were for Student's maladaptive behaviors, the staff gave her different answers as to what they felt the triggers were. At one point, in Student's group home, she had a significant behavioral incident that lasted almost a half hour. Ms. Marsden and Ms. Redira noted that Student engaged in 78 acts of physical aggression toward others during the two and a half hours they observed her in class.

96. Heartspring staff collected data on Student's behaviors between March and May 2017. Student averaged 1,799 incidents of self-injurious behaviors a month, an increase from the prior reporting period where she had averaged 1,144 incidents a month. Heartspring staff did not report on self-injurious behaviors that were mild in nature, so their data actually underreported the times Student hit her ear.

97. Student's physically aggressive behaviors had increased from 1,359 incidents a month to 1,478 incidents a month. Therefore, over the 15-month period Student attended Heartspring, her behaviors increased significantly from what they had been during her last few months at the Development Center. After more than a year at the residential treatment center, Heartspring had been unable to address the disruptive behaviors that had been the reason Parents chose to enroll her there. Heartspring held another IEP team meeting for Student on July 17, 2017, just two weeks before the start

of the hearing.

DISTRICT'S APRIL 7 AND APRIL 20, 2017 IEP

April 7, 2017 IEP Team Meeting

98. The November 2, 2016 Second Amended Settlement Agreement expired on December 31, 2016. Parents did not re-enroll Student in District after that date. They did not contact District to have it implement Student's April 2016 IEP or to invoke the stay put provision of the settlement agreement. Rather, they retained Student at Heartspring as a parentally placed private school student in lieu of returning Student to District.

99. Ms. Redira explained at hearing that as of December 31, 2016, and ongoing, District continued to have a master contract in force with the Development Center. The terms of the contract did not require District to separately develop individual contracts for students District placed at the Development Center through the IEP process. Had Parents decided to dis-enroll Student from Heartspring and re-enroll her in District, District could have placed Student at the Development Center as her stay put placement within a few days of her re-enrollment. Student presented no evidence to controvert District's evidence that it was ready, willing, and able to implement Student's stay put IEP at the Development Center had she returned to District.

100. Although Student remained privately placed at Heartspring, District convened an IEP team meeting for her on April 7, 2017, to develop Student's annual IEP. Team members present included Parents; Ms. Redira; Ms. Marsden; Student's attorneys and District's attorney; and another District representative. Heartspring staff attended the IEP by conference call. Heartspring team members included Ms. Olvera; Ms. Thompson; Mr. Pearson; speech language pathologist Beth Schneider; and other staff who worked with Student.

101. Student's present levels of performance were based primarily on input from Heartspring staff, with some input from Ms. Redira and Ms. Marsden based on their observations. Student continued to have difficulty working in groups. She would not interact with peers or staff unless prompted by staff. Student continued to be non-verbal. Her primary modes of communication continued to be her communication device,[6] gestures and signs, as had been the case when at the Development Center. Heartspring was able to increase Student's facility of use with the iPod by increasing the size of icons on the screens and decreasing the amount of icons per screen. However, her use of the device remained focused on preferred items, such as food, having lunch, and going on outings. She more often used gestures or nods of the head to respond to "yes" or "no" questions rather than use the communication device. When Student was not motivated to communicate, she required maximum prompts from staff to use the device. Receptively, Student continued to only be able to follow one-step directions, and then only when motivated to do so. Heartspring found it difficult to assess Student's true receptive language skills because her performance, attention, and motivation decreased when language concepts were more complex.

102. Vocationally, Student participated in community activities such as a "meals on wheels program," a recycling program, field trips, and outings to small stores. However, her self-injurious behaviors, unawareness of dangerous situations, lack of recognition of safety signs, and lack of pedestrian safety, impeded her ability to participate and required that she have constant supervision on outings.

103. Student required supervision and adult prompting to complete all self-care tasks as well. She required hand-over-hand assistance at times to dress herself and

[6] Heartspring began using an iPad with Student after she had been there several months.

at all times when cutting her food with a fork and knife. She required assistance in some aspects of toileting as well. She required hand-over-hand assistance to brush her teeth. Student often engaged in self-injurious and aggressive behaviors during these types of self-care routines. She required prompting to complete all self-care skills.

104. Heartspring staff acknowledged at the April 7, 2017 IEP team meeting that Student's self-injurious and aggressive behaviors had not been controlled. They acknowledged that in the month prior to the IEP team meeting, they had seen an escalation in her behavior at school and even more in the home. Heartspring staff acknowledged that its frequent staff changes and use of inconsistent substitute staff caused increases in Student's maladaptive behaviors.

105. The IEP team was unable to finish development of Student's IEP on April 7, 2017. The team reconvened on April 20, 2017, to complete the IEP process. All required IEP team members were present.

106. District proposed 14 new goals for Student. The goals were based upon goals developed by Heartspring as part of its own IEP process, including consideration of Heartspring reports of Student's present levels of performance, and Ms. Redira's and Ms. Marsden's observations of Student at Heartspring. District proposed mathematics goals; vocational goals; an adaptive physical education goal to increase Student's independent participation in activities; writing goals; self-help and adaptive living goals; a language goal to increase Student's independent use of her communication device; and a goal for on-campus job participation. Since Student needed full prompting at Heartspring to sit within a group of peers, District proposed a new goal for Student to be able to engage in non-preferred activities with her peers for up to five minutes with prompting as needed.

107. District also proposed three goals designed to address decreasing Student's self-injurious and aggressive behaviors, in conjunction with its proposed

behavior intervention plan. The goals were in response to Heartspring's data showing that Student's maladaptive behaviors had increased substantially while enrolled there as compared to her behaviors while enrolled at the Development Center the prior year.

108. To address Student's continuing self-injurious and physically aggressive behaviors, District proposed a behavior intervention plan as part of the IEP. The plan targeted the four behaviors Heartspring's support plan had identified: physical aggression, self-injurious behaviors, non-compliance/stalling, and dropping/refusing to move. The plan described the antecedents to Student's behaviors, strategies for addressing the behaviors, and prompts to be used unless Student's goals required lessor or greater prompting. The plan also described procedures to use to get Student to comply with directives and to decrease her maladaptive behaviors.

109. Based on Student's present levels of performance, the goals the IEP developed for her, and recommendations from Heartspring and the services it was offering Student through its own IEP, District offered Student individual speech and language services twice a week for 15 minutes each session. It also offered her 80 minutes a week of group speech and language services. District offered Student three, 30-minute sessions of adapted physical education in a group setting, 15 minutes a week of occupational therapy, and extended school year services with the same level of related services.

110. Student's IEP team then discussed what her placement should be to implement the goals and related services. Parents, their representatives, and Heartspring staff advocated for a continued residential placement for Student. They believed Student required the residential component to provide an additional element for her safety. Parents also believed that Student required a residential placement to generalize her skills across environments. However, Student's behaviors had not improved at a residential placement. Rather, the data showed that her behaviors at school had

increased substantially while enrolled at Heartspring. Her behaviors in the group home setting had also continued unabated.

111. District believed that a non-public school in California was Student's least restrictive environment and that she did not require a residential placement to receive a FAPE. After discussion with all team members, they offered, as in prior IEP offers, placement at a non-public school under contract with District or the Special Education Local Plan Area to which it belonged.

112. Parents communicated to Ms. Redira their desire that District not only consider a residential placement, but that it also not offer Student a non-public school placement that Student had previously attended. Parents did not want Student to return to the Development Center. In response, Ms. Redira started reviewing other possible non-public school placements for Student prior to the April 20, 2017 IEP team meeting. She was not able to give the schools any specific information about Student because she did not request Parents to sign a release of information that would permit her to do so. As of the April 20, 2017 IEP team meeting, Ms. Redira contacted Port View Preparatory, located in Orange County, California. District recommended that Port View as Student's placement at the meeting, along with District-provided transportation to and from the school, including a safety vest and a one-on-one aide on the bus.

113. To facilitate Student's transition to the new non-public school, District proposed a transition plan that included having Student and Parents visit the new school prior to her starting the school. District also proposed providing Student with a social story with pictures of the new school, the school staff, and the school setting, to prepare her for the transition. Student did not put on any evidence of what other type of transition supports District should have included in its transition plan.

114. Ms. Redira acknowledged at hearing that Port View had told her that it did not presently have space for another student. It was planning on expanding and

opening another campus. Once it did, it might have room for Student at one of the two campuses, but it was unknown when that would be. After the April 20, 2017 IEP team meeting, Mother contacted Port View and was told the same information.

115. After the April 20, 2017 IEP team meeting, Ms. Redira investigated other possible non-public school placements for Student. Beacon Day School, a non-public school also in Orange County, informed her that it had space available for Student based on the little information Ms. Redira provided regarding the type of placement Student might require.

116. District did not provide Parents with a release of information form at the IEP team meeting or when they sent the completed IEP document to them. District could not send to a non-public school a child's personal educational information without such a release and a non-public school that had no prior experience with a child would not consider enrolling the child without the information. District therefore could not have sent Student's information packet to Port View for it to consider whether it would even accept her as a student if and when it had space available. Had Parents accepted District's offer of Port View, District would not have been able to enroll her at the school at the time of the offer, or at any time prior to Student's filing for due process in this case.

117. District sent a prior written notice letter to Parents on May 5, 2017, confirming its position that the District members of the IEP team did not think Student required a residential placement to access her education and receive a FAPE. District also repeated its offer of a non-public school placement, specifically at Port View. District did not include a release of information form in this letter.

118. At Parents' request, District met with them on May 11, 2017, to discuss, among other things, the disagreement over Student's placement and a plan for transitioning Student to a new non-public school in Orange County. District did not

provide Parents with a release of information form to sign at this meeting. District wrote another prior written notice letter to Parents on May 22, 2017, repeating its IEP offer. It also offered to fund Student's present placement up to what it would cost District to place Student at a non-public school in California, from the time the parties' settlement agreement expired through the time Student returned to California and enrolled in a non-public school funded by District. District did not include a release of information form for Parents to sign with this letter.

119. On June 22, 2017, after Student filed her complaint in this case, District sent Parents another prior written notice letter. The letter informed Parents that District could place Student at Beacon, which was also able to provide all the related services required by District's proposed IEP. District would further contract with Beacon to provide bus transportation for Student, with a one-on-one bus aide. In this letter, District offered Student placement at Beacon, and said it could arrange enrollment and placement as soon as possible. District again offered to fund Student's educational costs from the time of the expiration of the settlement agreement on December 31, 2016, until Student enrolled in a non-public school in California. District also included a release of information for Parents to sign giving District permission to obtain and exchange confidential medical, psychological and educational information with Beacon. As of the date of the hearing, Parents had not signed the release of information.

PARENTS' ATTEMPTS TO OBTAIN REGIONAL CENTER FUNDING FOR A RESIDENTIAL PLACEMENT

120. Parents were required by the terms of the settlement agreements with District to pursue funding through the Regional Center for Student's residential placement. Parents contacted Regional Center soon after they signed the agreement requesting funding for at least the residential portion of the cost of placing Student at Heartspring or another out-of-state residential treatment center.

121. Regional Center and, later, the Department of Developmental Services denied the request for funding. Parents then filed a request for fair hearing with OAH on Student's behalf on July 12, 2016, asking OAH to issue an order that Regional Center was required to fund the residential services costs at Heartspring.[7]

122. OAH held a fair hearing for Student in OAH Case Number 2016070702 on March 9, 2017. The Regional Center of Orange County and the Department of Developmental Services were the named respondents. District was not a party to the matter. The only issue heard was whether the Department of Developmental Services was required to fund the residential portion of Student's placement at Heartspring. Whether Student required placement at Heartspring to receive a FAPE was not at issue in the fair hearing.

123. No one from District was called to testify at the fair hearing. Parents did not enter the settlement agreements between Parents and District into evidence and did not present them to the ALJ hearing the matter. A letter from the Executive Director of the Regional Center of Orange County to the Director of the Department of Developmental Services was admitted into evidence. In that letter the Executive Director incorrectly stated that District had authorized funding of Student's placement at Heartspring because District had determined that it could not safely meet her needs elsewhere. This misrepresented the facts as District had always contended that it could meet Student's needs through placement at a local non-public school. District did not authorize funding of the educational portion of Student's placement at Heartspring. Rather, it agreed to settle the prior due process matter Student filed against it by agreeing to partially reimburse educational costs for Student. The settlement agreement

[7] The General Jurisdiction division of OAH hears matters brought pursuant to the Lanterman Act.

between the parties did not even reference Heartspring. Heartspring was not Student's IEP placement.

124. Parents did not inform the ALJ at the fair hearing that Student's placement at Heartspring was a unilateral parental decision and District was not involved in the decision and not directly funding the placement. Instead, Father misrepresented at the fair hearing in his testimony that District had agreed it could not meet Student's needs in California.

125. OAH's fair hearing decision found against Student because the Regional Center had not followed all statutory necessary steps to determine whether an out-of-state residential placement was the only means by which Regional Center could meet Student's needs. The decision did not address Student's educational needs under the Individuals with Disabilities Education Act and therefore did not find that Student required placement at Heartspring to receive a FAPE.

TESTIMONY OF STUDENT'S EXPERT DR. CRONIN

126. Dr. Pegeen Cronin testified on Student's behalf. Dr. Cronin has a doctorate in clinical psychology from Palo Alto University and is a licensed clinical psychologist. From 2004 to 2012 she was the Clinical Director of the Autism Evaluation Clinic at the University of California, Los Angeles. She is now in private practice. Her specialty is in autism and not in behavior. While she has conducted hundreds of assessments, researched autism extensively, and worked with hundreds of autistic students, Dr. Cronin has never implemented a behavior intervention plan.

127. In preparation for her testimony, Dr. Cronin observed Student at Heartspring in school and in her group home, spoke with Heartspring staff, spoke with Parents, and reviewed those Student records Parents provided to her. She also visited Beacon. Parents did not provide Dr. Cronin with all of Student's records. Dr. Cronin did not speak with any staff from the Development Center or from District who had

assessed Student or worked with her and did not do an observation at the Development Center.

128. Dr. Cronin did a partial assessment of Student. Based upon her observations of Student, her review of Student's records, and the results of her assessment, Dr. Cronin acknowledged that Student had been functioning at the level of a three-year-old since at least 2013 and continued to function at that level. She agreed that it was highly unlikely that Student's cognitive level would change much, although she believed it possible that Student, whose assessment scores indicated she was functioning between the level of a two-year-old and a four-year-old, could conceivably increase her cognitive level to that of a five-year-old in time.

129. Dr. Cronin opined that Student required continued placement at a residential treatment center for several reasons. First, she criticized the behavior support plans District and the Development Center had developed for Student and criticized the previous data taken by the Development Center. She also criticized the fact that District's and the Development Center's behavior plans and behavior goals had all included prompting as a strategy to address Student's behaviors and teach Student replacement behaviors. Dr. Cronin opined that the goals and support plan should have been based on having Student independently complete tasks.

130. Dr. Cronin's criticisms and opinions were not persuasive. The behavior plans developed by Heartspring were similar to those developed by District and the Development Center. All included prompting as a tool to address Student's behavior, and all had the goal of fading the prompting where possible to increase Student's independence. Ms. Olvera acknowledged at hearing that Student had become more prompt dependent at Heartspring.

131. Dr. Cronin also opined that Student required a residential treatment center placement because her self-injurious and aggressive behaviors had become so

ingrained in Student that they had become comforting strategies for her. Dr. Cronin opined that Student required the overall therapeutic environment at Heartspring to address the ingrained nature of the behaviors. However, Dr. Cronin had not reviewed all of the Development Center's data for the months between September 2015 and the April 2016 IEP team meetings. That data demonstrated that at least at school in the two months prior to the IEP team meetings, Student had significantly decreased her aggressive or self-injurious behaviors. The behaviors were not ingrained at school as of Student's April 28, 2016 IEP team meeting. The behaviors only returned and then increased during Student's 15 months at Heartspring. Dr. Cronin's failure to acknowledge these facts undermined the persuasiveness of her testimony and opinions.

132. Finally, Dr. Cronin emphasized that Student required a residential placement due to her low cognitive levels. Dr. Cronin's demeanor during her testimony indicated she was somewhat incredulous that Regional Center had suggested Student live in an assisted living situation. She opined that it was impossible to imagine a person with the cognitive level of a three-year-old who had no ability to care for herself living outside of some type of residential treatment setting.

133. However, Dr. Cronin's opinions in this regard were also unpersuasive. Upon questioning from the ALJ, she opined that *anyone* with a cognitive level of a three-year-old, or who could not care for themselves, was a candidate for a residential treatment center placement. The result of her opinion would be to place all students with low cognition in a residential placement, no matter what were their other needs and no matter if a school district could meet the student's educational needs in a less restrictive setting. It would also result in the necessity of having to place all students who were not able to care for themselves, such as those with advanced muscular dystrophy or cerebral palsy, or those who were quadriplegics, in a residential placement.

134. Dr. Cronin also opined that Beacon might have once been appropriate for

Student but was no longer appropriate because of Student's continued maladaptive behaviors. However, she gave no reason why Beacon would not be able to address those behaviors. In light of the fact that the Development Center had successfully reduced Student's behaviors at school and that her behaviors had only increased when she began attending Heartspring, the ALJ gave no weight to Dr. Cronin's speculation that Beacon could not meet Student's needs.

PARENTS' COSTS FOR MAINTAINING STUDENT AT HEARTSPRING SUBSEQUENT TO DECEMBER 31, 2016

135. Father has funded Student's placement at Heartspring from January 1, 2017, through the time of hearing. Heartspring charged $11,330 a month for Student's educational placement and $14,115 a month for the residential portion of Student's placement. For the months of April, May, and June 2017, it charged a total of $1,472.50 for speech therapy services for Student; a total of $1,108.65 for occupational therapy during those three months; and a total of $200 for group psychological therapy during those three months. Heartspring also charged $451.52 for the cost of providing Student with an iPad and $268.74 for the Proloquo2Go software program for the iPad, for use as Student's new communication device. Heartspring believed the iPad to be superior to Student's prior communication device which was smaller, harder to navigate, and not as easy to use as the iPad. Heartspring also charged for some items that were personal in nature and unrelated to Student's need for placement there. Student produced invoices at hearing showing that Father had paid all but $25,836.89 of the Heartspring charges as of July 14, 2017.

136. From April 27, 2017, through June 28, 2017, Mother made two trips to Kansas to visit Student at Heartspring. Her total costs for air transportation and car rental for the two trips was $1,082.75.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA[8]

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.;[9] 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 IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, 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

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

[9] All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. 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. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.*, 580 U.S. __ ; 137 S.Ct. 988; 197 L.Ed.2d 335 (March 22, 2017) (*Endrew F.*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 137 S.Ct. at pp. 1000-1001, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Id.*, 137 S.Ct. at p. 1001.)

4. 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).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code 56505, subd. (l).) 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. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on the issues decided.

5. An IEP for a disabled child 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 (*J.W.*).) Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *J.G. 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.

6. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947.) "First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley*, *supra*, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.)

7. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. *(W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483.) (*Target Range*.) Citing *Rowley, supra*, the Ninth Circuit also recognized the importance of adherence to the procedural requirements of the IDEA, but determined that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Target Range, supra*, at 1484.) This principle was subsequently codified in the IDEA and Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) The Ninth Circuit Court of Appeals has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3; *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) The Ninth Circuit has also found that IDEA procedural error may be held harmless. (*M.L.* v. *Fed. Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 652.)

FAILURE TO OFFER AN APPROPRIATE PLACEMENT (ISSUES 1(A) AND 2(A))

Parties' Contentions

8. Student contends that District failed to offer her an appropriate placement after the expiration of the Parties' settlement agreement on December 31, 2016, and in Student's annual IEP developed on April 7 and April 20, 2017. Student contends that she required placement at a residential treatment center to address her unique needs, particularly in the area of behavior and in her need to learn to generalize positive

behavior across all environments. District generally contends that Student did not require a residential placement and that its offer of placement at a non-public school for Student's school day adequately addressed her needs and was Student's least restrictive environment. District further contends that Student waived all rights to contest the appropriateness of her placement for the period after the expiration of the Parties' settlement agreement and through the time it made an IEP offer at Student's annual IEP team meetings in April 2017, based on the waiver language of the agreement.

Applicable Law Regarding Settlement Agreements

9. A special education settlement agreement is a contract. (See, e.g., *D.R. v. East Brunswick Board of Education* (3d Cir. 1997) 109 F.3d 896, 898, 901 (*East Brunswick*.) Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) "Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (*Id.* at p. 686.) If a contract is ambiguous, that is if it is susceptible to more than one interpretation, then evidence outside of the settlement's language may be used to interpret it. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37-40.) Even if a contract appears to be unambiguous on its face, a party may offer relevant evidence outside of the language of the agreement to demonstrate that the contract contains a hidden ambiguity; however, to demonstrate an ambiguity, the contract must be "reasonably susceptible" to the interpretation offered by the party introducing extrinsic evidence. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 393.)

10. In *East Brunswick, supra,* 109 F.3d at pp. 898, 901, the parties resolved a student's prior claims against the school district through a settlement agreement. The

parties also resolved future claims in the settlement agreement for the upcoming school year because the school district agreed to reimburse the student's parents for 90 percent of the cost of the private school in which they had placed the student. After the settlement agreement had been signed and the student began attending the private school chosen by the student's parents, the private school doubled the tuition because the student supposedly needed a one-on-one aide.

11. The student's parents thereafter wanted the school district to pay the additional costs. The district refused to pay for the additional cost because the aide was not a related service covered by the parties' settlement agreement. The Third Circuit agreed with the school district's interpretation of the settlement agreement, and rejected the parents' attempt to void the settlement agreement for the upcoming school year. The court held that nothing in the IDEA prevents the parties from waiving future FAPE claims, or prevents enforcement of such a provision, unless there has been a change of circumstances. "A party enters a settlement agreement, at least in part, to avoid unpredictable costs of litigation in favor of agreeing to known costs. Government entities have additional interests in settling disputes in order to increase the predictability of costs for budgetary purposes. We are concerned that a decision that would allow parents to void settlement agreements when they become unpalatable would work a significant deterrence contrary to the federal policy of encouraging settlement agreements." (*East Brunswick, supra,* 109 F.3d at p. 901.)

Analysis of Effect of the Parties' Settlement Agreements

12. In the instant case, Parents, on behalf of themselves and Student, entered into a series of settlement agreements with District on January 5, 2016, as amended by the June 27, 2016 and November 2, 2016 agreements. The waiver provisions of each of the agreements are identical: Parents agreed to waive all claims through the expiration of the settlement agreements. By the terms of the second amended settlement

agreement, Parents waived all claims through December 31, 2016.

13. Pursuant to the terms of the original agreement, District convened Student's annual IEP team meeting on March 23, 2016, and April 28, 2016, and developed an IEP for her that, by the specific terms of the settlement agreement, was District's offer of placement and services for the time subsequent to the expiration of the agreement. In the original agreement, fully executed on January 5, 2016, Parents *prospectively* waived their right to contest any dispute they might have had with the validly, adequacy, or appropriateness of that IEP. By the time Parents signed the June 27, 2016 and November 2, 2016 amendments to the agreement, District had already convened the required IEP team meeting and developed and offered Student an IEP. Parents' waivers in the amended agreements were therefor *retrospective* waivers of their right to contest the IEP.

14. None of the three settlement agreements carved out an exception to the waiver for the annual IEP developed on March 23 and April 28, 2016. Parents agreed to waive their right to do so. It is incongruous that they agreed to accept a total of $145,000 of District money to help fund their choice of placement for Student in exchange for the waiver, but now argue that the IEP offer of placement in a non-public school was not appropriate. District's reimbursement to Parents of that substantial amount of money was contingent on Parents' waiver. They have not shown any factual or legal basis to abrogate that agreement.

Applicable Law Regarding Residential Placements

15. 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.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) 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.*)

16. School districts are also required to provide each special education student with a program in the least restrictive environment. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and the severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. § 300.114(a).)

17. If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1050.)

18. The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

19. By their nature, non-public school placements require a student's removal from the general education environment and are, therefore, one of the most restrictive placements on the least restrictive environment continuum. (34 C.F.R. § 300.115.) Given their restrictive nature, removal of a student with disabilities to a residential setting complies with the least restrictive environment mandate in only extremely limited situations for students with severe disabilities who are unable to receive a FAPE in a less restrictive environment. (*Carlisle Area Sch. Dist. v. Scott P.* (3rd Cir. 1995) 62 F.3d 520, 523.) Further, some residential placements are considered to be more restrictive than others. Generally, the further a residential placement is located from a student's home and community, the more restrictive it is considered to be. (*Todd D. v. Andrews* (11th Cir. 1991) 933 F.2d 1576, 1582.)

20. A school district must provide a residential placement to a student with a disability, if such a placement is necessary to provide the student with special education and related services. (34 C.F.R. § 300.104.) In analyzing the question of whether a child's behaviors outside of the classroom warrant a residential placement, the Ninth Circuit has looked at the effect those behaviors on the child's education. In *Clovis Unified School Dist. v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635 (*Clovis*), the court distinguished a residential placement that was for medical purposes from one that was for educational purposes. In *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, the court analyzed the *Clovis* case and articulated "three possible tests for determining when to impose responsibility for residential placements on the special education system: (1) where the placement is 'supportive' of the pupil's education; (2) where medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement is primarily to aid the student to benefit from special education." (*Id.* at p. 1468.)

21. School districts are not responsible for residential placements when the primary purpose is for issues distinct from a child's educational needs. An analysis of whether a residential placement is required must focus on whether the placement was necessary to meet the child's educational needs. (*Clovis, supra,* 903 F.2d at p. 643.) If "the placement is a response to medical, social, or emotional problems ... quite apart from the learning process," then it cannot be considered necessary under the IDEA. (*Ibid.,* accord *Ashland School Dist. v. Parents of Student R.J.* (9th Cir. 2009) 588 F.3d 1004, 1009 (*Ashland*).) Under all these cases, Student had the burden of proving that she required a residential treatment center for educational purposes.

Analysis of Student's Need For a Residential Placement

22. No dispute exists in this case that Student should have been placed in a general education classroom or even in a special day class at a comprehensive high school campus. The only dispute is whether she required placement in a residential treatment center, as Student contends, or whether placement in a non-public school, as offered by District, would provide her with a FAPE.

23. Student failed to meet that burden with regard to any time period at issue in this case. Irrespective of her waiver of claims relating to the March 23, 2016 and April 28, 2016 IEPs, she failed to demonstrate that she required a residential placement for educational purposes. The weight of the evidence, both through the testimony of staff from the Development Center and District witnesses as well as from the documentary evidence of Student's assessments, progress reports, and IEPs, demonstrated that Student had been making significant educational and behavioral progress as of March and April 2016. She had made progress on or met all of her goals. Student's self-injurious and physically aggressive behaviors had significantly decreased by the time of those IEP team meetings to the extent that some of the behaviors had not occurred at all in the two months prior to the meetings.

24. Parents acknowledged Student's successes at school. Their statements during the March and April 2016 IEP team meetings made clear that their focus on a residential placement was twofold: first on issues concerning transportation of Student from home to school in the school bus and second because Student's behaviors at home had not decreased.

25. Student's behaviors on the school bus did not warrant a residential placement. Student has not cited any persuasive evidence that difficulty in transporting a child safely from home to school by itself supports the necessity of an out-of-state residential placement. However, even if it did, Student failed to demonstrate that she had continuing behavioral issues on the school bus that District failed to or could not address. To the contrary, after Student's self-injury on the bus two days prior to the end of the summer session in 2015, District immediately addressed the problem. Its transportation director contacted the Development Center to discuss Student's behavior. District convened an IEP team meeting immediately after the start of the 2015-2016 school year to address the issue. It modified Student's bus transportation support plan, changed the bus used to transport Student, and changed the bus route. The changes were successful. For the six to seven-month period before the March 23, 2016 IEP team meeting, Student did not injure herself on the bus.

26. Student's behavior at home was also not a basis for a residential placement. Student offered no evidence that her in-home behaviors affected her ability to access her education at school. District was therefore not required to offer a residential placement. The Ninth Circuit's decision in *Ashland*, *supra* at p. 1185, is instructive on this point. *Ashland* also addressed the request by parents of special needs child for reimbursement of a residential placement. There, the student, who was in high school, began to have emotional problems following her parents' divorce. She had problems at home and with a boyfriend. She was defiant at home. She would leave

home without permission, and continued a relationship with an older man in spite of her parents' demands that she discontinue the relationship with him.

27. Because of these personal matters, her schoolwork suffered. She exhibited signs of depression, had brief suicidal ideation, and on at least one occasion, mutilated herself by sticking herself with safety pins. The student refused to turn in class assignments from classes in which she was not interested. Although she was academically capable of doing her class work, the student's grades suffered due to her failure to complete class assignments and homework. She began refusing to participate in class and was often tardy.

28. The school district responded to the student's issues by providing her with modifications and accommodations at school and providing family and individual counseling. The student's parent did not think the school district's interventions were sufficient and eventually placed the student in two different residential treatment centers. One of the treatment centers was an out-of-state placement.

29. The district court reversed the ALJ's findings that the school district was required to reimburse the parent for the costs of one of the residential placements. The district court found that a residential placement was not necessary to meet Student's educational needs. Rather, the parent made the placement based on Student's needs outside of the classroom. The Ninth Circuit affirmed the district court's findings that the residential placement was not necessary to meet the student's educational needs.

30. Parents in this case preferred a residential placement for Student because her behavioral problems at home negatively affected their lives and their ability to address the needs of their other special needs child. However, starting with *Rowley*, courts have held that an educational agency is not held to a standard of parental preference. (*Rowley*, *supra*, 458 U.S. at p. 197, fn. 21 [the IDEA does not require a potential-maximizing education]; see also *Blackmon v. Springfield R-XII School Dist.* (8th

Cir. 1999) 198 F.3d 648, 658.) An appropriate education under the IDEA need not be "the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the best choice." (*G.D. v. Westmoreland School Dist.* (1st Cir. 1999) 930 F.2d 942, 948 (italics in text).) In short, the court state that "(T)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals with that program." (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

31. Here, while a residential treatment center had benefits for Student's family life, the proper focus is on District's offered educational plan. Student failed to show that District's offered educational plan was not reasonably calculated to confer Student with educational benefit in the least restrictive environment, or that it was not designed to meet her particular needs. (*Rowley*, *supra*, 458 U.S. at pp. 206-207, *Endrew F.*, *supra,* 137 S.Ct. at p. 1001.) Student did not show that District had failed in the past to meet her educational needs through placement at a non-public school, or that her needs following the expiration of the settlement agreement could not be met there.

32. Further weakening Student's argument that she required a residential treatment center placement to meet her behavioral needs is the strong evidence that Student's maladaptive behaviors did not abate at all subsequent to her enrollment at Heartspring. Rather, many of those behaviors increased during the 15 months she was there prior to the hearing. Certainly, the fact that her behaviors increased during the first couple of months of her enrollment is unremarkable. Student's disabilities resulted in her having difficulty with transitions and with accessing new people and locations. It was natural and reasonable that she would revert to engaging in her maladaptive behaviors

the first few months of attendance at Heartspring.

33. However, Student's self-injurious and physically aggressive behaviors did not decrease at Heartspring even after she had time to become accustomed to her new environment. Heartspring held an IEP team meeting for Student just two weeks before the hearing. Its data for her behaviors at that time demonstrated that the behaviors had *increased* rather than *decreased* over the 15 months of her enrollment. That evidence undermines any argument Student made that she required a residential placement to address her behavior, particularly since her behaviors in the group home continued to increase as much as they did in the classroom. Dr. Cronin's opinion that the behaviors were ingrained in Student and required years in a residential treatment center to reverse is contradicted by the fact that Student's behaviors had steadily decreased over the three years she had been enrolled at the Development Center. If the behaviors were ingrained, they only became so subsequent to Student's enrollment at Heartspring.

34. Dr. Cronin's opinion that Student required placement in a residential treatment center to access her education was not substantiated by the evidence in this case. The persuasiveness of Dr. Cronin's opinion was further undermined by her opinion that Student required the placement because of Student's low cognition which prevented her from independently caring for herself. Dr. Cronin offered no support for her opinion that those two factors alone are a basis for a school district to have to place a student in a residential treatment center. The vast majority of students with cognitive and physical impairments are successfully educated by school districts in a variety of settings less restrictive than a residential treatment center.

35. An additional issue to consider is the cost of enrollment at Heartspring. The combined cost of the educational placement, residential costs, and the costs for providing Student with related services at Heartspring was almost $30,000 *a month*. That significant cost is not justified because District's offer of placement at a non-public

school offered Student a FAPE and because Student failed to make progress on reducing her disruptive behaviors while at Heartspring, the very reason Parents had placed her there. The cost of a placement is a proper factor to consider when weighing the appropriateness of a placement. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404; *Ashland, supra,* 587 F.3d at p. 1184.)

36. Student also argued that the fair hearing decision in OAH case number 2016070702 stands for the proposition that Heartspring was an educational placement and that she required it to receive FAPE. Student is mistaken. The OAH fair hearing decision addressed whether Regional Center or the Department of Developmental Services was required to fund the residential portion of Student's placement at Heartspring under the Lanterman Act. The decision found against Student. District was not a party to the fair hearing matter and the decision did not address whether District was required to offer Student placement at a residential treatment center for her to receive a FAPE. The fair hearing decision therefore does not apply to this case under either the doctrine of res judicata or collateral estoppel.

37. Based upon a preponderance of evidence presented at hearing, Student failed to meet her burden of showing that District denied her a FAPE by failing to offer placement at a residential treatment center at any time relevant to this case.

FAILURE TO MAKE A LEGITIMATE, CLEAR WRITTEN OFFER OF PLACEMENT (ISSUES 1(B), 1(C), 2(B), AND 2(C))

Contentions of the Parties

38. Student contends that District did not make her a legitimate, clear, written offer of placement after the expiration of the Parties' settlement agreement and again failed to do so in the April 7 and April 20, 2017 annual IEPs. Student bases her contention on the fact that neither her March/April 2016 annual IEP nor her April 2017 annual IEP specified the non-public school District was offering as a placement. District

contends that it did make a legitimate, clear, written offer to Student for the period subsequent to the expiration of the settlement agreement because it had made an appropriate offer in the March 23/April 28, 2016 annual IEP. District further contends that Student waived any dispute as to the validity of that offer through her waiver of claims in the three settlement agreements. District contends the offer in the April 2017 annual IEPs was legitimate, clear, and in written form. To the extent that it might not have been a clear offer, District contends that the procedural violation did not rise to the level of a denial of FAPE to Student since Parents had no intention of removing Student from Heartspring and accepting a District offer of placement in a non-public school.

Applicable Law

39. In *Union School Dist. v. Smith* (1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*), the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement: "We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any." (*Union, supra,* 15 F.3d at p. 1526 see also *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.)

40. A formal, specific offer from a school district (1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA, (2) helps parents determine whether to reject or accept the placement with supplemental services, and (3) allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (See *Union,*

supra, 15 F.3d at p. 1526.)

41. *Union* involved a district's failure to produce any formal written offer. However, numerous judicial decisions have invalidated IEPs that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *A.K. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine School Dist. v. K.H.* (D.Ore., June 2, 2005, No. 04-1468) 2005 WL 1587241, p. 10; *Glendale Unified Sch. Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108; *Mill Valley Elem. School Dist. v. Eastin* (N.D.Cal., Oct. 1, 1999, No. 98-03812) 32 IDELR 140, 32 LRP 6047; see also *Marcus I. v. Department of Education* (D. Hawai'i, May 9, 2011, No. 10–00381) 2011 WL 1833207, pp. 1, 7-8.)

Analysis of Whether District Made Legitimate, Clear Written Offers of Placement

42. Student has failed to meet her burden of persuasion that District failed to have a legitimate, clear offer of placement for her after the expiration on December 31, 2016 of the Parties' settlement agreement, as twice amended. The agreements specified that District would hold an IEP team meeting and develop an IEP for Student to address her placement and services after the settlement term expired. District complied with its obligation under the settlement and convened an IEP team meeting on March 23, 2016, which continued on April 28, 2016. District made a specific, clear, written offer of placement at a non-public school under contract with District or the Special Education Local Plan Area to which District belonged.

43. Student argues that it was not clear that District had a placement for her after the expiration of the settlement agreement. The evidence does not support this contention. District's offer in the March 23/April 28, 2016 IEP was clear. District had an

ongoing master contract with the Development Center. Had Parents removed Student from Heartspring and re-enrolled Student in District, a place was waiting for Student at the Development Center. Student offered no evidence to contradict Ms. Redira's testimony that District could implement Student's placement at the Development Center within a matter of days had Parents indicated they wished to invoke the stay put provision of the settlement agreement.

44. The situation is markedly different from the one in *Student v. Lemon Grove School Dist., et al.* (2016) Cal.Offc.Admin.Hrngs. Nos. 2015050337 and 2015090042, *aff'd A.V. v. Lemon Grove School Dist.* (S.D.Cal. Feb. 24, 2017) 2017 WL 733424 (*Lemon Grove*). In *Lemon Grove*, the parties also entered into a settlement agreement where the school district agreed to fund the student's private placement. The agreement specified that the district would convene an IEP team meeting prior to the expiration of the settlement to develop an IEP for the period following the expiration of the agreement. The parties agreed that in the event of a disagreement as to the new IEP, the student's stay put would be his last agreed upon and implemented IEP that placed him in a district special day class.

45. Unlike the settlement agreement in the instant case, the parents in *Lemon Grove* did not waive their right to challenge the validity of the IEP to be developed at the expiration of their agreement. The IEP process was not completed before the expiration of the settlement, and the agreement expired. The continued IEP team meeting did not occur until about a month later. Because there was no new IEP offer when the agreement expired, there was no disagreement between the parties and therefore no triggering of the agreement's stay put clause. The student therefore had no placement available for him between the time the settlement expired and the re-convened IEP team meeting. Further complicating matters was the fact that when the IEP team did reconvene, all parties, including the district, agreed that the prior IEP

placement in a special day class was not appropriate for student and that he rather required a non-public school placement to meet his needs. The district did not offer a non-public placement until some three months after the re-convened IEP team meeting, leaving the Student without a placement for almost four months.

46. In contrast, in the instant case, District convened an IEP team meeting for Student and developed an IEP offer for him long before the expiration of the Parties' settlement agreement. The IEP offered Student placement at a non-public school. Because Parents did not consent to the placement offer of the March 23/April 28, 2016 IEP, the stay put provision of the settlement agreement was triggered, making Student's placement a non-public school under contract with District as specified in his April 2015 IEP, which Parents had consented to and District had implemented. District always contended that the non-public school placement was appropriate for Student. District was ready, willing, and able to implement the provisions of Student's stay put IEP had Parents requested it, which they did not. Student offered no evidence to the contrary. Student has not met her burden of proof that District failed to have a legitimate, clear, written offer of placement available for her for the period after the expiration of the Parties' settlement agreement through the time District made its offer of placement for Student in the April 2017 annual IEP.

47. However, the situation is different when analyzing the April 2017 IEPs. As of April 7, 2017, when District first convened the IEP team meeting, Student remained as a parentally placed private school student at Heartspring. District knew that Parents were not willing to return Student to the Development Center, although the evidence supports a finding that it was an appropriate placement for Student. To meet Parents' concerns, District, through Ms. Redira, its Coordinator of Special Education, investigated other possible non-public school placements for Student.

48. Ms. Redira contacted Port View, another non-public school in Orange

County, which she believed could meet Student's needs. Port View, however, had no available space for any new students. Port View informed Ms. Redira that it hoped to open a second campus that might be able to accept Student, but it had no concrete date by which that might occur. In spite of Port View's inability to accept Student in April 2017, District nonetheless offered it, rather than the Development Center, as Student's non-public school placement in the April 2017 annual IEP. Because District did not offer the Development Center and because it had no other non-public school in mind for Student which had space for her at the time District made the placement offer, the offer was illusory. District compounded the violation by failing to ask Parents to sign a release of information so that it could determine if Port View could meet Student's needs if it later had room for Student.

49. District argues that even if failed to make a legitimate, clear, written offer of placement, its actions did not rise to the level of a denial of FAPE because 1) Student suffered no loss of educational benefit, and 2) Parents' right to engage in the IEP process was not significantly impeded. District contends Parents never had any intention of removing Student from Heartspring and accepting any type of non-public school placement.

50. While that argument has support with regard to other types of procedural violations a district might be found to have committed under the IDEA, the Ninth Circuit has specifically rejected it in the context of a school district's obligation to make a clear offer of placement. In *Union*, the Ninth Circuit found that "a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement." (*Union, supra,* 15 F.3d at p. 1526.) As has been stated by many courts, *Union* requires "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal." (See, e.g., *J.W., supra* 626 F.3d at p. 460; *Glendale*

Unified School Dist. v. Almasi, supra, 122 F.Supp.2d at p. 1108.)

51. District's reliance on Parents' perceived unwillingness to remove Student from Heartspring as a defense to its lack of a legitimate offer is therefore misplaced. Student has met her burden of demonstrating that District denied her a FAPE by failing to make a legitimate, clear, written offer of placement in the April 2017 IEPs.

52. District however did later make such an offer. Ms. Redira subsequently contacted Beacon, another non-public school within Student's community. Beacon assured her that it had space available and would enroll a student with Student's profile. In its June 22, 2017 prior written notice letter, District offered to place Student at Beacon. It included a release of information form for Parents to sign so that it could provide Beacon with Student's educational records to confirm the placement. The offer was clear and legitimate. (See, e.g. *J.W., supra,* 626. F.3d. at pp. 460-461.) Parents did not accept the offer of placement at Beacon and never signed and returned the release of information form.

53. Student cannot dispute the offer by arguing that since Beacon did not have all her educational records, District cannot validly state that Beacon would accept her. Student's argument is speculative because Parents, not District, created any uncertainty when they did not return the necessary release of information when District provided it to them. Student cannot use a circumstance she, through Parents, has created to undermine the validity of District's offer of placement.

54. Therefore, the only period for which Student is entitled to a remedy for District's failure to make her a legitimate, clear offer is from April 7, 2017, the first date District convened Student's annual IEP team meeting, through June 22, 2017, when District made the offer of Beacon and sent Parents a release of information form for them to sign.

FAILURE TO OFFER A COMPREHENSIVE TRANSITION PLAN (ISSUES 1(D) AND 2(D))

Contentions of the Parties

55. Student contends that she required a plan to transition her from Heartspring to a non-public school because her disabilities interfered with her ability to easily transition between settings. She argues that District did not develop such a plan for the period after the Parties' settlement agreement expired and that the plan that was included in the April 2017 IEPs was inadequate. District responds that Student waived her right to contest the lack of a transition plan in the March 23/April 28, 2016 IEP. It further contends that the plan it developed in the April 2017 IEPs was adequate to meet Student's needs.

Applicable Law

56. Where appropriate, an IEP shall include provision for transition into the regular classroom program if the pupil is to be transferred from a special day class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day. (Ed. Code, § 56345(b)(4).) This statutory provision is not applicable to this case because District did not offer Student placement in a regular, general education classroom for any portion of her school day.

57. However, an IEP is required to be reasonably calculated to enable a student to receive educational benefit (*Rowley, supra*, 458 U.S. at 206-207.) It must include a comprehensive statement of the education needs of the student and the specifically designed instruction and related services which are to be used to meet the student's needs. (*School Committee of Burlington, Mass. V. Department of Education* (471 U.S. 350, 368 [105 S.Ct. 1996, 85 L.Ed.2d 385].) A student's need for a transition plan therefore must be addressed if she needs the plan to receive a FAPE.

Analysis

58. Student has failed to meet her burden of persuasion as to this issue to the extent that Student argues District failed to have a transition plan in place for her after the expiration of the Parties' settlement agreement. As stated above, Student waived all claims as to the validity, propriety, or legality of the March 23/April 28, 2016 IEP. At the time of that IEP team meeting, Parents had already arranged for Student to enroll in Heartspring. They could have proposed, but did not, that District include a transition plan for Student's return to a District placement following the expiration of the settlement agreement. Nor did they ever request District hold a subsequent IEP team meeting to amend the IEP to address Student's transition. Rather, they agreed in three settlement agreements, two of which they signed after District developed this IEP, to waive any deficiencies in the IEP or any claim they might have with regard to it. Having waived all claims in exchange for receipt by her Parents of a substantial amount of District's funds to help pay for her private placement, Student cannot now disavow the settlement agreement to attack the sufficiency of the IEP.

59. District did include a plan to transition Student from Heartspring to a non-public school placement in the April 2017 IEPs. It proposed having Parents and Student visit the school and proposed providing Student with a social story addressing her attendance at the school. The social story would include photographs of the school and of the staff who would be working with Student.

60. Although Student states that the plan was not adequate, she offered no evidence of exactly what more District should have included. While multiple visits to the school would have been ideal, such was not possible while Student was placed at Heartspring. Mother testified that Student was not capable of making multiple airplane trips back and forth from Kansas to California. Student required four trials before she could board an airplane for her trip to Kansas to begin her enrollment at Heartspring.

Further, it would be unreasonable to require District to fund multiple trips from a placement they neither offered nor funded, and which Student has failed to show was necessary for her to receive a FAPE.

61. District's proposed transition plan provided Student with an opportunity to visit the non-public school offered to become acquainted with the facility and the staff. It also offered Student a means of becoming accustomed to the idea of moving to a new school through the social stories, and through being able to look at photographs of the facility and of staff multiple times before beginning her first day of school. District was not required to maximize Student's transition from Heartspring; it was only required to provide her with a reasonable transition plan. This it did through the plan offered in the April 2017 IEPs. Student has failed to meet her burden of persuasion as to this issue.

FAILURE TO TIMELY CONVENE AN IEP TEAM MEETING AND MAKE AN OFFER OF PLACEMENT AND SERVICES (ISSUE 1(E))

Contentions of the Parties

62. Student contends that District should have convened an IEP team meeting for her prior to the annual IEP team meeting first convened on April 7, 2017. Student contends that if she was regressing behaviorally at Heartspring, as District contends, District was required to hold an IEP team meeting to address the regression. District responds that it had no obligation to hold an IEP meeting for Student or address her progress or lack thereof at Heartspring, between the annual IEP team meeting it was required to hold pursuant to the terms of the settlement agreement, and the annual IEP team meeting it convened in April 2017.

Applicable Law

63. The law requires an IEP team to meet at least annually "to determine whether the annual goals for the pupil are being achieved, and revise the individualized

education program, as appropriate, to address among other matters the following: (1) Any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate…." (Ed. Code, § 56341.1, subd. (d).) An IEP meeting must be called when the "pupil demonstrates a lack of anticipated progress." (Ed. Code, § 56343, subd. (b).)

64. However, a school district does not have a similar obligation to a student who is privately placed by her parents. "A school district is only required to continue developing IEP's for a disabled child no longer attending its schools when a prior year's IEP for the child is under administrative or judicial review." (*M.M. v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 537-538 (*Greenville*); see also *Amann v. Stow School System* (1st Cir.1992) 982 F.2d 644, 651, fn. 4.) In *Greenville*, a student was found eligible for special education at the age of three and an IEP was implemented for her. The student attended public schools with an IEP for the 1995-1996 school year. An IEP team meeting convened in May 1996 to develop an IEP for the 1996-1997 school year. The district and parents disagreed about the appropriate placement for student. Parents did not consent to the IEP. Instead, beginning in May 1996, student attended kindergarten in a local Presbyterian Church. Neither party filed a due process complaint to resolve whether the 1996 IEP was appropriate. The district did not develop an IEP for 1997-1998. Parents filed a complaint in March 1998 as to the 1996 IEP and on other issues. The decision in *Greenville* held that the district was under no continuing obligation in 1997 to develop an IEP for student because parents rejected the IEP offered in 1996 and voluntarily placed student in a private school outside the district boundaries. (*Id*, 303 F.3d at p. 538.)

Analysis

65. District was not required to hold IEP meetings for Student at any time during the term of the settlement agreement, other than to hold an annual IEP meeting

on or before April 3, 2016. District convened the meeting as required by the agreement. It had no further obligation to Student because she was not enrolled in school pursuant to a District IEP but rather was privately placed by Parents at Heartspring. District did not place Student at Heartspring, did not develop the IEP Heartspring implemented, and had no ability to determine the course of Student's education at Heartspring. Any lack of progress Student made at Heartspring was attributable only to Heartspring. More importantly, District had no ability to modify any aspect of Student's program at Heartspring because it had not placed her there.

66. Student's argument that District was required to hold an IEP meeting to address her lack of progress at a private placement therefore borders on frivolous. Accepting Student's argument would result in every school district being required to monitor the education of all children privately placed by their parents in private schools, in home school programs, and in parochially schools and then hold IEP team meetings to suggest modifications to programs over which the districts have no control. Student has not provided any persuasive authority for such an argument.

67. Parents rejected District's offer of placement and chose, for at least 15 months, to retain Student in the private placement of their choice, even though her behavior significantly regressed. District had no obligation to Student during that time, had no duty to monitor her progress, and had no duty to convene an IEP team meeting when Student failed to make progress in the private program. Student has failed to meet her burden of persuasion as to this issue.

REMEDIES

1. Student prevailed on Issues 2(b) and 2(c), by proving that District failed to make a legitimate, clear offer of placement in the April 2017 IEP, as amended, resulting in a denial of FAPE. Student is therefore entitled to a remedy for this violation. Student sought full reimbursement of all costs incurred by Father for Student's placement at

Heartspring up through the date of the hearing; reimbursement of Mother's expenses for two trips to Heartspring to visit Student; and prospective placement through her IEP at Heartspring or another appropriate residential as remedies.

2. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

3. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington, supra,* 471 U.S. at pp. 369-370 [reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE].) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement found to be reimbursable where it had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade, and where expert testimony showed that the student had made substantial progress]; *C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155 [a private placement need not provide all services that a disabled student needs to permit full reimbursement]; See also, *S.L. v. Upland Unified Sch. Dist.* (9th Cir. 2014) 747 F.3d 1155, 1159.)

4. District argues that, even if this Decision finds District denied Student a

FAPE on any of the issues presented, Parents are not entitled to reimbursement for their costs for placing Student at Heartspring because Heartspring was not an appropriate placement. District points to Student's increase in maladaptive behaviors as evidence of the inappropriate nature of the Heartspring placement. It also argues that Heartspring was inappropriate because it follows procedures not permitted under the IDEA, used restraints on Student to physically restrain her during many of her episodes of maladaptive behavior, and had significant turnover in staff, which triggered many of Student's behaviors.

5. Student did not prove that she required placement at a residential treatment center to receive a FAPE at any time pertinent to this case. She specifically failed to prove that she required such a placement as of her annual IEP team meeting in April 2017, or that District's offer of a non-public school placement in California would not meet her needs. Student therefore failed to meet her burden of proof that ordering District to prospectively place her at Heartspring is required or an appropriate remedy supported by any facts in this case.

6. However, Student has met her burden of proof that Heartspring offered her some educational benefit during the time she has been there. Conversely, District has failed to demonstrate that Heartspring was so inappropriate that Parents should not be entitled to reimbursement for the costs of funding the placement where Student has proved a violation of her right to a FAPE. Although Student's behaviors increased rather than decreased, Student did make vocational progress and progress on some of her social skills. Under the *Garden Grove* and *Upland* cases cited above, these benefits are sufficient to support a request for reimbursement of at least some of Parents' costs for the placement at Heartspring.

7. District failed to make a legitimate, clear, offer of placement for Student in her April 2017 IEPs. District's offer of placement at Port View in the April 2017 IEPs was

illusory because Port View had no space available for any student. Further, had Parents accepted the placement at Port View, District admitted it could not have implemented the offer, and did not know when, or if, it could ever implement it. This was a violation of *Union*.

8. District mitigated that violation on June 22, 2017, when it offered Student placement at Beacon, which had room for Student and would have been able to accept her enrollment as of that date, and provided Parents with a release of information for them to complete, which would allow District to forward Student's records to Beacon. Reimbursement may be reduced or denied if the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3); see *Patricia P. v. Board of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 469 [reimbursement denied because parent did not allow district a reasonable opportunity to evaluate student following unilateral placement].) In this case, Parents were offered an appropriate placement by District on June 22, 2017. District also provided, for the first time, a release of information for Parents to sign. Parents have never signed it, and have never agreed to the placement. It is therefore equitable and appropriate to restrict the award of reimbursement to the three months between April 7, 2017, and June 22, 2017.

9. Further, District's failure to make a clear, legitimate offer of placement in the April 2017 IEPs meant Student did not have a viable District placement available for the remainder of the 2016-2017 school year. This is further reason to award Parents reimbursement for tuition at Heartspring from the time the illusory offer was made in April 2017, through the end of June 2017, when the school year ended.

10. Finally, Parents were required to make monthly payments to Heartspring. It is therefore equitable to order reimbursement for the full three months of tuition for the period April to June 2017.

11. However, as stated above, equity defines the parameters of remedies

awarded in due process cases. In this case, Student has failed to demonstrate that she required placement in a residential treatment center at any time during the 15 months she has spent at Heartspring. She did not require placement there in May 2016, when Parents made the decision to remove her from the Development Center. Significantly, in spite of all the evidence that Heartspring was unable to meet Student's behavior needs, that Student's self-injurious and physically aggressive behaviors not only continued but also increased significantly since her placement there, and despite the fact that Heartspring's method of addressing Student's behaviors is often to resort to restraining her, which has done nothing to decrease the behaviors, Parents chose to retain Student at Heartspring for non-educationally related reasons. Although District committed a procedural violation of Student's rights by failing to make a legitimate and clear offer of placement, it would be inequitable to order District to fund the residential portion of Student's placement at Heartspring. Student did not require placement in a residential treatment center to access her education. Additionally, Heartspring failed to curb any of her self-injurious or physically aggressive behaviors.

12. Therefore, District will be ordered to reimburse Father for the educational portion of Student's placement at Heartspring, including the cost of speech and language therapy, occupational therapy services, psychological services, and the cost of Student's new communication device, for the three month period from the beginning of April 2017, to the end of June, 2017. The total amount of the reimbursement award is $37,491.41. The documents submitted in this hearing and Father's testimony at hearing is adequate proof of the costs Father has incurred. Because Student's placement at Heartspring was not supported by the evidence, and because Student did not require an out-of-state residential placement, Student's request to reimburse Mother for her travel costs for two visits to Heartspring is denied.

ORDER

1. Within 45 calendar days of the date of this Order, District shall reimburse Father for the educational portion of Student's expenses at Heartspring for the months of April, May, and June 2017, in a total amount of $37,491.41.

2. All other relief sought by Student is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on issues 2(b) and 2(c). District prevailed on all other issues heard in this matter.

RIGHT TO APPEAL

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

DATED: September 7, 2017

/s/

DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings