

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

IRVINE UNIFIED SCHOOL DISTRICT,

OAH Case No. 2018080938

IRVINE UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2018080860

DECISION

Irvine Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on August 22, 2018, naming Student.

Student filed a due process hearing request with OAH on August 23, 2018, naming Irvine. On September 6, 2018, Student filed an amended complaint.

On September 6, 2018, OAH granted Irvine's request to consolidate Student's case with Irvine's case.

On September 17, 2018, Irvine served Student with its written response to the amended complaint, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200 (*M.C.*))

ALJ Cole Dalton heard the matter in Irvine, California, on November 14, 15, 27, and 28, 2018, and December 4, 5, 6, 11, 12, and 13, 2018.

Timothy A. Adams and Lauren-Ashley L. Caron, Attorneys at Law, represented

Student. Mother attended each day of hearing. Father attended most days of the hearing.

Daniel Gonzalez, Attorney at Law, represented Irvine. Special Education Director Jennifer O'Malley attended each day of hearing on behalf of Irvine. Executive Director of Special Education Melanie Hertig attended most days of the hearing.

OAH granted the parties' request to continue the matter to January 14, 2019, to permit the parties to file written closing briefs. Upon timely receipt of closing arguments, the record was closed and the matter submitted for decision on January 14, 2019.

ISSUES¹

STUDENT'S ISSUES

- (1) Did Irvine deny Student a free appropriate public education by failing to convene an individualized education program team meeting within 30 days of Parents' request on September 22, 2016?
- (2) Did Irvine deny Student a FAPE in the October 28, 2016 IEP by:
 - (a) refusing to allow Parents to meaningfully participate in the IEP development process;
 - (b) failing to offer appropriate goals to address Student's needs in reading, writing, math, auditory processing, and social emotional development;

¹ The issues were rephrased and reorganized for clarity, and agreed upon by all parties before the hearing commenced. The issues were reorganized but not substantively changed in this Decision for analytical purposes. The ALJ has authority to redefine a party's issue so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir 2010) 626 F.3d 431, 442-443.)

- (c) failing to offer appropriate academic services, including reading, writing, and math;
 - (d) failing to offer appropriate services to address Student's auditory processing needs;
 - (e) failing to offer appropriate services to address Student's social-emotional needs, including anxiety;
 - (f) failing to offer an appropriate placement;
 - (g) failing to offer appropriate accommodations to address Student's needs in academics, auditory processing, and social-emotional development; and
 - (h) offering a modified academic curriculum?
- (3) Did Irvine deny Student a FAPE by failing to obtain informed consent from Parents prior to implementing Student's October 28, 2016 IEP?
- (4) Did Irvine deny Student a FAPE from October 28, 2016, through June 2018 by unilaterally modifying Student's academic curriculum without parental consent?
- (5) Did Irvine deny Student a FAPE in the IEP developed on March 23 and 27, 2017, by:
- (a) failing to offer appropriate goals to address Student's needs in reading, writing, math, auditory processing, social skills, and motor skills;
 - (b) failing to offer appropriate academic services, including reading, writing, and math;
 - (c) failing to offer appropriate services to address Student's auditory processing needs;
 - (d) failing to offer appropriate services to address Student's social skills;
 - (e) failing to offer appropriate services to address Student's motor skills, including developmental coordination;

- (f) failing to offer an appropriate placement;
 - (g) failing to offer appropriate accommodations to address Student's needs in academics, auditory processing, social skills, and motor skills; and
 - (h) offering a modified academic curriculum?
- (6) Did Irvine deny Student a FAPE in the October 5, 2017 IEP by:
- (a) failing to offer appropriate goals to address Student's needs in reading, writing, math, auditory processing, social skills, motor skills, and social-emotional development;
 - (b) failing to offer appropriate academic services, including reading, writing, and math;
 - (c) failing to offer appropriate services to address Student's auditory processing needs;
 - (d) failing to offer appropriate services to address Student's social skills;
 - (e) failing to offer appropriate services to address Student's motor skills, including developmental coordination;
 - (f) failing to offer appropriate services to address Student's social-emotional needs, including anxiety;
 - (g) failing to offer an appropriate placement;
 - (h) failing to offer appropriate accommodations to address Student's needs in academics, auditory processing, social skills, motor skills, and social-emotional development; and
 - (i) offering a modified academic curriculum?
- (7) Did Irvine deny Student a FAPE by failing to assess Student and convene an IEP team meeting within 60 days of Parent's consent to the assessment plan on October 11, 2017?
- (8) Did Irvine deny Student a FAPE in the IEP developed on January 8, 9, 17, 26,

and 31, and February 8 and 13, 2018, by:

- (a) failing to offer appropriate goals to address Student's needs in reading, writing, math, auditory processing, phonological processing, social skills, motor skills, social-emotional development, and assistive technology;
 - (b) failing to offer appropriate academic services, including reading, writing, and math;
 - (c) failing to offer appropriate services to address Student's auditory processing needs;
 - (d) failing to offer appropriate service to address Student's phonological processing needs;
 - (e) failing to offer appropriate services to address Student's social skills;
 - (f) failing to offer appropriate services to address Student's motor skills, including developmental coordination;
 - (g) failing to offer appropriate services to address Student's social-emotional needs, including anxiety;
 - (h) failing to offer appropriate assistive technology services;
 - (i) failing to offer an appropriate placement;
 - (j) failing to offer extended school year placement and services;
 - (k) failing to offer appropriate accommodations to address Student's needs in academics, auditory processing, phonological processing, social skills, motor skills, and social-emotional development; and
 - (l) offering a modified academic curriculum?
- (9) Did Irvine deny Student a FAPE in the March 7, 2018 IEP by:
- (a) failing to offer appropriate goals to address Student's needs in reading, writing, math, auditory processing, phonological processing, social skills, motor skills, social-emotional development, and assistive technology;

- (b) failing to offer appropriate academic services, including reading, writing, and math;
 - (c) failing to offer appropriate services to address Student's auditory processing needs;
 - (d) failing to offer appropriate service to address Student's phonological processing needs;
 - (e) failing to offer appropriate services to address Student's social skills;
 - (f) failing to offer appropriate services to address Student's motor skills, including developmental coordination;
 - (g) failing to offer appropriate services to address Student's social-emotional needs, including anxiety;
 - (h) failing to offer appropriate assistive technology services;
 - (i) failing to offer an appropriate placement;
 - (j) failing to offer extended school year placement and services;
 - (k) failing to offer appropriate accommodations to address Student's needs in academics, auditory processing, phonological processing, social skills, motor skills, and social-emotional development; and
 - (l) offering a modified academic curriculum?
- (10) Did Irvine deny Student a FAPE in the IEP developed on June 6, 11, and 13, 2018, by:
- (a) failing to offer appropriate goals to address Student's needs in reading, writing, math, auditory processing, phonological processing, social skills, motor skills, social-emotional development, and assistive technology;
 - (b) failing to offer appropriate academic services, including reading, writing, and math;
 - (c) failing to offer appropriate services to address Student's auditory processing

- needs;
- (d) failing to offer appropriate services to address Student's phonological processing needs;
 - (e) failing to offer appropriate services to address Student's social skills;
 - (f) failing to offer appropriate services to address Student's motor skills, including developmental coordination;
 - (g) failing to offer appropriate services to address Student's social-emotional needs, including anxiety;
 - (h) failing to offer appropriate assistive technology services;
 - (i) failing to offer an appropriate placement;
 - (j) failing to offer extended school year placement and services;
 - (k) failing to offer appropriate accommodations to address Student's needs in academics, auditory processing, phonological processing, social skills, motor skills, and social-emotional development;
 - (l) offering a modified academic curriculum;
 - (m) failing to offer a program consistent with Dr. Shari Giti's neuropsychological assessment report; and
 - (n) failing to address bullying and humiliation Student experienced at school?

IRVINE'S ISSUE

- (11) Did Irvine offer Student a FAPE for the 2018-2019 school year in the IEP developed on June 6, 11, and 13, 2018?

SUMMARY OF DECISION

Student prevailed on the gravamen of her complaint, modification of curriculum. Student met her burden of establishing Irvine denied her a free appropriate public education in IEPs from October 2016 through June 2018 by basing IEPs on the premise

Student had low cognitive functioning. Assessments demonstrated Student functioned in the low average range and made progress when provided with intensive instruction designed to meet her unique needs in reading, writing, and math. Before implementing modified curriculum in October 2016, Irvine did not inform Parents of the impact of modifications. Parents were not apprised that Student could not graduate with a regular high school diploma or that the gap between her and typically develop peers would continue to widen. Parents were denied meaningful participation in development of Student's IEPs from October through February 13, 2018, when the parties engaged in a robust conversation about the pros and cons of modified curriculum.

Student did not prevail on issues regarding an appropriate placement, extended school year services, and supports and services in the areas of auditory processing, motor needs, social-emotional needs, anxiety, assistive technology, and phonological processing. Student did not demonstrate she had been bullied at school.

Student prevailed on the issue of inappropriate goals in IEPs through February 13, 2018. Irvine did not assess Student for dyslexia or dyscalculia until 2018 and did not offer Student intensive intervention designed to remediate Student's deficits in reading, writing, and math until her February 13, 2018 IEP.

FACTUAL FINDINGS

1. Student was 12 and one-half-years old at the time of hearing. Her Parents shared joint legal custody, which included educational decision-making authority, since November 2013. They shared joint physical custody of Student, on a 50-50 basis. Student lived with each Parent within Irvine Unified School District's jurisdictional boundaries at all relevant times.

2. Student became eligible for special education in preschool to address deficits in speech and language. She attended Santiago Hills Elementary School, her school of residence, from first through sixth grades.

MARCH 2, 2015 MULTIDISCIPLINARY ASSESSMENT REPORT

3. Irvine conducted triennial assessments in the areas of motor and speech and language development, academics, and psychoeducation, resulting in a report dated March 2, 2015. The assessments were not in dispute at hearing, having been conducted outside the relevant statute of limitations. The assessment results were instructive on the issue of Student's abilities, areas of need, and progress over time.

4. Irvine's 2015 triennial assessment report documented results from 2009 and 2012 triennial assessments. In 2009, Irvine assessments determined Student's general intellectual ability was low average.

5. Student's adaptive behavior fell within the low average to average range as rated by Mother and below average to low average as rated by her teacher. Testing showed Student did not have intellectual disability, which would be characterized by significant limitations in both intellectual functioning and adaptive behavior.

6. In 2012, Irvine assessments determined Student's overall intellectual ability fell within the low average range, or one point below the average range. Her auditory processing and fluid reasoning were both well within the average range. Her long-term memory, short-term memory, and processing speed were low average. Student's testing scores in 2012 were consistent with 2009 testing. Overall, 2012 triennial test results were consistent with results from 2009 and demonstrated that Student did not have an intellectual disability.

7. In 2015, Irvine school psychologist Alicia Benson assessed Student and administered the Woodcock Johnson Cognitive, Fourth Edition. Ms. Benson held bachelor of arts and educational specialist degrees in psychology. She worked with Irvine since 2011 as an instructional assistant, a substitute teacher, and a school psychologist intern. She became a school psychologist for Irvine in 2014.

8. Student's general intellectual ability, in 2015 testing, fell within the low

range, while her auditory processing score was low average. She demonstrated areas of relative strength in verbal attention and letter-pattern matching, falling within the average range. Verbal attention was described as working memory capacity, the ability to temporarily hold and process information. Letter-pattern matching meant the speed at which visual stimuli could be compared for similarities or differences. Auditory processing described the ability to discriminate, encode, employ, and synthesize auditory stimuli. Ms. Benson did not administer tests for fluid reasoning, short-term memory, cognitive processing speed, and long-term memory.

9. Ms. Benson, at hearing, opined the 2015 report showed Student made progress in reading during her 3rd grade year. Reading literacy assessments outlined in the report, however, showed regression. In June 2014, the end of Student's 2nd grade year, she read 72 words per minute with 98 percent accuracy. In February 2015, Student read 70 words per minute at 95 percent accuracy. Student should have been reading 100 correct words per minute by February 2015.

10. During assessment observations, Student played with peers from special and general education settings on the playground and during physical education. She had more difficulty focusing in the general education classroom and required more support to complete complex academic tasks.

FEBRUARY 24, 2016 IEP

11. Student's annual IEP team meeting convened on February 24, 2016. Though beyond the statute of limitations for purposes of this hearing, the February 2016 IEP identified Student's placement and services for spring, summer, and fall 2016. An October 28, 2016, amendment to the February 24, 2016 annual IEP was at issue in this hearing.

12. In February 2016, Irvine described Student as a kind, caring person who enjoyed helping others, played with peers from general education and specialized

academic instruction settings, and worked hard on academic tasks. Student learned best in small groups, using visuals, repetition of examples, scaffolding of lessons, extra practice, and chunking of academic tasks.

13. Mother described Student as a hard worker, committed, having good self-esteem, getting along well with everyone, and having good friendship skills. Mother's concerns included word problems, phonetics, expressive and receptive language, reading comprehension, and vision processing issues.

14. In present levels of performance, Irvine reported that Student read at the end of the third grade level, but struggled with reading fluency, meaning the ability to read text accurately, quickly, and with expression. Student's phonics and decoding skills improved from her prior year. She continued to struggle with reading comprehension. Student had a reading fluency rate of 71 words correct per minute, with 92 percent accuracy. Student's expected level was 110 correct words per minute.

15. Student was diagnosed with developmental coordination disorder, but did not demonstrate motor skill deficiencies in the classroom or while playing with her peers. Irvine reported some lack of maturity in socialization, which they attributed to Student being an only child. Mother expressed concern over Student's frustration with the learning process.

16. Irvine identified Student's needs and proposed goals in the areas of math, writing, reading comprehension, reading fluency, expressive syntax, figurative language/idioms, pragmatics/points of view, academic vocabulary for science and history, and computer keyboarding.

17. Student's fourth grade teacher used Razz Kids and Reading A-Z, both peer-reviewed reading interventions that helped students work on phonemic awareness and decoding. Student accessed Wordly Wise to work on vocabulary and comprehension. The program contained exercises teaching definitions, word usage,

word roots, prefixes, suffixes, analogies, and synonym substitution.

18. Student remained eligible as a child with speech language impairment and other health impairment due to attention deficit disorder, inattentive type. Irvine offered specialized academic instruction for 915 minutes per day in the learning center special day class for writing, English language arts, and math; resource specialized support for 970 minutes per school day, for general education computer lab, science lab, science, social studies, library, music, and physical education; and speech and language therapy, 30 minutes per week each in group and individual. Student was provided with several accommodations including scaffolding lessons, extra practice, small group instruction for reading, math, and writing; extended time on tests; separate setting for tests; test questions read aloud; use of a multiplication chart; chunking of academic tasks; a slanted surface for reading material; a reading strip; passages read aloud; and seating in the front of the class. Parents consented to the February 24, 2016 IEP.

2016-2017 SCHOOL YEAR

19. Student began attending Megan Kelly's fifth grade class on August 24, 2016. Ms. Kelly held a bachelor of science in business and marketing and of education in differentiated instruction. She held clear credentials in multiple-subject teaching and single-subject foundational level mathematics. She taught fifth and sixth grade general education classes over the seven years prior to hearing.

20. On August 30, 2016, Mother began emailing Ms. Kelly, Ms. Benson, and other Irvine staff regarding Student's "distress" over being in a general education math class, without support. Several emails were exchanged between August and September 2016 regarding Student's inability to complete homework assignments and struggles in general education academics.

21. Ms. Sharma and Ms. Benson responded to Mother's emails and concerns. Student received academic instruction in Ms. Sharma's special day class; resource and

specialized academic support had been in place from the beginning of the school year; and the first weeks of school had been spent reviewing old material before addressing new fifth grade level content. Ms. Benson reported Student was reading between a second and third grade level, her math was below grade level, and her state-wide assessments below standards in most areas of English language arts and math. Student's reading level had regressed since the February 24, 2016 IEP, which reported she read at an end of third grade level.

22. In one of her emails, Ms. Sharma described Student's work being "modified" and reduced. At the time, Mother was glad that Ms. Sharma was "reducing the work and modifying it to work better for [Student's] needs." Mother later took this wording to mean that Irvine began modifying Student's work before obtaining parental consent.

23. Ms. Sharma did not testify at hearing. Ms. Benson, who worked closely with her, explained that Ms. Sharma confused the words modification and accommodation, a common mistake among teachers. Ms. Benson's testimony on this point was more credible than Mother's position, proffered in hind-sight during the hearing, that Ms. Sharma was implementing modifications without consent. Student's 2016-2017 report card supports this finding, as it shows that Student's curriculum was modified after the first reporting period in October, 2016.

24. Both Ms. Sharma and Ms. Benson asked Mother if she wanted to meet informally or call an IEP meeting. Ms. Benson suggested an IEP amendment could be drafted to modify Student's academic work, if she continued to struggle with homework and classwork. Mother requested both a parent-teacher conference and an IEP team meeting. The conference occurred on October 21, 2016. Subsequently, Parents and Irvine developed an agenda for the upcoming IEP team meeting, which included potential changes in math grade-level work and participation grades for social studies

and science.

OCTOBER 28, 2016 IEP

25. On October 28, 2016, Parents and Ms. Benson, Ms. Hughes, Ms. Kelly, Ms. Sharma, and school principal Michele Ogden met to hold an amendment to Student's February 24, 2016 IEP, 35 days after Mother's September 23, 2016 written request. Neither Ms. Hughes nor Ms. Ogden testified at hearing.

26. The IEP team discussed and added accommodations the following accommodations: textbooks sent home, audio and abridged versions when available; no participation in Wordly Wise; alternative testing formats to include use of oral questions and answers; and reduced content exposure for science and history with study guides to match curriculum and grades matching the content learned. Irvine offered modified math and reading curricula.

27. Irvine did not explain why it removed Wordly Wise from Student's program and she required continued work on vocabulary and comprehension in order to make progress reading. Irvine did not offer counseling services, as staff did not observe social-emotional issues at school. Student did not demonstrate behaviors that impeded her learning or that of others. Ms. Kelly, at hearing, described Student being frustrated, at times, during general education science. She opined that Student was missing many foundational aspects related to the fifth grade curriculum. She did not believe Student required counseling.

28. Mother described the meeting as rushed. Parents did not leave the meeting with an understanding of modified curriculum and the impact that would have on Student's education. Specifically, Parents were not told that modification meant Student would no longer receive instruction toward grade-level standards, which meant Student would, ultimately, receive a certificate of completion rather than graduate with a regular high school diploma.

29. Ms. Benson testified that she typically discusses modifications at IEP team meetings. She did not have a specific recollection of doing so at the October IEP team meeting. There was no evidence that she explained to Parents the long-term ramifications of modifying Student's curriculum in fifth grade. There was no evidence that she explained that Student would continue to fall further behind grade-level standards or that she would not graduate with a regular high school diploma.

30. At hearing, Mother credibly explained her understanding, that offered changes to Student's program would allow a review of the foundational material or building blocks in math and reading, so Student could keep up with her class. Emails subsequent to the IEP meeting corroborate this understanding. At hearing, Parents presented as intelligent and articulate people who cared deeply for their child and wanted the best educational access for her. Mother periodically sent Irvine legal citations to support her request for educational resources for her daughter, for example, in the area of dyslexia. She demonstrated an understanding of her daughter's needs, educational resources, and the law. Mother's testimony as to her understanding based on what was said during the meeting was more persuasive than Ms. Benson's failure of recollection and her typical discussions. Parents were not told that modified curriculum would serve to widen the gap between Student's academic achievement and that of her peers.

31. Parents initialed the IEP amendment. Neither Parent believed they consented to implementation of the IEP amendment and, at hearing, could not remember why they initialed the document in the notes section. Parents attended and participated in the development of the October 28, 2016 IEP amendment, based upon the limited information Irvine gave them about modifying Student's curriculum. They were offered no other options. Parents were not told that modified curriculum would serve to widen the gap between Student's academic achievement and that of her peers.

32. Student offered no evidence that any of the goals offered in her February 2016 IEP required altering at the time of the October IEP team meeting.

33. Irvine did not establish what, if any, direct intensive reading instruction Student received during the 2016-2017 school year. Irvine did not establish how much time per week Student spent using any particular reading program, whether she received direct reading instruction individually or in a small group, or what specific reading deficits were being addressed.

IMPLEMENTATION OF MODIFIED CURRICULUM

34. On October 31, 2016, Mother sent an email to Ms. Benson, copied to Ms. Sharma, Ms. Kelly, Ms. Ogden, and Father, thanking the IEP team for a productive meeting. She asked for a follow-up meeting in four weeks to determine “the success of the measures being put in place.” Mother’s email corroborated testimony from Ms. Benson and Ms. Kelly that Parents consented to implementation of the October 2016 amendments.

35. At the same time, Mother’s November 28, 2016 email to Ms. Sharma, copied to Ms. Kelly and Father, corroborated her misunderstanding about the impact of modified curriculum. Mother requested feedback on Student progress since “adjustments” were made and asked whether anything removed from her program should be put back. She asked about the academic level of Student’s math curriculum and the plan on getting her back up to fifth grade work. She had questions about getting Student’s reading level back up. These questions were not consistent with an understanding of modified curriculum and supported Mother’s testimony that she did not know modified curriculum meant Student would no longer be working to achieve grade-level standards but instead would be working only at her own ability level, however far below grade-level that was.

JANUARY 16, 2017 SPEECH AND LANGUAGE ASSESSMENT BY PROVIDENCE

36. Student's pediatrician Marnie Baker referred her to Providence Speech and Hearing Center for evaluation to address concerns over speech delays. Speech-language pathologist Justin Morgan assessed Student. Ms. Morgan did not testify at hearing. Irvine speech-language pathologist Lauren Mock interpreted the assessment at hearing. Ms. Mock held a bachelor of arts in social science, a post-baccalaureate in communication sciences and disorders, and a master's degree in speech-language and communication disorders. She worked as a reading clinician for Lindamood-Bell and as a speech and language therapy clinician for four years, overall. She worked as a school district speech-language pathologist for seven years at the time of hearing. She provided direct speech services to Student during the 2017-2018 school year.

37. Ms. Mock found Providence's speech-language assessment and recommended goals appropriate. Student scored within the average range except in subtests of semantic relationships and sentence assembly. Overall, standardized index scores demonstrated Student performed slightly below average in receptive language. Mother reported concerns about pragmatics, including attention to topics in conversation. Student scored average in pragmatics testing; initiated conversation during group speech sessions; made appropriate eye contact; and demonstrated personal space. Ms. Morgan diagnosed Student with a mixed receptive-expressive language disorder.

38. Ms. Morgan recommended goals in the areas of understanding linguistic concepts, like before, after, and between when following directions and sequencing stories; using past tense verbs in sentences and recalling a personal event; maintaining preferred and non-preferred topics in conversation. Ms. Morgan recommended individual speech therapy one time per week for 60 minutes and a continuation of school-based services. Ms. Morgan certified the need for therapy through April 16, 2017,

at which time she would review Student's progress.

MARCH 27, 2017 ANNUAL IEP

39. Irvine convened Student's annual IEP team meeting on March 23 and 27, 2017. Ms. Benson, Ms. Sharma, speech language pathologist Lisa Lee, Ms. Kelly, Student's grandmother, and Parents attended on the first meeting date. All of the same participants, except grandmother, attended on the second meeting date.

40. Mother expressed Student's needs in the areas of math word problems, understanding money, reading and writing, and comprehension. She informed the team that the October 2016 IEP adjustments made a huge difference with math foundations and asked for more support in deciphering math word problems. She reported that Student was having trouble developing friendships with same-age peers. Parents provided Student with two academic tutors for two hours per week of afterschool academic support. Mother asked that homework and studying for tests be tailored to Student's capacity.

41. The IEP team reviewed Student's present levels of performance and progress on goals. Irvine noted that Student participated in regular physical education with her peers and did not demonstrate needs in fine or gross motor skills at school. Socially, Student was always happy, able to engage and interact with peers.

42. Student met goals in reading comprehension; expressive syntax; idioms; points of view; writing; comprehension; multiplication; making change with money; keyboarding; and academic vocabulary. Student did not meet her reading fluency or reading comprehension goals.

43. In reading fluency, Student progressed from reading 71 to 100 correct words per minute based on fourth grade-level text. She fell 10 words per minute short of meeting the goal. Irvine discontinued Student's reading fluency goal.

44. Student made some progress in reading comprehension. Student was able

to determine the main idea of instructional level, fourth grade literature text and explain how it was supported by two details with 80 percent accuracy. She could identify and state one detail from grade-level science and social studies with 80 percent accuracy.

45. In figurative language/reading comprehension, Irvine offered a goal requiring Student to define intended meaning of idioms, metaphors, personifications, and the like with 80 percent accuracy. Her baseline showed she could identify simple idioms with 89 percent accuracy, but in passages could only define figurative language elements with 25 percent accuracy.

46. In the area of inferencing, Student's new goal required her to provide two textual evidence details to infer information after being presented with instructional level passages orally and visually, with 75 percent accuracy. Her baseline showed she could provide evidence of two details to infer with illustrations with 25 percent accuracy and could not provide two contextual evidence details.

47. In the area of syntax, Student's baseline showed she could combine two simple sentences to generate a complex sentence using a subordinate conjunction (after, although, as, when, while, etc.) with 50 percent accuracy. Her new goal was to combine two sentences to generate a complex sentence with a subordinate conjunction with 80 percent accuracy.

48. In the area of pragmatics-emotions, when presented with various social scenarios (real-time, picture, or video), Student's baseline showed she could state the emotion and reason for the emotion with 40 percent accuracy. Her new goal was to state what a specific person was feeling based on nonverbal language cues and why the person felt that way, with 80 percent accuracy.

49. In the area of division, Student could independently solve equations with a one-digit divisor and up to three digits in the dividend with 10 percent accuracy. Her new goal required her to solve 10 such equations with 80 percent accuracy.

50. In math, Student met her goal for identifying information needed to set up and solve an equation with 75 percent accuracy. The goal was continued at a higher level, for 90 percent accuracy.

51. In the area of typing speed, Student was able to type 13 words per minute with three errors. Her new goal required her to touch-type 20 words per minute with one error.

52. In math, Student was able to multiply two-digit by two-digit numbers, accurately solving one of ten problems. Her new goal required her to accurately solve 80 percent of the problems.

53. In writing, Student was able to compose a single paragraph, including a topic sentence, with three supporting sentences, and a concluding sentence on a topic of choice, 50 percent of the time. Her new goal required her to follow teacher-led prewriting activities, independently organize her plan for writing using a graphic organizer to develop a topic, main idea, three details, and a conclusion.

54. During the IEP team meeting, Mother voiced concern over not pushing Student hard enough to continue her development. Irvine opined that its strategies worked well, pointing to Student's progress on goals. Student's English language arts goals for reading, writing, and language were tied to fourth, not fifth, grade standards. Student's math goals were tied to third and fourth grade standards. Student made progress toward non-modified fifth grade curriculum in the first trimester of the 2016-2017 school year. The fact that Student made progress toward lower grade level goals was not surprising.

55. Mother's concerns about Student being dyslexic were met with a referral to Irvine's procedural safeguards and Student's triennial assessments, due in Spring 2018. Irvine recommended Student participate in Lexia reading intervention, but only if licenses were still available. Irvine did not offer Student intensive reading intervention to

remediate Student's existing deficits and prevent development of more severe problems.

56. Student continued to develop peer relationships and enjoyed whole group instruction in her general education science and social studies class. Ms. Kelly described Student as delightful. IEP notes show that Student had to be reminded to express frustration in appropriate ways, using coping strategies. Student did not demonstrate needs in the areas of auditory processing, motor skills, or social skills.

57. The IEP team did not address whether Student would obtain a high school diploma or certificate of completion. The Supplementary Aids and Services page indicated that Student would have modified curriculum in reading, writing, and math and modified grades to match the content she learned. Irvine offered Wordly Wise for Student to work on vocabulary at her reading level.

58. Irvine removed several accommodations from the October 2016 amendment IEP, which were critical to Student's learning. Specifically, Irvine removed scaffolding lessons; extra practice; small group instruction for reading, writing, and math; extended time on tests; test questions read aloud; multiplication chart; chunking of academic tasks; use of a slanted surface for all reading materials; and a reading strip. The accommodation previously written as "seating in front of class" was changed to "preferential seating." Reduced or shortened assignments was added to social sciences and continued to apply to science and history. Teacher notes were available to Student.

59. Irvine offered Student continued placement in the learning center special day class for 915 minutes weekly, for reading, writing and math; specialized academic support for 970 minutes weekly in general education computer lab, science lab, science, and social studies; and group speech and language for 30 minutes, with 6 sessions during the school year. Parents did not sign consent to the IEP.

60. At hearing, Ms. Benson relied on Student's progress towards goals to

support her opinion that Student did not require extended school year services. She did not agree that State assessments should be used to determine regression/recoupment. She did not explain why one could rely on State assessments to show Student required modification of her curriculum, but not provide extended school year services to address the same academic deficits.

GRADE REPORTING 2016-2017 SCHOOL YEAR

61. Ms. Kelly developed Student's grade report for the 2016-2017 school year in early June 2017. She noted, generally, that Student showed steady progress and less anxiety after her curriculum was modified in October 2016. Prior to having modified math and writing, Student received an A- in English language arts and was on track to meet year-end standards in reading literature and informational text, and foundational skills. Foundational skills included word analysis, and reading with sufficient accuracy and fluency to support comprehension. She earned a B- in language, and was on track to meet year-end standards in the areas of grammar, usage, and spelling; and understanding and use of grade-level vocabulary.

62. In math, Student earned a B for the first trimester. She received "area of concern" for writing and interpreting numerical expressions; analyzing patterns and relationships; understanding place value system; and performing operations with multi-digit whole numbers. She earned a C in science and a C+ in social science.

63. Student's first trimester grades did not support the need for modification of her curriculum to below grade-level standards. Irvine did not explain why it did not offer intensive individualized intervention to address Student's needs in English language arts and math before offering to modify her curriculum.

64. Results for the California Assessment of Student Performance and Progress, dated June 19, 2017, showed Student was below standards for English language arts and math. Student's score had increased 56 points from third to fourth

grade, and dropped 30 points for fifth grade math assessments. Student's score dropped 45 points between third and fourth grade and declined another 20 points for fifth grade English language arts assessments.

2017-2018 SCHOOL YEAR

65. Student had a new general education teacher for sixth grade, Jennifer Lopez. Ms. Lopez held a bachelor of arts in elementary education and a master's degree in education with a specialization in reading. She held a clear multiple subjects teaching credential. She taught general education classes, including math and social studies, for 12 years before coming to Irvine. She worked as a fifth and sixth grade general education teacher at Irvine for five years at the time of hearing.

66. On September 26, 2017, Mother emailed Ms. Benson and school principal Ms. Ogden, copied to Ms. Lopez, Ms. Sharma, and Father, expressing both Parents' concern over Student's lack of progress in math and reading. Mother asked for an IEP team meeting and reported that Student may have dyslexia and require different teaching methods. She provided research on dyslexia markers and California state legal standards regarding interventions for students with dyslexia.

67. In response, Ms. Benson reported Student made great progress and met all but her typing benchmark in June 2017. She related Student did not make as much progress on grade-level standards because she worked on below grade-level, modified curriculum. Ms. Benson advised Parents that they should watch her progress by looking at specific goal areas, not by looking at grade-level standards.

68. Ms. Benson did not believe Student had dyslexia because reading and phonological awareness were areas of relative strength for Student during 2015 testing. She pointed out lower areas, such as memory recall and mathematics. Ms. Benson recommended discussing issues during parent conferences, or working with Ms. Sharma to set up an IEP team meeting and suggested the IEP team could review Student's

cognition and academic achievement in the 2018 triennial evaluations.

OCTOBER 5, 2017 IEP

69. Student's IEP team met, at Parents' request, on October 5, 2017. Ms. Benson, Ms. Ogden, Ms. Lopez, Ms. Sharma, Ms. Mock, and Parents attended the meeting.

70. Ms. Benson reviewed differences between a medical diagnosis and educational eligibility regarding dyslexia. She explained components of the upcoming triennial evaluation as it related to Student's reading and learning problems. Parents expressed concern that Student's reading ability had plateaued. The team discussed early triennial evaluations.

71. At hearing, Ms. Lopez described Student as being like most of her other students in sixth grade social studies and history. She was an active participant in the class. Student's curriculum was based on sixth grade standards but accommodated pursuant to her IEP. Student was one of approximately 28 children in the class and received assistance from a special education aide assigned to the class. Student was able to keep up with her peers. According to Ms. Lopez, the social studies textbook was difficult for most of her sixth graders. She spent much time breaking down the text, using repetition and teacher notes, outlines, study guides, and graphic organizers. She had students work in whole and small groups, doing skits, art projects (building pyramids or making posters), dressing up in period costumes, and watching period movies.

72. Ms. Lopez used exit tickets, which meant that she asked a recall question regarding two achievements of a newly studied civilization to ensure understanding. She opined that her class was appropriate for Student as evidenced by Student's progress on grade-level standards.

73. No changes were made to Student's IEP.

74. On October 10, 2017, Parents requested early triennial evaluations and were sent an assessment plan. Father returned his assessment plan, signed October 10, 2017, to Ms. Benson the following day.

STOWELL LEARNING CENTER LEARNING SKILLS ASSESSMENT

75. On October 23, 2017, Parents had Student privately assessed at Stowell Learning Center. Lauren Ma testified about the assessment. Ms. Ma worked as a 2nd grade teacher for three years. She worked at Stowell for 13 years as a clinician, clinical services coordinator and center director. She held a bachelor of science in child development. She held a clear multiple subject teaching credential to teach kindergarten through 8th grade.

76. The purpose of the assessment was to identify weaknesses in Student's learning skills and academic skills. Student was assessed using various screeners, Parent rating scales, portions of standardized tests, and tests that were not supported by peer-reviewed research. Stowell determined Student, very generally, had skill deficits in listening and auditory memory, oral communication, motor ability, academics, and learning skills.

77. Ms. Ma and the Stowell report spent a significant amount of time on the subject of primitive reflexes. Primitive reflexes, such as fight or flight, should gradually integrate into higher-level motor functions as babies develop. Primitive reflexes that do not integrate were called "retained" and said to create neurological interference, producing anxiety and causing a person to work harder and less efficiently than would be expected. Stowell called this neurodevelopmental delay.

78. Stowell diagnosed Student with dyslexia based upon results from the Dyslexia Determination Test, a non-peer reviewed assessment instrument. According to Ms. Ma, the results showed Student had difficulty remembering and writing letter symbols without reversals; difficulty connecting sounds and symbols to use phonics for

reading and spelling; and difficulty visually recognizing whole words for reading and recalling visual images for spelling.

79. Stowell recommended two hours per day, three days per week, for nine months of various listening and other programs to “integrate Student’s retained reflexes and strengthen neurological connections” for attention, speaking, reading, spelling, and writing. Stowell also recommended one hour per day, four days per week, for six months of cognitive educational therapy, described as programming to “increase overall cognitive efficiency for learning.”

80. Parents obtained services from Stowell to fill in gaps left behind by Irvine’s lack of targeted and intense individualized interventions. Student attended Stowell two hours per day, three days per week beginning November 14, 2017.

81. On October 31, 2017, Ms. Sharma notified Parents she scheduled an IEP team meeting for December 5, 2017, and would be sending a notice for them to sign. From November 1, 2017 through November 30, 2017, Irvine staff and Parents exchanged several emails changing proposed IEP meeting dates due to scheduling conflicts on both sides. On November 1, 2017, Father specifically agreed to reschedule the meeting beyond the 60-day legal timeline. In early November, Mother sent Irvine Stowell Learning Center’s assessment, which diagnosed Student with dyslexia.

NOVEMBER 2017 READING INTERVENTION

82. Giselle Eaton held a bachelor of arts in liberal studies and master of science in special education. She held a credential for Education Specialist II, for teaching children with mild to moderate disabilities, and a multiple subject teaching credential. Ms. Eaton worked for Irvine as an education specialist teaching specialized academic instruction for ten years, a reading specialist for four years, and was a middle school assistant principal at the time of hearing.

83. Ms. Eaton described dyslexia as a specific learning disability in the area of

reading, with weaknesses in phonemic awareness, reading decoding, reading fluency, reading comprehension, and possibly spelling. She described Irvine's multi-tiered response to intervention supports for students with reading deficits. Tier 3 was the most intensive with one to seven students working in a small group setting with a teacher or instructional aide. Tier 2 involved a small group setting of approximately 10 students, using re-teaching and scaffolding of instruction. Tier 1 consisted of regular classroom strategies and scaffolding that could be used to support all students in class.

84. Ms. Eaton was tasked with researching, selecting, and administering Tier 2 and Tier 3 reading interventions for Irvine. Irvine tested use of Lexia and Sonday System, ultimately choosing Sonday System for Tier 3 intervention for elementary school students. Sonday System used Orton-Gillingham methodologies to teach phonemic awareness, phonics, reading comprehension and fluency, and spelling. She described the program as systematic, research-based, and proven to support students with dyslexia. She trained Ms. Sharma, along with other teachers, to implement the program.

85. Ms. Eaton reviewed Student's pre- and post-testing, which reflected progress in all areas of reading from November 17, 2017, through February 2018. Student's pre-test results determined where Student would begin Sonday System intervention. Student required some pre-reading skills, but was not low in reading, overall. Student had holes in the areas of whole word discrimination and rhyme recognition. On expository text, Ms. Eaton determined that Student's comprehension improved when passages were read aloud to her. By February 2018, Student closed the gap on pre-reading skills and moved forward with reading intervention using Sonday System.

86. According to Ms. Benson, Student participated in Sonday System reading intervention with one other peer for 30 minutes per day, three to four times per week. This reading intervention had not been incorporated into Student's IEP and it was not

clear that Parents were aware the intervention had been implemented.

2018 TRIENNIAL ASSESSMENTS

87. Irvine conducted triennial assessments of Student from October through December 2017, in the areas of health and development, psychoeducation, academics, and speech and language. Irvine summarized its assessment results in a multidisciplinary assessment report, dated January 8, 2018. At Parents' request, she assessed for specific learning disability, to address dyslexia. Ms. Benson reviewed Student's records; obtained information through input surveys from Parents, Ms. Sharma, and Ms. Lopez; observed Student in multiple settings at school; and conducted various standardized assessments.

88. Ms. Benson, with the help of a psychological intern, administered a series of psychoeducational assessments to determine Student's cognition; psychological processing; deficits in reading, writing, and math; executive functioning; and social-emotional behavior. Ms. Benson broke testing sessions into ten days to accommodate Student's behaviors. Notes written within testing instruments demonstrated that Student was uncooperative at times and consistently appeared restless and fidgety. Her concentration and attention were labored throughout testing. She was easily distracted. Student engaged in nail picking, hair twirling, tongue biting, and staring off. When tasks became more difficult, Student appeared tense and worried. She hurried her responses and gave up easily on more difficult tasks. Ms. Benson attributed Student's behaviors resulted to attention issues rather than externalized stress. According to Ms. Benson, these behaviors were consistent with Student's classroom behaviors.

89. Ms. Benson administered the Woodcock-Johnson Test of Cognitive Abilities, Fourth Edition. Seven subtests combined to form the general intellectual ability cluster, which Ms. Benson described as a predictor of overall school achievement. The seven subtests were oral vocabulary, number series, verbal attention, letter-pattern matching, phonological processing, story recall, and visualization.

90. Four subtests, in oral vocabulary, general information, number series, and concept formation, comprised the "Gf-Gc Composite" score, which was based on the theory that one's reasoning abilities and general knowledge, were the most common expressions of cognitive of ability.

91. Student scored in the very low range in both the general intellectual ability and Gf-Gc clusters. Her intelligence quotient dropped 13-points, compared to 2015 triennial testing. In her report, Ms. Benson interpreted the 13-point drop to mean Student had not made growth similar to her peers. Ms. Benson tied the lack of growth to Student's overall abilities, rather than either a lack of appropriate instruction or invalid test results.

92. Overall, results from the Woodcock-Johnson differed wildly from prior Irvine assessment scores. To illustrate the point, Student's fluid reasoning score was average in 2012 but very low in 2018. Number series and concept formation made up the fluid reasoning cluster score. Irvine's prior assessments did not identify prior administration of the concept formation subtest. However, on the number series subtest, Student score was scored low in 2015, compared to very low in 2018.

93. Student's scores in cognition on triennial testing in 2009 were within the average range and were within the average to low average range, in 2012. The drop between 2012 and 2015 assessments was significant. The drop between 2015 and 2018 was even greater.

94. Ms. Benson did not credibly explain the overall drop in cognitive scores between 2009 and 2018 testing. At hearing, Ms. Benson opined that test results differed over time for reasons including (1) intelligence scores tended to fluctuate until age 10 to 12 years, when cognition solidified; (2) Woodcock-Johnson updates after 2012 meant the test was normed on a different population in 2015; and (3) what children were expected to know differed substantially between age six and age nine. Overall, Ms.

Benson believed her testing accurately depicted Student's development.

95. Ms. Benson conceded that 2018 testing did not result in a valid or "interpretable" intelligence quotient. At hearing, she unequivocally denied that Student had an intellectual disability. Ms. Benson opined that Student's ability was best interpreted by looking at individual processing scores.

96. However, processing scores also varied significantly between 2012, 2015, and 2018 assessments. In auditory processing, Student scored average in 2012, low average in 2015, and low in 2018. Auditory processing cluster scores consisted of phonological processing and non-word repetition subtests. Student scored low average in phonological processing in 2012, compared to low in 2018. Non-word repetition subtest, given only in 2018, resulted in a score in the low average range. In other areas, Student's scores increased. Student scored low on the visualization subtest in 2015 versus average in 2018. She scored low on the oral vocabulary subtest in 2015 versus low average in 2018. Irvine offered no compelling explanation for the great disparity in processing scores between 2012, 2015, and 2018 triennial assessments.

97. Ms. Benson's report relied on an invalid intelligence quotient, throughout, when determining Student's achievement in various areas was consistent with her abilities. For example, in math, Ms. Benson found that Student's significant difficulty with mathematical problem solving was commensurate with her cognitive ability and overall mathematics performance on 2018 achievement tests. Ms. Benson concluded similarly in the area of reading.

98. Ms. Benson administered the Test of Nonverbal Intelligence, Fourth Edition, which measured intelligence, aptitude, abstract reasoning, and problem solving. The test required no reading, writing, or speaking by Student. Student scored below average for this instrument. Student's score dropped from average on prior testing.

99. Student scored in the poor range in phonological awareness, phonological

or verbal short-term memory, and rapid naming, the three composites of Comprehensive Test of Phonological Processing, Second Edition. She scored in the average range on Test of Visual-Perceptual Skills-Revised, Third Edition. Visual processing was a relative strength for Student.

100. Ms. Benson administered the Children's Psychological Processes Scale Normative Update. The instrument consisted of rating scales completed by Ms. Sharma and Ms. Lopez to help determine whether Student had specific learning disability. Ms. Lopez scored Student in the average range in all areas. Ms. Sharma rated Student very low in phonological processing and visual-spatial processing; low in auditory processing, fluid reasoning, long-term recall, processing speed, and working memory; below average in attention, executive functioning, and oral language; and average in fine motor skills.

101. Ms. Sharma administered the Woodcock-Johnson Tests of Achievement, Fourth Edition. Student scored in the very low range in reading comprehension, mathematics, and broad mathematics; low in reading, broad reading, basic reading skills, math calculation skills, written language, and broad writing language; and low average in written expression. Compared to 2015 testing, Student dropped from average to low in basic reading skills and reading fluency; from average to very low in reading comprehension; and from low to very low in mathematics.

102. Ms. Benson administered the Feifer Assessment of Mathematics, on which Student scored significantly below average, overall. Ms. Benson found Student's deficits consistent with dyscalculia in two of the three Feifer indexes. Dyscalculia describes difficulty acquiring mathematical skills, not explained by low intelligence or inappropriate schooling. Ms. Benson determined Student's performance was commensurate with her cognitive ability and overall mathematics performance on the Woodcock-Johnson.

103. Ms. Benson administered the Feifer Assessment of Reading, a test designed to examine cognitive and linguistic processes supporting proficient reading skills. Subtests measured phonological development, orthographical processing, decoding skills, morphological awareness, reading fluency, and comprehension skills. Overall, Student scored in the significantly below average range.

104. According to Ms. Benson, Student's reading patterns were consistent with mixed-type dyslexia. She opined, both in her report and at hearing, that Student did not meet the eligibility qualifications for specific learning disability because her performance was commensurate with her cognitive ability and overall reading performance on the Woodcock-Johnson Tests of Achievement.

105. Ms. Benson's report described Student's involvement in the Lexia reading program at Santiago Hills. She described Lexia as a Tier 3 intervention built into Student's educational program. Irvine did not present any evidence on when Student began the program, the number of hours spent using the program each week, or how it was individually tailored to address Student's unique reading needs.

106. Ms. Benson placed Student at a second-grade reading level based on a review of her progress in the Lexia program. According to Ms. Benson, Student showed progress in all areas using Lexia. She did not explain whether Student used both Lexia and Sonday or whether she switched from Lexia to Sonday in November 2017. Contrary to Ms. Benson's opinion, the Lexia data showed regression, overall, as Student was reading at an end-of-third-grade level while in fifth grade, as reported in her February 24, 2016 IEP.

107. Ms. Benson provided Parents, Ms. Sharma, Ms. Lopez, and Student with rating scales from the Behavior Assessment System for Children, Third Edition. Ratings resulted in scores falling within the average, at-risk, or clinically significant range. Scores in the clinically significant range suggested high levels of maladjustment, while scores in

the at-risk range might have identified areas of need to monitor but not necessarily address in an IEP.

108. Mother did not rate any areas as clinically significant. She rated Student as at-risk in the areas of hyperactivity, anxiety (nervous, fearful, or worried), depression (feelings of unhappiness, sadness, and stress, that may result in inability to carry out everyday activities), withdrawal (avoiding social contact), attention problems, activities of daily living, functional communication (ability to express ideas and communicate in easily understandable way), anger control (tends to become irritated or angry quickly, impulsively, and unable to self-regulate), executive functioning (ability to control behavior by planning, anticipating, in habiting, or maintaining goal-directed activity, and by reacting appropriately to environmental feedback in purposeful or meaningful way), and negative emotionality (tends to react overly negatively to changes in routines).

109. Father rated attention problems, leadership (skills associated with accomplishing academic, social, or community goals, including ability to work with others), and functional communication in clinically significant ranges.

110. Ms. Sharma rated Student as clinically significant for internalizing problems, school problems, anxiety, depression, learning problems, and negative emotionality. Ms. Lopez rated in the clinically significant range in the area of atypicality (tends to behave in ways considered odd).

111. Ms. Benson's report correlated results of behavior rating scales with Diagnostic Criteria for Clinical Disorders, Fifth Edition. Correlations were meant to identify areas of weakness that required intervention, rather than diagnoses. In her correlation, she found Parents' and Ms. Sharma's responses consistent with diagnostic criteria for attention deficit hyperactivity disorder. This conclusion was based on Student's difficulty sustaining attention, not listening when spoken to, being easily distracted, feeling restless, blurting out answers, and interrupting conversations or

activities. She also found responses consistent with diagnostic criteria for generalized anxiety disorder because of Student's being difficult to control, excessive anxiety and worry, feeling restless, keyed up, or on edge. Ratings were consistent with major depressive disorder based upon Student feeling depressed most of the day, feelings of worthlessness or feeling excessive guilt on a consistent basis, and difficulty thinking, concentrating, or making decisions.

112. Ms. Benson had Parents and Ms. Sharma complete the Conners Rating Scale, Third Edition, a screening tool that assessed a broad range of problems in the areas of executive functioning, conduct, anxiety, defiance, aggression, and social relationships. Ratings from Parents, Ms. Sharma, and Ms. Lopez supported a finding that Student demonstrated attention deficit hyperactivity disorder, inattentive type. All raters shared concerns with Student's learning problems, and all but Ms. Sharma with social relations.

113. Ms. Benson used rating scales from the Comprehensive Executive Function Inventory, to obtain perceptions from Parents and Ms. Lopez on Student's executive functioning at home, school, and in the community. Parents rated Student in the low average range, while Ms. Lopez rated Student in the average range.

114. Ms. Benson concluded, in her report, that Student met eligibility criteria for other health impairment due to attention deficit hyperactivity disorder but did not demonstrate a severe discrepancy between her cognitive ability and achievement and, therefore, did not meet eligibility criteria for specific learning disability.

115. Speech-language pathologist Ms. Mock administered standardized and non-standardized assessments to Student over four days in sessions lasting 30 to 45 minutes each. Student demonstrated joint attention and eye contact. She made best efforts to attempt completion of each test. She declined offered breaks from testing. Ms. Mock completed observations of Student in her special education and science lab

classrooms and at recess.

116. Based upon her assessments and observations, Ms. Mock determined Student's voice, fluency, and speech fell within the average range. Student's receptive, expressive, and pragmatic language fell within the average to low average range. She recommended the IEP team consider her findings.

117. On December 14, 2017, Ms. Benson sent Parents a copy of Irvine's draft triennial assessment. On December 22, 2018, draft IEP goals were sent to Parents. In early January, Parents met with Irvine lead psychologist Angela Wyeedn, Ph.D., Ms. Hertig, and Ms. Bennett to discuss the recent intelligence quotient reported by Ms. Benson and Student's lack of progress. Dr. Wyeedn determined the intelligence quotient, in the low range, was not a valid representation of Student's cognitive ability. Parents requested an independent neuropsychological evaluation.

JANUARY – FEBRUARY 2018 TRIENNIAL IEP

118. Irvine's winter break lasted from December 25, 2017, through January 8, 2018, before that, Irvine was closed for three days for the Thanksgiving holiday. Ms. Ogden scheduled the IEP team meeting for January 8, 2018, which would become the first of seven IEP team meetings.

119. Student's IEP team met to review the triennial multidisciplinary assessment and determine eligibility, placement, and services. The IEP team met on January 8, 9, 17, 26, and 31, 2018, and on February 8 and 13, 2018, for approximately 13 and one half hours, in total. The meetings resulted in Irvine's offer of special education and related services on February 13, 2018. The required IEP team members were present during each of the meetings. Parents attended each meeting with educational advisor Enid Webb, who sometimes appeared telephonically.

120. To address concerns over reading progress, Ms. Eaton conducted informal

reading assessments on January 12, 2018, later reported to the IEP team. Ms. Eaton determined Student's instructional reading levels in fluency, comprehension, and listening comprehension. Student reached a fourth-grade instructional level in reading fluency; low, third-grade level in reading comprehension; and third-grade level in listening comprehension. Ms. Eaton, at hearing, could not say whether Student would reach a sixth grade reading level based upon her learning disabilities. She believed Student could continue to make progress. Student's reading levels were higher than the second-grade reading level reported by Ms. Benson in her psychoeducational assessment.

121. On January 16, 2018, Ms. Webb and Ms. Benson collaborated on Student's reading development, progression of reading skills, and reading goals later offered by Irvine at subsequent IEP team meetings.

122. Throughout IEP meetings, Parents expressed concern with Student's needs in reading, math, and social skills. Because of the discrepancy in Student's prior and current cognitive testing results, Irvine offered Parents a referral to Diagnostic Center of Los Angeles. Irvine did not conduct any further testing to obtain valid cognition scores.

123. On January 23, 2018, Mother emailed Ms. Bennett and other Irvine members of the IEP team, clarifying Parents' request for an independent educational evaluation to assess Student's cognition scores. Ms. Benson did not believe Student's anxiety and externalized behaviors impacted her performance on triennial assessments, even after determining the cognitive scores were invalid.

124. Over the course of the seven IEP team meetings, the team reviewed assessments; discussed Student's progress on goals and developed new goals; discussed modified curriculum and grade level standards; considered Student's social skills, interaction with peers and behaviors; and discussed accommodations, related services and placement.

125. The IEP team reviewed findings from the 2018 multidisciplinary assessments. Irvine identified Student's needs in math (division, multiplication, equivalent fractions, and number sequences); English language arts (syllables, comprehension, root words, antonyms, sixth-grade high frequency words, and consonant-vowel-consonant-e spelling words); writing (organization and developing three paragraph essays); and executive functioning in attention.

126. The IEP team reviewed Student's progress on prior goals. Student met her goals for pragmatics-emotions and math word problems. She made meaningful progress toward her goals in figurative language-reading comprehension; inferencing; syntax; division; reading comprehension; typing speed; multiplication; and writing organization. Student met all prior speech goals. She was able to retain figurative language meanings and vocabulary.

127. Ms. Bennett, Ms. Benson, and Ms. Eaton explained, during IEP meetings and at hearing, that Student's 2017-2018 goals had been tied to grade-level standards and that Student's progress toward goals meant progress toward grade-level standards.

128. The IEP team discussed, at the February 13, 2018 meeting, the pros and cons of continuing modified curriculum Ms. Webb opined that modified curriculum was recommended for students with lower cognitive ability. Ms. Sharma discussed other reasons, such as Student's frustration and present levels of performance during the prior school year. Irvine believed pros included Student's reading comprehension, gaining content at an independent level, math deficits, ability to work on foundational skills, writing deficits, reducing anxiety, and Student having met her goals from the prior annual IEP. Ms. Webb believed the pros supported Parents' request for compensatory services, reasoning that Student would not have fallen so far behind in reading and math if she had not been on modified curriculum.

129. At hearing, Ms. Eaton defined modified curriculum as not working toward

grade-level standards. She did not know whether Student's curriculum was modified because goals for the 2018-2019 school year were tied to sixth grade standards.

130. Ms. Mock, at hearing, described observing Student picking her nails and forehead beginning January 2018, through the end of the 2017-2018 school year. She did not know whether Student was nervous or anxious. She testified that all Irvine providers noticed these behaviors and discussed redirection techniques. They used the phrase, "quiet hands, focus," which resulted in Student stopping picking behaviors for a few minutes. She did not recall whether this was discussed at an IEP meeting.

131. Student demonstrated the ability to engage in conversations and interact appropriately with peers and teachers. She was well liked. On the other hand, Ms. Mock did not know if Student developed friendships with specific peers. Ms. Mock did not observe a lot of interaction between peers and Student at recess. Ms. Benson observed Student engage in activities next to peers such as swinging or tetherball.

132. Irvine offered positive behavior interventions, strategies, and supports, which consisted of visual supports, task analysis, chunking of academic work, frequent breaks, school-wide positive behavior support and system, and reducing visual stimuli when presenting work.

133. Ms. Sharma agreed with modifying Student's curriculum. Parents were concerned with Student working below grade level and at an ever-increasing gap with her same-aged, typical peers. Student would not be on diploma track. Irvine did not explain, at hearing, or in IEP documents, how modified curriculum could benefit a Student with a low average intelligence quotient. Ms. Benson's reasoning was geared toward what she believed was Student's low cognition, even after determining the score was invalid. Parents did not agree to modified curriculum.

134. Parents believed Student developed good short-term memory as a coping skill and demonstrated increased attention in her afterschool programs. Ms. Bennett

heard Parents' concerns about reading and math skills and acknowledged the teaching team would, moving forward, take this information into consideration to target these concerns.

135. Irvine offered Student goals in English language arts, math, reading, emotional regulation, listening comprehension, and executive functioning/attention. Several goals required Student to use auditory skills to understand and respond to input.

136. The new reading goals Irvine proposed for Student included understanding word meanings; syllables; locating evidence in text; reading for fluency and accuracy; phonemic awareness for syllable identification, segmenting phonemes, and decoding words with "le" endings; decoding high frequency words; and reading comprehension. Irvine offered goals addressing vocabulary in fifth-grade root words and antonyms.

137. Ms. Eaton described one of Student's reading goals as targeting the sixth-grade standard of locating an answer in text while using a fourth-grade reading passage, which was at Student's instructional level. In Ms. Eaton's opinion, Student was working on sixth grade-level standards, albeit with reading material that was at a lower grade level.

138. In math, Irvine proposed goals to identify patterns/number sequences; multiplication; division; and equivalent fractions.

139. In writing, Irvine proposed goals to address Student's needs in writing organization for developing three-paragraph essays; spelling consonant-vowel-consonant-e words read aloud by the teacher; and editing grammar.

140. Irvine proposed an emotional dysregulation goal, for Student to learn independent use of coping strategies, such as deep breathing, counting to 10, and reviewing calming strategies. The executive functioning goal required Student to attend

to whole-group instructed activity for 30 minutes.

141. Irvine identified Student's needs in assistive technology accommodated through having passages read aloud, visuals, and graphic organizers.

142. Irvine offered math intervention embedded in Student's curriculum to fill foundational gaps. Touch Math was offered as a multisensory approach to address math facts. Irvine implemented Step Up to Writing as a universal writing program for all students, which would also address Student's writing deficits.

143. Irvine offered specialized academic instruction push-in services to support science and social studies and pull-out specialized academic instruction to support specific needs, targeting goals, and foundational skills. Overall, Irvine offered 350 minutes per week push-in and 1080 minutes per week pull-out specialized academic instruction. Ms. Webb believed the significant increase in specialized academic instruction reflected the need for compensatory services as Irvine had not provided sufficient prior services. Based upon Ms. Mock's assessment, speech and language services were not offered.²

144. Irvine did not offer extended school year services. Irvine IEP team members believed Student did not demonstrate a loss of skills over extended breaks, citing Student's progress on goals. Parents did not sign consent to the IEP.

145. On March 5, 2018, Ms. Bennett sent Parents prior written notice regarding a number of Parents' requests. Regarding extended school year, Irvine relied on goal progress reports, classroom work samples, Sonday System pre- and post-test data, showing Student did not demonstrate substantial regression and recoupment issues during the previous IEP year. Irvine did not believe Student required extended school

² Ultimately, Student continued receiving speech services through the end of the 2017-2018 school year as Parents did not consent to the IEP.

year services to provide practice to maintain previously acquired or learned skills. Further, Ms. Bennett responded to Parents revocation of consent for modified curriculum. Irvine did not believe Parents could partially revoke consent. Ms. Bennett notified Parents that Student's curriculum would continue to be modified.

146. On March 7, 2018, Parents consented to implementation of all goals with the exception of reading sixth grade-level high frequency words.

MARCH 7, 2018 ASSISTIVE TECHNOLOGY ASSESSMENT

147. Irvine's assistive technology specialist Sara Low conducted an assistive technology assessment of Student culminating in a report dated March 7, 2018. She held a bachelor of arts in psychology and a master of science in occupational therapy. She held a California license in occupational therapy, an assistive technology specialist certificate, and a national credential in occupational therapy.

148. Ms. Low conducted assessments to determine whether Student required assistive technology in reading comprehension, written expression, and math. Ms. Low reviewed records, obtained input from Parents and teacher, interviewed Student and observed her in class, and administered various testing protocols.

149. Ms. Low observed Student in her social studies classroom. Student was part of a seven-person group tasked with developing a presentation on ancient Greece. She demonstrated knowledge of the subject matter by turning to the correct pages in her textbook to locate needed information, and engaging in an appropriate exchange with other students providing input on the presentation.

150. Student transitioned easily to begin assessments. She participated in all trials and tasks, and did not require additional prompts or redirection. Ms. Low administered the Protocol for Accommodations in Reading. The protocol was used to make evidence-based decisions on reading accommodations supporting general education instruction. Ms. Low started her testing using third grade-level passages. She

based her starting point on Student's recent IEP, which noted Student's instructional reading comprehension was at the third-grade level. At a sixth-grade reading level, Student scored 10 of 12 on comprehension questions read aloud to her, when allowed to look back at text after hearing questions. She scored 11 of 12 when using a text-to-speech feature to have a sixth grade-level passages read aloud to her and using the feature to read back small sections of text after hearing the questions. In both trials, she looked back to passages on half of the questions.

151. Student was able to copy from the board and fill in worksheets, writing neatly and legibly. She makes spelling errors when not copying and reverses letters 'b' and 'd.' On assessment, Student wrote more quickly than she typed and her handwriting was legible. Dictating thoughts to a scribe did not allow her to provide additional detail or structure to her writing. Word prediction software was helpful to address spelling errors.

152. In the area of math, Student demonstrated the ability to align math calculations legibly. Due to difficulty processing and manipulating numbers from memory, Ms. Low recommended instructional strategies, such as breaking down steps; providing visual directions; and continued use of a calculator or multiplication charts.

153. On March 5, 2018, Mother sent program specialist Ms. Bennett correspondence seeking reimbursement for Student's afterschool program at Stowell. Mother opined that Student's pre- and post-testing on Irvine's Sunday System corroborated Student's reading progress through Stowell. Pre-testing occurred on November 17, 2017, days after Student began receiving reading services at Stowell. Post-testing on February 14, 2018 reflected Student's significant progress in reading. Mother notified Ms. Bennett of Parents' intent to seek reimbursement for Student to attend a private school for children with dyslexia over the summer.

MARCH 7, 2018 IEP AMENDMENT

154. On March 7, 2018, Irvine held an IEP amendment team meeting to review the results of Ms. Low's assistive technology assessment. All necessary Irvine IEP team members attended. Ms. Webb attended with Parents.

155. Accommodations recommended by Ms. Low were added to the IEP, which included access to a cloud-based laptop, such as a Chromebook, to use recommended programs; cloud-based word prediction program with a speech-to-text option; use of graphic organizers for extended writing tasks in paper or digital versions; use of digital text-to-speech program; access to handheld text-to-speech tool with vocabulary and dictionary support; district-sponsored Bookshare account; calculator and use of visuals such as a multiplication chart to support math. Irvine offered consultation between the assistive technology specialist and staff to support the use of assistive technology devices and accommodations.

156. Mother inquired about the use of an FM system, which had been recommended by an outside provider in an April 17, 2014 auditory processing evaluation. Mother provided the April 2014 report to Irvine on May 22, 2014. The Irvine IEP team members attending the March 7, 2018, meeting were not previously aware of the report. Ms. Lopez opined that Student did not appear distracted by extraneous noise in the classroom and did not believe an FM system was warranted.

157. Mother believed that Student could access grade-level curriculum using assistive technology tools, based upon Ms. Low's report of reading comprehension protocols. Irvine IEP team members believed Student should continue to work on modified curriculum with added supports before dispensing with modifications. Ms. Sharma reported that Student required time, chunking, and other strategies and tools. At hearing, Irvine did not explain how needing accommodations related to a continued need for modified curriculum. Irvine offered an assessment plan for auditory processing

to determine whether Student required an FM system. Parents did not consent to the IEP.

158. On March 8, 2018, Parents emailed Irvine their intention to unilaterally place Student at Prentice School and seek reimbursement. Ms. Bennett denied the request for reimbursement in a letter from Irvine dated March 23, 2018.

159. Parents were given and signed an assessment plan for auditory processing on March 12, 2018.

FUNCTIONAL BEHAVIOR ASSESSMENT

160. Behavior specialist Heather Griffith conducted a functional behavior assessment of Student in March 2018, resulting in a report dated April 9, 2018. Ms. Griffith held a bachelor of science in psychology and social behavior and a master of science in early childhood education. She obtained board certification in behavior analysis in 2009. She had extensive background in behavior working as a behavior therapist, behavior specialist, and clinical director for private companies providing behavior services, training staff, and overseeing clinical programs provided both in homes and at schools.

161. As part of her assessment, Ms. Griffith reviewed Student's records, obtained written input from both Parents, interviewed Ms. Sharma, observed Student in specialized academic instruction and general education, and collected data on Student's behaviors.

162. Ms. Griffith described Student's target behaviors as inattention and emotional dysregulation. Ms. Griffith defined inattentive behaviors as staring off, nail biting, tongue chewing, hair twirling, and skin picking. She determined the behaviors functioned as escape or avoidance, and sensory seeking. Responsive strategies included sensory breaks to engage in gross or fine motor movement and access to fidget items. At hearing, Ms. Griffith opined that Student's picking behaviors did not impede her

ability to access her education.

163. Student's emotional dysregulation was defined as crying, whining, pacing, and other "anxious behaviors." The behaviors occurred when Student was given a test or her teacher discussed an upcoming test, quiz, study guide, or project that was due. Ms. Griffith described the function of Student's emotional dysregulation as escape or avoidance. Ms. Griffith offered strategies of simple directives, offering choices, reviewing self-regulation strategies, and reviewing expectations for the assignment.

164. At hearing, Ms. Griffith opined that Student did not exhibit observable anxiety, even though she described crying, whining, and pacing as "anxious behaviors." She explained that Student demonstrated self-management skills in that she could engage in behaviors while remaining on task, and redirect herself when off task. For example, during one classroom observation, Student stood up and said, "I hate my life," sat back down, and continued working.

165. On April 25, 2018, Irvine held an IEP amendment team meeting to review Ms. Griffith's functional behavior assessment. Student did not place the April 2018 IEP at issue for this hearing. Irvine offered a Tier 2 behavior intervention plan, based on Ms. Griffith's assessment results. IEP notes reflect that Ms. Sharma had not observed Student engage in anxious behaviors in her special day class. Ms. Benson believed Student's behaviors aligned with processing deficits and not anxiety.

166. Parents reported anxiety around homework and testing, including making verbal protests. Student had not self-reported anxiety but told Parents she was not smart or was stupid. Mother believed Student experienced internal anxiety not observable to others. Irvine IEP team members again offered evaluations at Diagnostic Center of Los Angeles to address Parents' concerns.

AUDIOLOGICAL ASSESSMENT

167. On April 24, 2018, nationally certified audiologist Carey Williams

conducted an audiological assessment of Student, resulting in a report dated May 2, 2018. Dr. Williams held a bachelor of science in elementary education, master of arts in communication disorders, and a doctorate in audiology. Her experience included seven years teaching; nine years in educational audiology; and 19 years in diagnostic and clinical audiology. At the time of her assessment and at hearing, Dr. Williams worked for Orange County Department of Education as an educational audiologist.

168. Irvine referred Student to Dr. Williams for a central auditory processing evaluation at Parents' request. Parents were concerned with Student's limited vocabulary, difficulty expressing herself, slow progress toward grade-level standards, and inability to focus on oral instructions. Dr. Williams reviewed Student's records, conducted a clinical interview of Student, observed Student in class, received input from Parents and teachers through questionnaires, and conducted a peripheral hearing assessment and stressed listening tests.

169. At hearing, Dr. Williams explained that students with higher-order cognitive, language, or related disorders were sometimes erroneously thought to have central auditory processing disorder. Higher-order cognitive disorders included attention deficit hyperactivity disorder. Children with attention deficit were often poor listeners, or had difficulty understanding or remembering verbal information, but had intact neural processing of auditory input.

170. During clinical testing, Student willingly participated and did not request breaks, though they were offered. She easily developed rapport with Dr. Williams. Dr. Williams conducted a peripheral hearing assessment. Student demonstrated normal hearing and ear function.

171. Dr. Williams administered several stressed listening tests. Student scored within normal limits in auditory skill areas of temporal processing, auditory discrimination in quiet and in noise, and dichotic listening of words.

172. Student scored outside of normal limits on dichotic digits, pitch pattern sequencing, and auditory continuous performance tests. Dr. Williams credibly explained that results were consistent with deficits in auditory attention and short-term or working memory.

173. Dr. Williams recommended the following instructional strategies: listening breaks or schedule adjustments to minimize auditory overload and auditory fatigue; repeat information with visual cues or demonstration through modeling; clarify or rephrase oral information using smaller linguistic units and clear speech, emphasizing key words; metalinguistic or metacognitive strategies such as chunking of information, mnemonics, verbal rehearsal, visual imagery, summarizing and paraphrasing; and organizational aids such as lists, outlines, books, and calendars. She did not recommend use of an FM System, because Student demonstrated the ability to attend to teacher instruction over background noise.

174. For home use, Dr. Williams recommended HearBuilders, a program that taught auditory memory strategies. She recommended games that taught pattern memory like Simon, Brain Warp, Bopit, Catch Phrase, and alphabetizing games.

175. On May 8, 2018, the IEP team met to review Dr. Williams' assessment. Parents attended. Several accommodations were added to Student's IEP, specifically, access to HearBuilders for auditory memory; mnemonics; chunking information; verbal rehearsal; visual imagery; summarizing or paraphrasing; task analysis checklist; and access to a rubric for writing tasks and assignments.

176. At both the IEP team meeting and at hearing, Dr. Williams explained the differences between her assessment and the results from assessments by Providence in 2014 and Stowell in 2017. Dr. Williams could not explain why Student's scores differed but suggested that her auditory system matured over time.

177. At hearing, Dr. Williams opined that no research-based intervention

existed to completely remediate central auditory processing disorder. Auditory maturation could explain improvement in a child, because the auditory system continued to develop until age 12 or 13. Moreover, auditory processing skills could improve with use of accommodations or compensatory skills and strategies.

178. American Speech-Language-Hearing Association and American Academy of Audiologists recommended having two or more tests with more than two standard deviations from the mean and which followed a neurological pathway in order to diagnose central auditory processing disorder. Dr. Williams determined that neither Providence's 2014 nor Stowell's 2017 assessment met these criteria and did not support a diagnosis of central auditory processing disorder.

179. At the May 8, 2018 IEP meeting, Parents asked about use of an FM system. The evidence demonstrated that Student performed on tests administered with background noise; could hear instruction in special day class and general education settings; that she might not tolerate use of headphones; and that preferential seating allowed her to be closer to an instructor, when needed. Even so, the IEP team agreed to trial an FM system in the 2018-2019 school year, once Parents discussed the system with Student and provided consent.

INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION

180. In May 2018, Dr. Shari Giti conducted her independent neuropsychological evaluation of Student, resulting in a report dated June 1, 2018. Dr. Giti held a bachelor of arts in music and sociolinguistics; a master of music; and a master of arts and doctorate in clinical psychology. She was a post-doctoral graduate of the Reiss Davis Child Study Center, where she specialized and trained extensively in psychoeducational assessments of children and adolescents. At the time of hearing she acted as clinical director, clinician, and supervisor of South Bay Child and Family Therapy, which she founded.

181. Parents referred Student to Dr. Giti for assessment to determine cognitive, attention, and psychological functioning because of the discrepancy between Irvine's 2018 triennial and previous assessments. Dr. Giti reviewed Student's records, obtained feedback from Parents, teachers, and Student and conducted standardized assessments in the areas of cognition, behavior, attention, and executive, social-emotional, and psychological functioning.

182. Parents reported an increase in Student's irritability and emotional dysregulation over the past year and increase in anxiety over homework over the past two to three years. At home, Student demonstrated difficulties sleeping, and showed distress in crowds and with peer interaction.

183. Teachers reported Student was social and interacted well with peers at school. Student self-reported to Dr. Giti feeling lonely and believing others did not like her. She felt different from peers and believed they made fun of her for her differences.

184. Dr. Giti assessed Student's intellectual abilities using the Wechsler Intelligence Scale for Children, Fifth Edition. Student scored low average in verbal comprehension; low average in visual spatial; average in fluid reasoning; extremely low in working memory; and low average in processing speed. When averaged together, the scores yielded a full-scale intelligence quotient in the low average range for this instrument.

185. Dr. Giti noted Student's relative weakness in working memory, which skewed other scores. Student's global ability in verbal comprehension, visual spatial, and fluid reasoning fell within the low average range. Dr. Giti opined the global ability index was a better reflection of Student's overall ability, as it did not consider working memory or processing speed. At the same time, working memory most impacted Student's ability to learn new information and make academic progress. Dr. Giti noted Student performed better when answering questions based upon a narrative or story, than other

areas of memory. She opined that Student required significant repetition to recognize, retain, and retrieve new information.

186. In the area of processing, Student performed in the average to extremely low range. Processing speed tests were timed, featuring visual-motor tasks. The psychomotor processing speed test measured short-term memory, learning ability, visual perception, visual-motor coordination, visual scanning, cognitive flexibility, attention, and motivation. Student scored in the low average range. The visual scanning speed test measured short-term visual memory, visual motor coordination, cognitive flexibility, visual discrimination, and concentration. Student scored in the average range for visual scanning, in the low average range for visual-motor coordination and number matching; very low range in letter-pattern matching; and extremely low range in pair cancellation. Pair cancellation measured Student's ability to sustain attention with distractions and Student's extremely low score reflected difficulty with attention to task.

187. Dr. Giti provided Conners Comprehensive Behavior Rating Scales Parents, Student, and Ms. Lopez. Responses were used to assess behavioral, emotional, academic, and social problems. Results demonstrated concerns in the areas of emotional distress, specifically being anxious and distressed; social anxiety; inattention; and learning problems.

188. Ms. Mock was given rating scales but did not answer all questions, rendering that portion of the assessment invalid. Ms. Mock, however, expressed Student's good progress in speech and language, her ability to speak in complete thoughts and sentences, understand stories read aloud, and compassion toward peers. She observed Student often picking her nails and forehead, which impacted her focus and joint attention. She did not observe Student initiate interactions with general education peers at recess or unstructured times.

189. In the area of attention, Dr. Giti administered rating scales, visual

attentional testing, auditory attentional testing, and executive functioning testing. Parents and Student reported attentional difficulties. Ms. Lopez reported developmentally appropriate attention, with significant concerns in the area of memory. Overall, based upon Dr. Giti's review of data from rating scales and observations of Student during testing and the classroom, Dr. Giti diagnosed Student with attention deficit disorder, predominantly inattentive type.

190. Dr. Giti provided rating scales from the Multidimensional Anxiety Scales for Children, Second Edition, and the Children's Depression Inventory, Second Edition, to Parents and Student to assess difficulties with anxiety and depression. She also had Student perform a Sentence Completion Test. Based upon her assessment and observations, Dr. Giti opined that Student had significant emotional distress and anxiety relating to academic ability, homework, and fear of humiliation and rejection from peers. At the same time, Student had, overall, a fairly positive self-worth and outlook on her life and family relationships.

191. Overall, Dr. Giti determined Student had low average cognition with strength in fluid reasoning and weakness in working memory. Her auditory memory was stronger than her visual memory. She demonstrated some preference for tactile learning. Dr. Giti recommended use of a multi-sensory approach in the classroom; use of computers for written assignments; and talk-to-text software to address Student's visual-motor integration deficits.

192. Dr. Giti believed Student was off-task for most of her general education social studies observation. Student was easily redirected in smaller environments such as one-on-one testing and specialized academic instruction. Because of Student's anxiety about feeling different and being pulled out of general education classes, Dr. Giti recommended a school setting specifically structured for children with learning differences using research-based interventions integrated throughout general education

curriculum.

193. Dr. Giti outlined several suggestions addressing accommodations, methodology, and teaching strategies. Dr. Giti was not qualified as an expert in teaching and Irvine was not required to adopt a specific teaching methodology for Student. Dr. Giti suggested teacher training and use of methodologies in reading, writing, and mathematics remediation. Because of Student's anxiety about the size of middle school, Dr. Giti recommended small group, remediation-focused classes for all core subjects, on a smaller campus designed for students with learning differences.

194. Dr. Giti suggested accommodations including validating Student for strengths and positive contributions to class; clearly stated task demands; auditory directions; check-ins to ensure grasp of concepts; use of an agenda; lecture or class notes; standing near Student when giving directions; seating near teacher; seating near positive role model; avoiding distracting stimuli; use of multi-modalities teaching; not grading handwriting; giving exams orally; allowing extra time for exams; taking tests in a quiet room; use of an extra set of books at home; sending home daily or weekly progress reports; use of a homework assignment notebook; short breaks between assignments; cues to remain on task; and short movement breaks.

195. For reading remediation, Dr. Giti suggested teaching strategies for prioritizing information read; graphically organizing text read through highlighting or notes; chunking reading assignments; previewing text for reading efficiency; and providing auditory books for all textbooks. For writing, Dr. Giti recommended graphic organizers; writing rubrics; a computer for written assignments; modeling of written information; emailing typed assignments to teacher; and use of Handwriting Without Tears paper. For math, she recommended accommodations to answer only even or odd numbered problems; focus on math foundational skills; and use of mathematics worksheets.

196. Dr. Giti recommended Student work with an educational therapist, obtain social skills group experience, have counseling sessions with a school psychologist for check-ins, and have modified curriculum as necessary.

JUNE 2018 IEPs

197. On June 6, 11, and 13, 2018, the IEP team met for several hours to review Dr. Giti's independent evaluation. All necessary Irvine IEP team members were present and included Ms. Bennett, Ms. Ogden, Ms. Benson, long-term education specialist substitute Gina Catalano, general education teacher Laura Vlastic, Ms. Mock, and Irvine's attorney Mr. Gonzalez. Parents attended with their attorney Mr. Adams. Dr. Giti participated telephonically. Parents were provided a copy of Irvine's procedural safeguards and declined clarification of them.

198. Dr. Giti thoroughly reviewed testing instruments and results with the IEP team. Irvine expressed doubt over results of social-emotional testing. Irvine team members reported they did not hear Student talk about being humiliated or having anxiety. Parents shared that Student did not simply offer up information about social fears but expressed such fears privately, to them. Parents and Dr. Giti described Student's skin picking during both task completion and down time.

199. Dr. Giti, at hearing, credibly opined that Student's skin picking and other classroom behaviors were outward demonstrations of internalized anxiety. Dr. Giti's opinion was consistent with Parents' input, statements generated by Student during Dr. Giti's evaluations, handwritten notations in Ms. Benson's evaluations, and a recording of Student submitted during Mother's testimony.

200. The IEP team reviewed Student's progress on benchmarks toward annual goals developed for her February 13, 2018 annual IEP. She met most of her 21 goal benchmarks and met some annual goals several months early.

201. She made some progress towards benchmarks in understanding and using

spelling patterns and syllable rules, writing for editing grammar; math number sequences; and executive functioning for attention to whole group instruction. She made no progress on root words; math multiplication and division problems; and was not able to independently write a three paragraph essay.

202. She met the annual goal for emotional dysregulation because providers did not observe Student demonstrate emotions that required use of coping strategies. She met her annual goal for listening comprehension (using a teacher read sixth-grade passage of 591 words); phonemic awareness; math equivalent fractions; and consonant-vowel-consonant-e spelling words. The team agreed to discontinue Student's equivalent fractions goal.

203. Irvine continued all goals from the February 13, 2018 annual IEP, which addressed reading, writing, math, and attention. All academic goals were attached to sixth-grade standards. Irvine agreed to attach goals to seventh-grade standards once Student began her 2018-2019 school year.

204. Irvine offered new goals in the areas of social-emotional development (self-praise, positive self-talk); and math fractions (adding and subtracting), based upon Dr. Giti's assessment.

205. The IEP team agreed to add accommodations for flexible seating (close to teacher if desired), seating near positive role models, frequent understanding checks, prompts to recheck work, not counting handwriting against grades, and weekly home/school communication through digital format.

206. At hearing, Dr. Giti opined that Student had holes in early foundational skills that needed to be addressed and Student could access the general education curriculum using accommodations rather than modifications. Her testimony was corroborated by several Irvine witnesses. For example, Ms. Eaton believed that modified curriculum meant Student would not be working toward grade-level standards. Here,

Student worked toward grade level standards. Ms. Eaton, Ms. Kelly, and Ms. Lopez testified that Student required several accommodations, but did not say that she required modifications to access her education.

207. Ms. Benson reported that Student reached the fourth grade independent reading level; was between the fourth and fifth grade level in math; and made great gains in listening skills. Irvine continued to recommend modified curriculum in reading, writing, and math to develop Student's foundational skills.

208. Dr. Giti discussed placement recommendations. Mr. Adams brought up Prentice School. Dr. Giti believed Prentice was an appropriate placement as the school embedded her recommendations within its programming. Parents notified Irvine they planned to unilaterally place Student at Prentice and seek reimbursement from Irvine.

209. Irvine offered Student placement for her seventh-grade year, in the directed studies program. Directed studies typically had from six to twelve students with IEPs. The class focused on time management, executive skills, writing in planners, organizing backpacks, and accessing work on google drives. The program embedded several supports such as the accommodations of working on organizational skills, including using a planner to organize homework. Irvine also offered collaborative classes in non-academic courses such as history and science. Collaborative classes taught general education with support of a specialized academic instruction teacher or aide.

210. Irvine offered specialized academic instruction, three 50-minute weekly sessions to address English language arts, math, and study skills; specialized academic instruction for two 50-minute sessions for collaborative science and history; six 30-minute sessions of individual counseling with a school psychologist; and extended school year services of specialized academic instruction for 900 minutes weekly over four weeks.

211. Irvine based its offer of extended school year services on Student's regression in a single goal area. Extended school year was offered with transportation, as it was not at Student's home school. Irvine offered intensive academic instruction in the areas of reading and math, using Read 180, System 44, and Sunday System..

212. Parents advised Irvine they would unilaterally place Student in Prentice school for the summer and fall of 2018 and seek reimbursement.

STUDENT'S EXPERT, DR. DUDLEY WIEST

213. Licensed clinical psychologist, Dr. Dudley Wiest, reviewed Student records and provided expert testimony at hearing. Dr. Wiest held a bachelor of science in elementary education, a master of arts in counseling and educational psychology, and a doctorate in educational psychology. He worked as a Professor Emeritus and dual board certified consulting psychologist, in school psychology and school neuropsychology, at the time of hearing.

214. Dr. Wiest held expert qualifications too numerous to mention, but had not observed, interviewed, or assessed Student in any setting. His testimony covered numerous topics relevant to Student's education but not in a manner shedding light on specific interventions directed toward Student's specific needs during any relevant timeframe. For these reasons, his testimony carried little weight.

215. He agreed with Dr. Giti, that Student required extended school year services, every year, based upon Student's scores on statewide assessments. He did not review Student's progress on goals or any specific skill areas to determine whether she regressed over the summer and could not recoup skills within a reasonable timeframe each new school year.

216. Dr. Wiest generally agreed that Student had deficits in reading and math that Irvine did not sufficiently address. He opined that Irvine should have offered goals in the areas of phonics, phonemic awareness, decoding, and comprehension throughout

the school years at issue. He did not detail what specific goals would have been appropriate for any school year.

217. Dr. Wiest opined that Student should have been offered intensive reading intervention at a rate of three hours per day, over the relevant time period. With appropriate reading intervention, he believed Student could reach a fifth- or sixth-grade reading level. He based his opinion on review of Student's triennial assessments, Dr. Giti's report, and Student's IEPs. Student demonstrated progress across all areas, over time. Further, Student demonstrated a low average overall intelligence quotient with higher and lower splinter skills. She did not require modified curriculum, which would only serve to maintain below grade level skills.

JUNE 18, 2018 STOWELL LEARNING CENTER PROGRESS EVALUATION

218. On June 18, 2018, Ms. Ma conducted an evaluation of Student's progress in Stowell Learning Center programs. Testing instruments were similar to those used in the October 23, 2017 assessment. Results showed Student improved her ability to blend, segment, and manipulate phonemes in words. Student scored in the average range in auditory processing, with a relative weakness in phonological segmentation. She scored within normal limits on auditory processing testing, consistent with Dr. Williams' findings.

219. On the Gray Oral Reading Test, Fifth Edition, Student demonstrated progress in rate, accuracy, fluency, and comprehension. Overall, Student scored at the third grade, fourth month reading level, with the exception of comprehension, where she scored in the fourth grade, second month level. This was generally consistent with Ms. Benson's report at the June 2018 IEP meetings.

220. The Wide Range Achievement Test, Fourth Edition showed Student's word reading at the third grade, fifth month level, or low average. In spelling, Student scored at the fourth grade, seventh month level, or average.

221. Student showed progress on the PATH Diagnostic Screening device, where scores indicated she could read more comfortably, quickly, and easily. The testing instrument was said to provide information about the two visual pathways in the brain that must work in sequence, rather than simultaneously, as they are said to do for dyslexic readers.

222. Ms. Ma also reported improvement in the area of "primitive reflexes." The significance of this testing remained dubious, given the lack of peer-reviewed scientific research in this area.

223. Ms. Ma interviewed Student, who expressed that reading was easier, she could read for longer periods of time, and she had a more positive attitude toward reading. Parents reported Student became more vocal about the world around her, expressed her opinions more openly, and expressed emotions and feeling with more advanced vocabulary, since starting her program at Stowell. Ms. Ma recommended Irvine continue Student's program at Stowell for six hours per week.

2018 PRENTICE READING EVALUATIONS

224. In August 2018, Prentice School conducted reading assessments of Student to determine instructional reading levels. Student demonstrated she was between an instructional and independent fifth-grade reading level. This showed continued progress in reading since the June 2018 IEPs.

225. In October 2018, Student's teacher at Prentice conducted additional reading assessments of Student. Student demonstrated a sixth grade instructional reading level for informational text; fifth grade instructional level for reading comprehension; and fifth grade reading level for fictional text. Test results demonstrated progress in the reading program at Prentice. Student demonstrated improvement from January 12, 2018, when she tested at a fourth grade instructional level for reading word lists; and a third grade instructional level for listening comprehension and reading

expository text.

PROGRAM AT PRENTICE SCHOOL

226. Student began attending Prentice School in August 2018. Student's sixth-grade class at Prentice used multi-modality instruction in reading, writing, and math. Student used assistive technology consisting of access to a computer with voice-to-text and word prediction software.

227. Micki Simon, Student's sixth-grade teacher at Prentice School described Student's program at hearing. Student repeated sixth-grade to help her bridge gaps in her academic skills. She rotated to different classes during the day, simulating a regular middle school campus. She attended math and English language arts classes with fewer than 10 students; science and homeroom with 18 students; and social studies with 10 students.

228. Student used mindful meditation, check-ins, and breaks to address frustration and anxiety. She used Go Math, Math-Antics, and Math-Aids to strengthen foundational skills in math. Student worked on third-grade level math by October 2018, demonstrating progress in that area.

229. Student worked on sixth-grade level English language arts, non-modified curriculum by Ready Gen, by October 2018. Student's writing level was at the second- to third-grade level. Student was placed in a structured literacy class for reading, which progressed through Orton-Gillingham methodology. Student demonstrated progress in academics and social skills while attending Prentice School.

230. Licensed clinical speech-language pathologist Juliana Clark provided Student with speech and language services while she attended Prentice School. Ms. Clark held a bachelor of arts in speech and hearing services and a master of science in communication disorders. She held a clear clinical or rehabilitative services credential and certificate of clinical competence in speech-language pathology from American

Speech-Language-Hearing Association. She worked as a speech-language pathologist for 22 years at the time of hearing.

231. Ms. Clark began working with Student in August 2018, while Student attended Prentice School. She has seen Student one time per week for 45 minutes, after school, to avoid interfering with her academic schedule. Before providing services to Student, she reviewed Student's records, interviewed Mother, Prentice summer school staff, and observed Student on the playground.

232. Ms. Clark credibly described Student's needs in the area of social interactions with peers. Student struggled with inferencing, figurative language, and idioms, components of pragmatic language. Such struggles made it difficult for Student to understand motives and intentions of peers, particularly in every day social interactions, which tend to be fast paced. Ms. Clark cogently explained the difference between working on social interactions in a small group, highly structured speech and language setting versus real world peer interaction in class or on the playground.

233. Ms. Clark developed goals for social pragmatics in the areas of reciprocal conversations and right sizing problems. She helped Student develop strategies for engaging in lengthy social interactions and for responding in positive ways to undesired situations. Periodic reporting on goals showed Student made progress in social pragmatics. Moreover, Student developed friendships on campus and engaged in peer interactions during lunch and recess. Student expressed being happy at school.

PARENTS' EXPENSES FOR SUPPLEMENTAL EDUCATIONAL SERVICES

234. Irvine failed to offer appropriately intensive academic intervention from the 2016-2017 school year, through the development of Student's annual IEP on February 13, 2018. Student filed her original complaint on August 24, 2018 and did not allege exceptions to the two-year statute of limitations. To address Student's regression in academic areas, Parents obtained academic tutoring services from August 29, 2016,

through January 28, 2018, totaling \$4,780.00. Student attended 89 sessions at a rate of \$60.00 each.

235. Tutoring sessions were paid by check. Student submitted evidence of payment consisting of cancelled checks and, because a few cancelled checks were unavailable, bank statements consistent with check numbers, charges, and dates associated with each day of tutoring services.

236. Student obtained assessments from Stowell Learning Center to determine academic needs related to dyslexia and dyscalculia, after Mother advised Irvine of these areas of concern and Irvine did not initiate an assessment plan. Costs for the assessments totaled \$1,370.00. Stowell provided Student with cognitive education therapy from October 23, 2017 through February 2018, totaling \$10,080.94. Student received therapy over the same time period as academic tutoring and after Irvine offered intensive academic intervention in the February 13, 2018 IEP. Stowell's therapy was based on a theory of integration of primitive reflexes, which had not been hypothesized, tested, and generally accepted within the scientific community.

237. Student attended the Prentice School summer program in 2018. She declined Irvine's offer of extended school year services, which would have provided intensive academic instruction in reading and math. Student produced an invoice marked "paid," a bank statement, and Parents' testimony demonstrating payment of \$350.00 for a Chromebook. Student used the Chromebook throughout summer school and the 2018-2019 regular school year for speech-to-text and other applications she required to access her education.

238. Student provided Irvine with proper written notice that she would be unilaterally placed at Prentice School for the 2018-2019 school year and seek reimbursement. Student demonstrated regular attendance at Prentice School through testimony of Parents, teachers, and an attendance chart. Student demonstrated

payment of costs and tuition over the 2018-2019 school year through invoices marked "paid," canceled checks, bank statements, and Parents' testimony. By the time of hearing, Parents paid \$500.00 for registration and instructional materials and \$2,766.67 per month for tuition from August 2018 through December 2018., totaling \$13,833.35.

239. Student received speech and language services while attending Prentice School, to facilitate interaction with peers on campus. Ms. Clark testified she provided Student with one 45-minute session per week. Student submitted invoices, cancelled checks, and Parent testimony demonstrating payment of \$490.00 for seven speech sessions, from August 2018 through the time of hearing.

240. Parents testified they shared responsibility for transporting Student to and from Prentice School. They provided maps documenting a distance of 6.3 miles, one-way, from Father's house and 12 miles, one-way, from Mother's house to Prentice School. IRS mileage rates were 54.5 cents-per-mile in 2018 and 58 cents-per-mile in 2019.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), 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)⁴ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴ All subsequent references to the Code of Federal Regulations are to the 2006 version.

all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their Parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the Parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "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 California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of Parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide

educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) In a recent unanimous decision, the United States Supreme Court declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’ ” the Tenth Circuit Court of Appeals had used. (*Andrew F. v. Douglas School Dist. RE-1* (2017) 580 U.S. ___ [137 S.Ct. 988, 1000] (*Andrew F.*)). The Supreme Court in *Andrew F.* stated that school districts must “offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” (*Id.* at p. 1002.)

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.)

5. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 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].) Here, Student had the burden of proof on issues one through ten and Irvine had the burden of proof on issue eleven.

ISSUE 1: CONVENING TIMELY IEP MEETING AFTER SEPTEMBER 22, 2016 REQUEST

6. Student contends Mother submitted a written request for an IEP team meeting on September 22, 2016. In its closing brief, Irvine contends the IEP team meeting was convened 36 days after Mother's written request, six days later than required under statute. Irvine further contends the delay did not result in a denial of FAPE.

7. An IEP team shall meet whenever a parent or teacher requests a meeting to develop, review, or revise the IEP. (Ed. Code, § 56363, subd. (c).) An IEP team meeting requested by a parent to review an IEP pursuant to Education Code section 56343, subdivision (c) shall be held within 30 calendar days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five school days, from the date of receipt of parent's written request, pursuant to section 56343.5. (Ed. Code, § 56043, subd. (j).)

8. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) The Ninth Circuit 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. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 652.)

9. On September 23, 2016, Parents requested an IEP meeting in writing, sent through email. There was no evidence as to when Irvine received it. On October 28,

2016, Irvine held an IEP team meeting. The IEP team meeting was 35 days after Parents sent the written request. Since the timeline runs from when the written request was received, there is no evidence the meeting was held five days late. Even if there was evidence the IEP meeting was held five days after the statutory timeframe there was no evidence that Student was deprived of educational benefit for five days. Likewise, Student did not show Parents' opportunity to participate in the decision making process was impeded. Parents actively participated in the decision making process between the time of the request and the time of the meeting. On October 21, 2016, Parents, Ms. Kelly and Ms. Sharma held a parent-teacher conference where they discussed Student's work and progress. Between September 23, 2016, and October 28, 2016, Ms. Sharma and Parents discussed an agenda for the upcoming IEP team meeting.

10. Student did not meet her burden of proof on Issue 1.

ISSUE 7: CONVENING TIMELY ASSESSMENT AND IEP TEAM MEETING PURSUANT TO OCTOBER 11, 2017 ASSESSMENT PLAN

11. Student contends Parents signed consent for assessments on October 11, 2017, and Irvine failed to timely assess and hold an IEP team meeting within 60 days. Irvine contends it conducted timely assessments. Irvine also contends Parents waived timelines for setting an IEP team meeting to review assessments.

12. A local educational agency is required to complete an assessment and hold an IEP team meeting to review the results within 60 days of receiving parental consent to assess, exclusive of school vacations in excess of five schooldays and other specified days, unless parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f)(1), 56344, subd. (a).)

13. When the local educational agency delays assessment of a child already eligible for special education services, the delay may deprive parents of assessment results they need to participate in the decisionmaking process, and may deprive the

child access to educational benefits he or she would otherwise obtain as a result of assessment findings.

14. Irvine sent Parents an assessment plan for early 2018 triennial assessments on October 10, 2017. Father signed and returned the assessment plan to Irvine on October 11, 2017 and, on November 1, 2017, agreed to reschedule the meeting beyond the 60-day timeline.

15. Here, the evidence demonstrated that Parents agreed in writing to extend the deadline to review Irvine's 2018 triennial assessments and specifically agreed to hold the IEP team meeting on January 8, 2018, which Irvine did. Accordingly, Student did not meet her burden of proof on Issue 7.

ISSUES 2(A), 3, 4: INFORMED CONSENT FOR OCTOBER 28, 2016 IEP

16. Student contends Irvine offered and implemented modified reading and math curriculum in her October 28, 2016 IEP without obtaining Parents' informed consent. As such, Student argues, Parents were denied meaningful participation in development of the IEP. Student argues Irvine explained short-term benefits of modifications without advising Parents of the long-term consequence, specifically, that Student would no longer be on diploma track. Student further contends Parents did not agree to implement the October 28, 2016 IEP, in any event. Irvine contends that it explained modified curriculum during the meeting and Parents initialed the IEP, evidencing their consent.

17. Whenever a district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child, it must give parents prior written notice of that decision. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.102(a)(3)(iii); Ed. Code, § 56500.4.) The notice must include (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency made the decision; (3) a description of each evaluation procedure,

assessment, record, or report on which the decision was based; (4) a reminder of parents' procedural safeguards; (5) sources for assistance; (6) the options considered and the reasons for rejecting the others; and (7) a description of other factors relevant to the decision. (34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd. (b). The notice must be given "a reasonable time before" the district actually changes the student's placement or the provision of a FAPE to the student. (34 C.F.R. § 300.503(a).) This is to ensure that "parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect." (*Letter to Chandler* (OSEP April 26, 2012) 59 IDELR 110; see also *C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70 (*Cape Henlopen*)). An IEP provides prior written notice of a placement change when it contains all of the notice requirements set out in 34 CFR 300.503(a). (See 71 Fed. Reg. 46, 691 (2006).)

18. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

19. "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].) Protection of parental participation is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

20. A school district must obtain informed parental consent to an IEP prior to implementation of special education and related services offered in the IEP. (34 C.F.R. §

300.300(b)(4)(i); Ed. Code, § 45346, subd. (a.) Informed consent means that the parent has been fully advised of all information relevant to the activity for which consent is sought, that the parent understands and agrees in writing to the activity for which the consent is sought, and the consent describes that activity and lists any required records that are to be released, and to whom they will be released. Further, the consenting parent understands that consent is voluntary, and may be revoked at any time. (34 C.F.R. § 300.9(c)(1); Ed. Code, § 56021.1)

21. The weight of the evidence shows that Irvine did not inform Parents of long-term consequences of curriculum modification at or before the October 28, 2016 IEP team meeting. Parents, Ms. Sharma, and Ms. Benson exchanged several emails leading up to the IEP, which discussed Student's struggles and frustration. Ms. Benson suggested modified curriculum but did not explain long-term consequences.

22. Moreover, the IEP amendment itself does not state that long-term consequences of curriculum modification were discussed. This was consistent with testimony from both Mother and Ms. Benson. Notably, Ms. Benson did not state, under oath, that she discussed the difference between diploma track and a certificate of completion or that she explained that Student could fall further behind her peers using modified curriculum.

23. Mother's emails after the October 2016 IEP team meeting corroborate her testimony, as she referred to changes in Student's IEP as accommodations or modifications, generally. Further, Mother persuasively testified that she was not fully informed of the ramifications of modified curriculum until meeting with Student's educational advocate prior to Student's February 13, 2018 annual IEP. Emails and IEP team meeting notes subsequent to the October 2016 IEP meeting corroborate her testimony on this point.

24. In the end, it was not up to Parents to research the meaning of modifying

curriculum in a public school setting. Irvine was responsible for providing Parents with an understanding of the impact of modifying Student's work such that they could make an informed decision before agreeing to implementation of the October 2016 IEP. Irvine did not fulfill its obligations in this regard.

25. Lacking informed consent, it follows that Parents were denied meaningful participation in the development of Student's October 2016 IEP. Parents sought a change in Student's program that would allow her to develop foundational skills in reading and math to fill in gaps that had developed. They did not knowingly agree to place Student on a curriculum that would increase the gap between Student and her peers. Moreover, Parents would not have consented to place Student on a certificate of completion track.

26. Student's claim that Irvine unilaterally modified her academic curriculum without parental consent is synonymous with failure to obtain informed consent before implementing the IEP and reflects a denial of meaningful parental participation in the development of Student's October 28, 2016 IEP. According, Student prevailed on Issues 2(a), 3, and 4.

ISSUES 2(B)-(H): FAILURE TO OFFER A FAPE IN OCTOBER 28, 2016 IEP AMENDMENT

27. Student contends Irvine's October 28, 2016 IEP amendment failed to offer appropriate goals, accommodations, services, and placement to address Student's needs. The October 28, 2016 amended the February 24, 2016 annual IEP. Irvine contends it offered Student a FAPE in the October 2016 amendment by modifying Student's curriculum to address her instructional level.

Issue 2(B): Failure to Offer Appropriate Goals

28. Student contends Irvine failed to offer appropriate goals in reading,

writing, math, auditory processing, and social-emotional needs at the October 28, 2016 amendment IEP team meeting. Irvine contends all goals were appropriate.

29. An IEP must contain a statement of the child's present levels of academic achievement and functional performance and a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(i) & (ii); Ed. Code, § 56345, subds. (a)(1) & (2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

30. Failure to provide a statement of appropriate annual goals is a violation of the IDEA's procedural requirements for the formulation and revision of IEPs. (See 20 U.S.C. § 1415(d)(1)(A)(i); Ed. Code 56345, subd. (a).)

31. The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child, and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS March 25, 1998); Notice of Interpretation, Appendix A to

34 C.F.R., part 300, Question 4 (1999 regulations).)

32. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is “a snapshot, not a retrospective.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir.1993) 993 F.2d 1031, 1041 (*Fuhrmann*).) It must be evaluated in terms of what was objectively reasonable when the IEP was developed, by looking at the IEP’s goals and goal-achieving methods at the time the plan was implemented and determining whether the methods were reasonably calculated to confer an educational benefit. (*Adams, supra*, 195 F.3d at p. 1149; *Fuhrmann, supra*, 993 F.2d at p. 1041 (“an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted”).)

33. The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) & (i).)

34. Student argues Irvine offered deficient goals in reading, writing, math, auditory processing, and social-emotional development in the October 28, 2016 amendment. Student failed to demonstrate Irvine should have offered goals at that time.

35. The October meeting resulted in an amendment to Student’s February 24, 2016 annual IEP. The February annual IEP was predominantly based on results from Student’s 2015 triennial assessments. Neither the 2015 triennial assessments nor the February 2016 annual IEP are in dispute. No new assessments were conducted between the February and October 2016 IEPs, which would have required changes to Student’s annual goals.

36. Irvine had no obligation to offer new goals within the October amendment IEP. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd.

(a)(2.) Accordingly, Student did not prevail on Issue 2(b).

Issue 2(g): Failure to Offer Appropriate Accommodations

37. Student contends Irvine failed to offer appropriate accommodations in the October 28, 2016 IEP, to address Student's needs in academics, auditory processing, and social-emotional development. Irvine contends it offered various accommodations addressing Student's needs throughout the relevant timeframe.

38. An annual IEP must include a statement of the accommodations, modifications or supports, based on peer-reviewed research to the extent practicable, that will be provided to the student to allow him to advance appropriately toward attaining his annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i) & (ii); Ed. Code, § 56345, subds. (a)(4)(A) & (B).)

39. At the October 28, 2016 IEP amendment team meeting, Irvine added accommodations to have an extra set of textbooks at home, in audio or abridged versions when available; alternative testing formats, including oral questions and answers; reduced content exposure for science and history, with study guides to match curriculum and grades matching to learned content.

40. These accommodations were designed to alleviate Student's frustration with homework and classwork, as reported by Parents. Ms. Kelly and Ms. Benson did not see Student struggle with social-emotional issues at school leading up to the October 28, 2016 IEP amendment. Rather, at the time of the annual IEP in February 2016, IEP team members described Student as a kind, caring person who enjoyed helping others and playing with peers from both general and special education classes. The IEP team did not report social-emotional difficulties during the beginning of the 2016-2017

school year.

41. Nonetheless, Student argues the accommodations fell short. For instance, Student contends an FM system could have been provided to address auditory process needs. Student cites Dr. Williams' testimony on the use of such systems.

42. Student's argument lacks merit for several reasons. First, an IEP is a snapshot, not a retrospective. Dr. Williams did not conduct and report on her audiological assessment until May 2, 2018. Student's IEP team did not discuss use of an FM system until the IEP amendment team meeting of May 8, 2018.

43. Second, Dr. Williams did not actually recommend an FM system, because Student demonstrated the ability to hear instruction even with noise in the background. Father did not believe Student would wear FM headphones, in any event.

44. Third, Student demonstrated average auditory processing ability in Irvine's 2012 and 2015 triennial assessments. Irvine provided auditory processing accommodations in the February 24, 2016 annual IEP, specifically, small group instruction for reading, writing, and math; separate setting for tests; test questions read aloud; passages read aloud; and seating in front of the class.

45. Student did not demonstrate that she required more or different accommodations at the time of the October 28, 2016 IEP amendment. Student did not meet her burden of proof that she required any additional accommodations to advance appropriately toward attaining her annual goals, to be involved and make progress in the general education curriculum, or to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subd. (a)(4)(B).) Accordingly, Student did not prevail on Issue 2(g).

Issues 2(c), (d), (e): Failure to Offer Appropriate Services

46. Student contends Irvine failed to offer appropriate services to address her unique needs in the areas of reading, writing, math, auditory processing, social-emotional development, and anxiety. Irvine contends it offered Student appropriate services in the February 2016 annual IEP, which were modified and agreed to by Parents at the October 2016 amendment meeting.

47. Related services include speech and language services, occupational therapy services, physical therapy services, and other services as may be required to assist a child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d 664]; *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527.)

48. Related services may be provided to individuals or to small groups in a specialized area of educational need, and throughout the full continuum of educational settings. (Cal. Code Regs., tit. 5, § 3051, subd. (a)(1).) Related services, when needed, are determined by the IEP. (Cal. Code Regs., tit. 5, § 3051, subd. (a)(2).) The IEP must show a direct relationship between present levels of performance, goals, and specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

AUDITORY PROCESSING SERVICES

49. In the area of auditory processing services, Student argues Irvine failed to implement programs recommended by an auditory processing assessment conducted by Providence Speech and Language in April 2014. Student did not raise that issue in her complaint, as required by 20 U.S.C. § 1415(f)(3)(B). Student is limited to the issues alleged in her complaint, unless the other party consents, which did not happen here. (*Ibid.*; see also Ed. Code, § 56502, subd. (i).)

50. In any case, results of Providence's 2014 audiological assessment were not

consistent with Irvine's 2012 and 2015 triennial assessments or with Dr. Williams' 2018 central auditory processing assessment, which found Student did not have a central auditory processing disorder. Dr. Williams' thoroughly and concisely explained her testing and opinions and conclusions. Dr. Williams' opinion that Student did not demonstrate a central auditory processing disorder was reliable and trustworthy and carried significant weight.

51. The evidence demonstrated that Student did not require auditory processing services at the time of the October 28, 2016 IEP amendment. Accordingly, Student did not prevail on Issue 2(d).

SOCIAL EMOTIONAL SERVICES

52. Student did not prove, by a preponderance of the evidence, that she had social-emotional needs, including anxiety, which required any particular service at the time of the October 2016 IEP. The fact that Student became frustrated under the weight of her homework did not show that she required a related service directed at social-emotional needs at school.

53. Ms. Kelly observed a decline in Student's frustration levels in her class after the first trimester, which she attributed to the October 2016 modifications. However, Student's work in Ms. Kelly's class was not modified, it was accommodated. The fact that Student showed less stress in Ms. Kelly's class after additional accommodations were implemented tends to show that Student exhibited less stress when she received appropriate interventions. The problem was not with Student's social-emotional development, but with the lack of appropriate instruction.

54. Accordingly, Student did not prevail on Issue 2(e).

ACADEMIC SERVICES

55. Student demonstrated that she required more intensive intervention in

academics at the time of the October 2016 IEP, particularly in the areas of reading and math. Irvine's 2015 psychoeducational assessment showed Student was reading at a middle of second grade level, while in third grade. Her February 2016 annual IEP showed she was reading at an end of third grade level, while in fourth grade. By September 2016, Student's reading skills regressed to a level between second and third grade, as reflected in Ms. Benson's September 23, 2016 email exchange with Parents.

56. Student received Razz and Reading A-Z peer-reviewed reading intervention during her 2015-2016, fourth-grade school year. During reading interventions, Student worked on phonemic awareness and decoding. Without such intervention, Student's reading skills declined.

57. Student persuasively demonstrated that Irvine did not provide Student with direct intensive reading instruction at a level reasonably calculated to confer educational benefit appropriate in light of her circumstances. Irvine presented no evidence on what, if any, specific reading program Student was provided from the beginning of the 2016-2017 school year, how much time she spent obtaining reading instruction, whether she received it individually, in small group, or both, and what specific deficits were being addressed.

58. Statewide assessments showed Student scored below standards in English language arts and math. Her standard scores increased 56 points from third to fourth grade, and dropped 30 points in fifth grade. Her English language arts scores continued to decline throughout the relevant time period. Irvine did not discuss math services available to Student at the October 2016 IEP. Instead, Irvine offered a modified curriculum.

59. Student met her burden of proof that Irvine failed to offer appropriate academic services in response to Student's regression, which was evident at the time of the October 2016 amendment IEP. Accordingly, Student prevailed on Issue 2(c).

Issue 2(f): Failure to Offer Appropriate Placement

60. Student contends Irvine did not offer an appropriate placement at the October 28, 2016 IEP amendment team meeting, in that Irvine did not change her placement in response to her need for intensive intervention. Irvine contends it offered modified curriculum to address Student's needs.

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

62. As stated above, an IEP is evaluated in light of information available at the time it was developed. It must be evaluated in terms of what was objectively reasonable when the IEP was developed, by looking at the IEP goals and achieving methods at the time the plan was implemented and determining whether the methods were reasonably calculated to confer an educational benefit. (*Adams, supra*, 195 F.3d at p. 1149.)

63. The educational benefit to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office, et. al.* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

64. Student, in her closing brief, argues Irvine should have provided the

placement outlined in Dr. Shari Giti's June 2018 neuropsychological evaluation. That placement was consistent with Prentice, where Student was unilaterally privately placed in the summer of 2018 and for the 2018-2019 school year.

65. As stated above, an IEP is a snapshot, not a retrospective. Evidence of what may have been appropriate in later years is not determinative as to what was appropriate at the time Student's February 2016 annual IEP was amended in October 2016. Moreover, the evidence does not support the conclusion that a more restrictive setting was required at that time, particularly as the evidence demonstrated Student's regression occurred during the 2016-2017 school year.

66. Accordingly, Student did not prevail on Issue 2(f).

ISSUES 2(H), 5(H), 6(I), 8(L), 9(L), 10(L): MODIFIED CURRICULUM

67. Student contends Irvine denied her a FAPE by offering modified curriculum in IEPs offered from October 28, 2016, through June 2018. Irvine contends Student required modified curriculum at all relevant times due to her low cognition and frustration levels when presented with instruction at a level beyond her reach.

68. The adequacy of a given IEP turns on the unique circumstances of the child from whom it was created, and the nature of the IEP process ensures that parents and school representatives will "fully air" their respective opinions on the degree of progress a child's IEP should pursue. (*Andrew F., supra*, 137 S.Ct. 988 at p. 1000.)

69. "[A] student offered an educational program providing 'merely more than de minimis' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly ... awaiting the time when they were old enough to 'drop out.'" (*Andrew F., supra*, 137 S.Ct. 988 at p. 1000.)

70. In developing a Student's IEP, the team must consider the strengths of the child, concerns of the parents for enhancing the education of their child, results of the

most recent evaluation, and the academic, developmental, and functional needs of the child. (34 C.F.R. § 300.324(a)(1).) The child's regular education teacher must, to the extent appropriate, participate in the development of the child's IEP, including the determination of appropriate positive behavioral interventions and supports and other strategies, and supplementary aids and services, program modification, and support for school personnel consistent with § 300.320(a)(4). (34 C.F.R. § 300.324(a)(2).)

71. Here, Student persuasively demonstrated that she should not have been on modified curriculum throughout the time period alleged. Student made progress in her general education curriculum during her first trimester of the 2016-2017 school year, as reflected in grade reports.

72. Expert testimony from Dr. Giti and Dr. Weist demonstrated that students with intellectual disabilities receive modified curriculum, but students with low average cognition are capable of progress in non-modified curriculum, with appropriate accommodations, supports, and services. Ms. Eaton was not aware that Student's curriculum was modified and did not opine that she required modifications.

73. Student does not have an intellectual disability. Multiple tests from Irvine and Dr. Giti show Student's cognition fell within the low average range. Student had deficits in working memory and required repetition, chunking, scaffolding and other accommodations. When provided with Tier 3 reading intervention, she was able to fill in missing gaps, and develop her reading skills. While Student required supports and services to attend general education courses, she did not require curriculum that would result in a certificate of completion as opposed to graduating with a regular high school diploma.

74. No evidence was presented that modified curriculum would provide meaningful educational benefit consistent with Student's low average cognitive abilities. Irvine did not offer a cogent and responsive explanation for its decision to modify

curriculum, rather than offering direct intensive Tier 3 interventions designed to remediate Student's existing deficits and prevent more severe regression.

75. Student's IEPs developed in January through June 2018 were based upon Irvine's 2018 triennial assessment. Irvine conceded the intellectual quotient obtained during 2018 psychological testing was invalid. Rather than conducting additional testing in the area of cognition, it referred Student to the Diagnostic Center and continued to rely on invalid testing results.

76. Student exhibited excessive signs of anxiety during 2018 psychological testing compared to other assessments. She did not develop the kind of rapport with Ms. Benson that she had with other assessors, including Ms. Mock, Ms. Ma, or Dr. Williams. The resulting invalid cognitive score was tied, throughout the report, to other processing areas to justify results that were, in many other respects, inconsistent with prior and subsequent testing.

77. Moreover, Student attended Prentice School during the summer of 2018 and over the 2018-2019 school year. Student received instruction in sixth-grade general education curriculum. She received accommodations similar to what Irvine offered. Student demonstrated academic progress in the general education curriculum at Prentice, with appropriate accommodations.⁵

⁵ After-acquired evidence "may shed light" on the adequacy of the program a public agency proposed, although such evidence is not outcome determinative. (*Adams, supra*, 195 F.3d at p. 1149.) The holding of *Adams*, that exclusive use of hindsight is forbidden, does not preclude consideration of subsequent events. (*Adams, supra*, 195 F.3d at p 1149-1150, quoting *Fuhrmann, supra*, 993 F.2d at p. 1041.) "The clear implication of permitting some hindsight is that additional data, discovered late in the evaluation process, may provide significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date." (*E.M. v. Pajaro Valley*

78. The weight of the evidence demonstrated that Student did not make progress appropriate in light of her circumstances using modified curriculum. Student demonstrated she could make appropriate progress in the general education curriculum, with appropriate supports and services to address reading, writing, and math. Accordingly, Student met her burden of proof on Issues 2(h), 5(h), 6(i), 8(l), 9(l), and 10(l).

ISSUES 5(A)-(G): FAILURE TO OFFER A FAPE IN MARCH 2017 ANNUAL IEP

79. Student contends Irvine failed to offer appropriate goals, accommodations, services, and placement in her annual IEP, which began on March 23, 2017, and concluded on March 27, 2017. Irvine contends it offered Student a FAPE during all relevant time periods.

Issue 5(a): Failure to Offer Appropriate Goals

80. Student contends the annual goals Irvine proposed in the areas of reading, writing, math, auditory processing, social skills, and motor skills were not appropriate.

81. Irvine identified Student's present levels of academic achievement and functional performance at the time of the March 2017 annual IEP. Student continued to demonstrate deficits in reading, writing, and math. Student did not meet her reading fluency goal. Irvine discontinued the goal. Irvine did not offer goals to address Student's reading in areas that had previously been addressed through intensive reading intervention. These areas included reading fluency, decoding, and phonemic awareness. Irvine did not address goal areas through intensive reading intervention but, instead, offered access to Lexia reading intervention, only if licenses were available. The evidence did not demonstrate that licenses became available or that Student accessed Lexia

Unified School Dist. (9th Cir. 2011) 652 F.3d 999, 1006.)

reading intervention throughout her 2017 – 2017 school year.

82. Moreover, the evidence demonstrated that Student made progress toward non-modified fifth grade curriculum in the first trimester of the 2016-2017 school year. However, Irvine tied goals in English language arts, writing, and language to fourth, not fifth, grade level standards. Irvine tied math goals to third and fourth grade level standards.

83. Irvine modified Student's curriculum and lowered the bar on her goals in response to Student's work frustration. Irvine should have tried less restrictive methods to address work frustration, but did not.

84. Irvine offered goals to address Student's needs in speech and language, specifically, figurative language, inferencing, and pragmatics/emotions. Speech goals addressed Student's ability to interact with others by learning nonverbal language cues, and identifying and stating reasons for emotions. Though Mother expressed concern with Student not developing friendships with same-aged peers, Irvine did not see this issue at school. Student was well liked by staff and peers at school.

85. Student did not require a motor skills goal. She participated with typically developing peers in physical education, accessing playground equipment with no reported difficulties.

86. Student met her burden of proof that academic goals were not appropriate and denied her a FAPE. Accordingly, Student prevailed on Issue 5(a).

Issue 5(g): Failure to Offer Appropriate Accommodations

87. Student contends Irvine failed to offer appropriate accommodations in the March 2017 annual IEP, to address her needs in academics, auditory processing, social skills, and motor skills. Irvine contends it offered various accommodations addressing Student's needs throughout the relevant timeframe.

88. In her closing brief, Student makes the same arguments regarding

deficient accommodations as she did for the October 2016 IEP. For the same reasons stated above, those arguments do not show deficient accommodations in the areas of auditory processing or social skills, here. Student did not present evidence on what accommodations she contends she required to address motor skills and did not prove any such motor skill deficits existed at the time of her March 2017 annual IEP.

89. In the area of academics, Irvine replaced accommodations for scaffolding lessons, extra practice, and small group instruction for reading, writing, and math, with accommodations that included modified curriculum for reading, writing, and math. Irvine's offer of modified curriculum denied Student a FAPE, as stated above. Provision of modified curriculum in place of accommodations for small group academic instruction resulted in a denial of educational benefit to Student and, therefore, denied her a FAPE.

90. Accordingly, Student prevailed on Issue 5(g).

Issue 5(b), (c), (d), (e): Failure to Offer Appropriate Services

91. Student contends she was not offered appropriate services to address reading, writing, math, auditory processing, social skills, and motor skills in her March 2017 annual IEP. Irvine contends it addressed Student's needs through accommodations and use of modified curriculum and denies Student had social skills or motor skills needs.

92. For the same reasons set forth above regarding services in Student's October 2016 IEP, Irvine did not provide Student with appropriate services in the area of academics in the March 2017 IEP. On the other hand, Student did not have needs that required services in the areas of auditory processing, social skills, or motor skills.

93. By the time of Student's March 2017 annual IEP, Irvine had not offered Student direct intensive instruction in reading or math at a level reasonably calculated to confer educational benefit appropriate in light of her circumstances.

94. Accordingly, Student did not prevail on Issues 5(c), (d), or (e). Student prevailed on Issue 5(b).

Issue 5(f): Failure to Offer Appropriate Placement

95. Student makes the same argument relevant to her March 2017 IEP as she did for her October 2016 IEP. For the same reasons stated above, Student did not meet her burden of proof that she required a placement in the more restrictive setting recommended by Dr. Giti.

96. Accordingly, Student did not prevail on Issue 5(f).

ISSUES 6(A)-(H): FAILURE TO OFFER A FAPE IN OCTOBER 5, 2017 AMENDMENT IEP

97. Student contends Irvine failed to offer appropriate goals, accommodations, services, and placement in an amendment IEP held on October 5, 2017. Irvine contends it offered Student a FAPE during all relevant time periods.

Issue 6(a): Failure to Offer Appropriate Goals

98. Student argues that Irvine failed to offer appropriate goals in reading, writing, math, auditory processing, social skills, motor skills, and social-emotional development.

99. Student did not demonstrate that her social-emotional development needs changed from the time of the March 2017 annual IEP.

100. Student demonstrated that she required academic goals in her annual IEP, which Irvine did not provide. No academic goals were added to the October IEP amendment to address these deficiencies. For the same reasons as stated in reference to March 2017 annual goals, Irvine failed to offer appropriate goals to address her academic needs and, on that basis, denied her a FAPE.

101. Student met her burden of proof that goals offered in her October 2017

amendment IEP were not appropriate. Accordingly, Student prevailed on Issue 6(a).

Issues 6(b), (c), (d), (e), (f): Failure to Offer Appropriate Services

102. Student argues Irvine failed to offer appropriate services in the areas of academics, auditory processing, social skills, motor skills, and social-emotional development, at the time of the October 2017 IEP amendment.

103. Student offered no new assessments or other evidence tending to show that she developed needs in auditory processing, social skills, social-emotional development, or motor skills between the time of the March 2017 annual IEP and the October 2017 IEP amendment meeting. Student failed to meet her burden of proof as to these issues.

104. Parents expressed concerns about whether Student had dyslexia on September 26, 2017. Irvine did not have sufficient time to assess this suspected area of need and implement new services by the time of the October 5, 2017 IEP amendment meeting.

105. However, Irvine was well aware of Student's significant needs in reading, and math, in any event. Irvine had not offered Student direct intensive instruction in reading or math at a level reasonably calculated to confer educational benefit appropriate in light of her circumstances.

106. Accordingly, Student did not prevail on Issues 6(b), (c), (d), (e), or (f). Student prevailed on Issue 6(b).

Issue 6(g): Failure to Offer Appropriate Placement

107. Student makes the same argument relevant to her October 2017 amendment IEP as she did for her October 2016 amendment IEP. For the same reasons stated above, her arguments are not persuasive.

108. The IDEA "does not require that a school district provide a disabled child

with the best possible education.” (*Rowley, supra*, 458 U.S. at 192.) “Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal”. (*Endrew F., supra*, 137 S.Ct. 988, 999.)

109. Student demonstrated the ability to be educated with typically developing peers, something Prentice School did not offer. Ms. Lopez taught Student social studies and history during the 2017-2018 school year. She found Student like most of her other sixth-grade students, in that she participated in class discussions and kept up with her peers.

110. Student exhibited similar struggles as typically developing peers accessing the sixth grade social studies textbook. Ms. Lopez provided a multi-sensory learning approach for all of her students by breaking down text, using repetition and teacher notes, outlines, study guides, and graphic organizers. She had students work in small and whole groups, doing skits, building art projects, dressing up in period costumes, and watching period movies. Ms. Lopez used teaching strategies similar to those described by Ms. Simon, Student’s sixth grade teacher at Prentice, but in a less restrictive environment.

111. Student did not meet her burden of proof that she required a placement in the more restrictive setting. Accordingly, Student did not prevail on Issue 6(g).

ISSUE 6(h): FAILURE TO OFFER APPROPRIATE ACCOMMODATIONS

112. Student contends Irvine failed to offer appropriate accommodations in the October 2017 amendment IEP, to address her needs in academics, auditory processing, social skills, motor skills, and social-emotional development.

113. Student did not demonstrate needs in the areas of auditory processing, social skills, motor skills, or social-emotional development at the time of the October 2017 amendment IEP.

114. In academics, Student continued to struggle with reading, math, and

writing. For the same reasons as stated in Issue 5(g), Irvine denied Student a FAPE by replacing needed accommodations with modified curriculum. Accordingly, Student prevailed on Issue 6(h).

ISSUES 8(A)-(I), (K): FAILURE TO OFFER A FAPE IN FEBRUARY 13, 2018 ANNUAL IEP

115. Student contends Irvine failed to offer appropriate goals, accommodations, services, and placement in her January through February annual IEP concluding on February 13, 2018. Irvine contends it offered Student a FAPE during all relevant time periods.

Issue 8(a): Failure to Offer Appropriate Goals

116. Student argues Irvine failed to offer appropriate goals to address needs in reading, writing, math, auditory processing, phonological processing, social skills, motor skills, social-emotional development, and assistive technology.

117. Student's February 13, 2018 annual IEP was based on Student's progress on previous goals and her performance on 2018 triennial assessments. Irvine offered a variety of academic goals addressing specific skill deficits in English language arts; reading, including phonological processing; and math. Goals aligned with reading and phonological processing deficits determined through triennial assessments, including the areas of syllable rules, reading fluency, phonemic awareness, segmenting phonemes, decoding, and reading comprehension.

118. Math goals aligned with deficits in number pattern sequences, multiplication, division, and equivalent fractions. Writing goals aligned with deficits in organization, essay writing, spelling, and editing grammar.

119. Irvine offered goals aligned with Student's deficits in social-emotional development. Ms. Benson's correlation of rating scales from Ms. Sharma, Ms. Lopez, and

Parents with Diagnostic Criteria for Clinical Disorders, Fifth Edition, demonstrated Student's internalization and generalized anxiety. These findings were consistent with Ms. Mock's observations of Student's nail and skin picking beginning January 2018 and lasting through the end of the 2017-2018 school year. Dr. Giti described skin and nail picking as somatization, or externalization of Student's internalized anxiety, also consistent with Ms. Benson's findings.

120. Irvine addressed Student's internalization and anxiety through an emotional dysregulation goal, teaching Student coping and calming strategies, such as deep breathing and count to 10. Student did not offer evidence that additional goals were required for Student to benefit from her education.

121. Student did not present evidence on the need for a specific goal in assistive technology.

122. Irvine did not develop goals addressing Student's social skills deficits. Ms. Mock persuasively testified that Student, though well-liked by peers and adults, did not engage in any significant interaction with peers at recess or on the playground. Ms. Clark credibly demonstrated that Student had difficulty engaging appropriately with peers due to a combination of factors. Student struggled with inferencing, figurative language, and idioms, components of pragmatic language. Student demonstrated difficulty interpreting social and non-verbal language of peers quickly enough to interact with peers during fast paced social situations, which occur on school playgrounds.

123. The picture Ms. Clark painted of Student's social skills was an accurate depiction of deficits seen by Irvine in Student's speech language development. That Student made progress in pragmatic speech and language during small group therapy sessions did not preclude the need for development of her ability to interact with peers on campus outside of therapy sessions.

124. Educational benefit is not limited to addressing academics needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. Here, Student met her burden of proving Irvine failed to offer appropriate goals to address her unique needs in social skills. Accordingly, Student prevailed on Issue 8(a).

Issue 8(k): Failure to Offer Appropriate Accommodations

125. Student argues Irvine failed to offer appropriate accommodations to address her needs in academics, auditory processing, phonological processing, social skills, motor skills, and social-emotional development.

126. Irvine's February 13, 2018 annual IEP offered Student an extensive list of accommodations directed toward Student's needs including attention, working memory, and anxiety. Accommodations included multi-sensory learning opportunities; teacher notes, study guides, and outlines; information read aloud; dictation of responses; highlight key points in text; access to typing; use of calculator or multiplication chart; manipulatives; visual supports; chunking of academic work; frequent breaks; positive behavior system; self-regulation visuals; and access to sensory items.

127. Student did not present any specific evidence demonstrating that these, among other accommodations offered, did not allow Student to advance appropriately toward attaining her annual goals and make progress in the general education curriculum. To the contrary, the evidence demonstrated that Student benefited from use of such accommodations, both at Irvine and Prentice School.

128. Student did not meet her burden of proof that Irvine offered inappropriate accommodations, which resulted in denial of a FAPE. Accordingly, Student did not prevail on Issue 8(k).

Issue 8(b), (c), (d), (e), (f), (g), (h): Failure to Offer Appropriate Services

129. Student argues Irvine failed to offer appropriate services to address her needs in reading, writing, and math; auditory processing; phonological processing; social skills; motor skills; social-emotional development, including anxiety; and assistive technology.

130. Irvine offered Student Touch Math, a multisensory program, embedded in Student's curriculum, to address missing foundational gaps in math skills. Step Up to Writing was offered as a universal writing program for all students, but addressed Student's unique needs in writing organization, spelling, and editing grammar.

131. Irvine offered Sunday System, a peer-reviewed multisensory reading intervention, which would provide Student with Tier 3 intensive reading intervention. Student demonstrated her ability to access the program and obtain educational benefit. Ms. Eaton conducted pre- and post-testing of Student using Sunday System, which demonstrated progress between November 17, 2017 and February 13, 2018.

132. During the 2018 triennial assessments, Ms. Benson determined Student was reading at an end of second grade level. Using Sunday System, Ms. Eaton determined that Student reached a listening comprehension third grade level; reading comprehension low third grade level; and instructional fourth grade level. Student showed improvement from August of 2016, when her reading level was rating between second and third grade.

133. Student did not demonstrate that she required any particular services addressing auditory processing, phonological processing, social skills, social-emotional development, motor skills, anxiety, or assistive technology.

134. Student did not prove, by a preponderance of the evidence that she required additional services to assist her from benefitting from special education. Accordingly, Student did not prevail on Issues 8(b), (c), (d), (e), (f), (g), or (h).

Issue 8(i): Failure to Offer Appropriate Placement

135. Student, in her closing brief, argues that Irvine's February 13, 2018 offer of specialized academic instruction, combined with general education classes denied her a FAPE, because neither setting offered services to remediate her deficits in all areas.

136. Student conflates placement and services, without addressing the underlying rationale for placement offers. The evidence demonstrated that Student required repetition and small group instruction to make progress in academic areas. At the same time, Student demonstrated her ability to make progress through participation in general education classes, with appropriate supports and services.

137. Irvine's placement offer was reasonably calculated to provide Student with educational benefit in light of her circumstances. Student did not demonstrate that Irvine's placement offer would not provide her with educational benefit. Accordingly, Student did not prevail on Issue 8(i).

ISSUES 9(A)-(I), (K): FAILURE TO OFFER A FAPE IN MARCH 7, 2018 AMENDMENT IEP

138. Student contends Irvine failed to offer appropriate goals, accommodations, services, and placement in an amendment IEP held on March 7, 2018. Irvine contends it offered Student a FAPE during all relevant time periods.

Issue 9(a): Failure to Offer Appropriate Goals

139. Student's March 7, 2018 IEP amendment meeting was held to review Ms. Low's assistive technology assessment. Ms. Low did not recommend goals directed towards Student's use of recommended assistive technology.

140. Student presented no evidence that she had additional needs, which had arisen since the time of her February 2018 annual IEP. Accordingly, Student did not prevail on Issue 9(a).

Issue 9(k): Failure to Offer Appropriate Accommodations

141. Irvine offered assistive technology accommodations consistent with Ms. Low's recent assessment. Accommodations included access to a cloud-based laptop and programs; word prediction with a speech-to-text option; use of graphic organizers; digital text-to-speech programs; access to a handheld text-to-speech tool; access to a Bookshare account; and a calculator and use of visuals for math.

142. Many of the accommodations had already been offered in Irvine's February 2018 annual IEP. The remaining accommodations were added at the March IEP amendment meeting.

143. Student sought use of an FM system, but produced no evidence that Student required one to access her curriculum. Accordingly, Student did not prevail on Issue 9(k).

Issue 9(b), (c), (d), (e), (f), (g), (h): Failure to Offer Appropriate Services

144. Irvine offered services to address Student's academic needs in her February 2018 annual IEP. Student did not present evidence that additional services were required to assist her in benefiting from her education.

145. As part of the March 2018 IEP amendment, Irvine offered consultation between the assistive technology specialist and staff to support use of newly offered assistive technology devices and accommodations. Student did not present evidence that the amount of consultation offered by Irvine was deficient in any way.

146. Student did not prove, by a preponderance of the evidence that she required additional services or more consultation time to assist her from benefiting from special education. Accordingly, Student did not prevail on Issues 9(b), (c), (d), (e), (f), (g), or (h).

Issue 9(i): Failure to Offer Appropriate Placement

147. For the same reasons as stated in relation to Student's February 2018 annual IEP, Student failed to demonstrate that Irvine did not offer an appropriate placement.

148. Irvine's placement offer was reasonably calculated to provide Student with educational benefit in light of her circumstances. Accordingly, Student did not prevail on Issue 8(i).

ISSUES 10(A)-(I), (K), (M): FAILURE TO OFFER A FAPE IN JUNE 13, 2018 AMENDMENT IEP

149. Student contends Irvine failed to offer appropriate goals, accommodations, services, and placement in an amendment IEP held on June 6, 11, and 13, 2018. Irvine contends it offered Student a FAPE during all relevant time periods.

Issue 10(a): Failure to Offer Appropriate Goals

150. Student argues Irvine failed to offer appropriate goals in reading, writing, math, auditory processing, phonological processing, social skills, motor skills, social-emotional development, and assistive technology.

151. Subsequent to Student's February 13, 2018 annual IEP, Dr. Giti conducted an extensive neuropsychological evaluation because of Parents' concern over the intelligence quotient obtained by Ms. Benson in her triennial assessment. Based upon Dr. Giti's testing and recommendations, Irvine offered new goals in social-emotional development for self-praise and positive talk and in math fractions.

152. Student had already met most of her initial benchmarks from goals offered in her last annual IEP. She made progress towards benchmarks for spelling patterns and syllable rules; writing for editing grammar; math number sequences; and executive function for attention to whole group instruction. She made no progress on benchmarks

for root words, math multiplication and division; and could not independently write a three-paragraph essay.

153. A student is not required to make progress toward every goal in order to receive educational benefit from her program. Here, Dr. Giti did not recommend discontinuing any of the goals over which Student struggled.

154. Student failed to demonstrate that Irvine did not offer appropriate goals in her June 13, 2018 IEP. Accordingly, Student did not prevail on Issue 10(a).

Issue 10(k): Failure to Offer Appropriate Accommodations

155. Based upon Dr. Giti's assessment, Irvine added accommodations for flexible seating; seating near positive role models, frequent understanding checks; prompts to recheck work; not counting handwriting against grades; and weekly home/school communication.

156. Student did not offer evidence that she required additional accommodations. For the same reasons identified regarding Student's February 13, 2018 annual IEP, Student did not meet her burden of proof that Irvine offered inappropriate accommodations, which resulted in denial of a FAPE. Accordingly, Student did not prevail on Issue 10(k).

Issue 10(b), (c), (d), (e), (f), (g), (h): Failure to Offer Appropriate Services

157. Dr. Giti reviewed Student's February 13, 2018 annual IEP and did not testify that Irvine failed to offer appropriate services. Her main concern was over Student's receipt of modified curriculum, which she determined was below Student's ability.

158. She recommended counseling to address Student's social-emotional needs and Irvine added six-30 minute sessions from August 23, 2018 through January 17, 2019. In her report, Dr. Giti recommended a social skills group.

159. Irvine was not required to agree to all the recommendations of Student's

outside assessor. Student's program at Prentice School did not include a social skills group. However, testimony from Ms. Clark persuasively demonstrated Student's difficulties in pragmatic language effected social pragmatics for initiating and sustaining conversations in fast paced social interactions during unstructured time on campus. Ms. Clark effectively supported Student at Prentice School without developing a social skills group.

160. Student did not prove, by a preponderance of the evidence that she required additional services to assist her from benefitting from special education. Accordingly, Student did not prevail on Issues 10(b), (c), (d), (e), (f), (g), or (h).

Issue 10(i), (m): Failure to Offer Appropriate Placement

161. Student contends Irvine failed to offer an appropriate placement and a program consistent with Dr. Giti's neuropsychological evaluation.

162. Irvine offered Student specialized academic instruction for three 50-minute weekly sessions to address English language arts, math, and study skills; specialized academic instruction for two 50-minute sessions to address collaborative science and history. Irvine offered placement in its direct studies program, which taught general education classes using a collaborative model.

163. Student sought placement in a more restrictive nonpublic setting, where she would receive an education without exposure to any typically developing peers. Student demonstrated that she can access her education amongst typical peers and does not require a more restrictive setting.

164. Accordingly, Student did not prevail on Issue 10(i) or (m).

ISSUES 8(J), 9(J), 10(J): EXTENDED SCHOOL YEAR PROGRAMS

165. Student argued that statewide assessment scores showed she regressed, over time, and required extended school year services in IEPs dated February 13, 2018,

March 7, 2018, and June 13, 2018. Irvine argued that, since Student was able to meet most benchmarks within a reasonable period of time after summer breaks, Student did not require extended school year services.

166. In addition to special education instruction and services during the regular school year, extended school year services must be provided if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, title 5, section 3043, provides that extended school year services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Extended school year is the period of time between the close of one academic year and the beginning of the succeeding academic year. (Cal. Code Regs., tit. 5, § 3043, subd. (c).)

167. Irvine did not offer extended school year services in Student's February 13, 2018 annual IEP or in her March 7, 2018 amendment IEP. After reviewing Dr. Giti's independent neuropsychological assessment, Irvine modified Student's annual IEP and offered extended school year services in the June 13, 2018 IEP.

168. Parents notified Irvine of their intention to place Student in Prentice School over the summer and seek reimbursement. Parents did not accept Irvine's offer of extended school year services, which consisted of intensive academic instruction to address reading and math. The appropriateness of Irvine's offer was not an issue for hearing.

169. Accordingly, Student did not prevail on Issues 8(j), (9j), or 10(j).

ISSUE 10(N): FAILURE TO ADDRESS BULLYING AND HUMILIATION IN JUNE 2018 IEPs

170. Student contends Irvine's June 2018 IEPs failed to address bullying at school, which resulted in humiliation. Irvine contends Student was not bullied at school.

171. In a 2013 joint letter providing guidance on the IDEA, the U.S. Office of Special Education and Rehabilitative Services and the Office of Special Education Programs described bullying as the use of real or perceived power over a target where the aggression is repeated, or has the potential to be repeated, over time. Acts of bullying include physical, verbal, emotional, or social behaviors ranging from blatant aggression to subtle and covert behaviors. (*Dear Colleague Letter*, (OSERS/OSEP August 20, 2013) 61 IDELR 263; 113 LRP 33753 (*Dear Colleague 2013*).

172. The California Education Code defines bullying as “any severe or pervasive physical or verbal act or conduct by a pupil or group of pupils . . . directed toward one or more pupils” that causes or is “reasonably predicted” to cause a reasonable student to experience one or more of the following: (a) fear of harm to his or her person or property; (b) a substantially detrimental effect on his or her physical or mental health; (c) a substantial interference with his or her academic performance; or (d) a substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school. (Ed. Code, § 48900, subd. (r).) A “reasonable student” is a pupil, including an exceptional needs pupil, who exercises average care, skill, and judgment in conduct for a person of his or her age, and with his or her special needs. (*Id.* at subd. (r)(3).)

173. The bullying of a student with a disability that results in the student not receiving meaningful educational benefit may constitute a denial of a FAPE under the IDEA. (*Dear Colleague 2013, supra*, at p. 2.)

174. Parents complained that Student felt humiliated and peers made fun of her because of her needs.

175. Student was well liked and had a good temperament. Moreover, Ms. Benson spoke to Student’s teachers often and received no input of bullying by or against Student. None of Student’s teachers, service providers, or assessors had

knowledge of Student being bullied at school. Student's providers, who testified at hearing, had no knowledge of Student being bullied.

176. Student did not establish that she suffered severe or pervasive aggression falling within the definition of bullying. Moreover, Student failed to establish any incident occurred that denied her access to her education, resulting in a loss of meaningful educational benefit. Accordingly, Student did not prevail on Issue 10(n).

ISSUE 11: ADEQUACY OF IRVINE'S JUNE 2018 FAPE OFFER

177. Irvine contends the June 2018 annual IEP offered Student a FAPE. Student contends the IEP offer was deficient in that Irvine continued to offer modified curriculum.

178. If the parent or guardian of a child who is an individual with exceptional needs refuses all services in the IEP after having consented to those services in the past, the local educational agency shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d); *I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164.)

179. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit and make progress appropriate in light of the child's circumstances. (*Ibid.*)

180. Typically, when a school district files to obtain an order that it offered a student a FAPE, the district must prove both procedural and substantive compliance with the IDEA. In this case, because Irvine inappropriately continued to offer Student modified curriculum even after Dr. Giti's assessment, it failed to offer Student a substantive FAPE. Based on the conclusion that Irvine denied Student a substantively

appropriate education, it is not necessary to analyze every procedural obligation or other substantive components of the June 2018 IEP offer.

181. Federal and state laws require school districts to provide a program in the least restrictive environment to each special education student. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

182. Here, Student made progress in all areas in the regular education environment and could be satisfactorily educated with non-disabled grade level peers with the use of supplementary aids and services. For the reasons stated above, Irvine denied Student a FAPE by continuing to offer her only a modified curriculum, therefore making it impossible for her to graduate with a regular high school diploma, based upon the invalid intelligence quotient obtained in its 2018 triennial assessments. Dr. Giti's June 2018 assessment report put Irvine on notice that the proposed modified curriculum was likely based on invalid testing information.

183. Irvine's failure to offer Student an appropriate curriculum is fatal to the entire IEP offer and Irvine did not meet its burden to prove it offered Student a FAPE in the June 2018 IEP.

184. Accordingly, Irvine did not prevail on Issue 11.

REMEDIES

1. Student prevailed on the issue of modified curriculum, which Irvine continued to offer in light of evidence that Student had low average cognition and was capable of making progress in general education with appropriate goals, services, and accommodations. Moreover, Irvine did not assess for dyslexia and dyscalculia when Student sought assessments. Irvine relied on invalid cognitive scores obtained during triennial assessments, rather than conducting additional testing. Irvine did not provide appropriately intensive academic intervention tailored to Student's unique needs in reading, writing, and math, until the annual IEP of February 13, 2018.

2. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) An ALJ can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist., supra*, 464 F.3d 1025, 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.)

3. An award of compensatory education need not provide a "day-for-day compensation." (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496-1497 (*Puyallup*).) The conduct of both parties must be reviewed and considered to

determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524 (*Reid*), citing *Puyallup, supra*, 31 F.3d at p. 1497.) The award must be fact-specific and "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid, supra*, 401 F.3d. at p. 524.)

4. 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); *Burlington, supra*, at 471 U.S. 359, 370; *Puyallup, supra*, at 31 F.3d 1489, 1496.)

5. Here, Irvine denied Student a FAPE by offering modified curriculum in IEPs from October 2016 through June 2018, which covered 2018 extended school year and the 2018-2019 school year. Parents timely notified Irvine of their intent to unilaterally place Student at Prentice School and seek reimbursement from Irvine. Prentice School constituted an appropriate educational placement for Student, which provided educational benefit. Student declined Irvine's offer of intensive academic instruction in math and reading during 2018 extended school year. The appropriateness of Irvine's offer was not at issue in this matter, which considered Student's claim that Irvine failed to offer extended school year services in 2018 IEPs. It is equitable to award compensatory education in the form of reimbursement for costs and tuition related to Student's attendance at Prentice School during the 2018-2019 school year in the amount of \$350.00 for purchase of a Chromebook; \$500.00 for registration; and \$2,766.67 for monthly tuition.

6. Irvine failed to timely assess Student for dyslexia and dyscalculia and offer appropriately intensive reading, writing, and math intervention beginning with Student's October 28, 2016 IEP. Irvine offered Student appropriate academic interventions beginning with its February 13, 2018 annual IEP. It is equitable to award Student reimbursement for academic tutoring services paid for by Parents to address her need for intensive academic instruction, consisting of 89 sessions, costing \$60.00 each, from August 29, 2016, through January 28, 2018, totaling \$4,780.00.

7. Parents paid \$11,450.94 for assessments and cognitive education therapy from October 23, 2017 through February 2018. Stowell utilized educational methods not based in peer reviewed scientific research and Student received academic tutoring over the same time period. Assessments obtained from Stowell and provided to Irvine resulted in Irvine offering Student intensive academic instruction required to address her needs in reading, writing, and math. It is equitable to award reimbursement for Stowell assessments, in the amount of \$1,370.00.

8. Student obtained speech and language services costing \$70.00 per session, throughout the 2018-2019 Prentice school year. Student demonstrated the need for speech services at Prentice to facilitate social interactions with peers. Student proved Parents paid for \$490.00 for seven sessions. Irvine shall reimburse Parents for costs of additional speech and language therapy Student obtained while attending Prentice School during the 2018-2019, upon receipt of invoices for services rendered and cancelled checks or other proof of payment.

9. Student shall also receive the equitable remedy of mileage reimbursement for attendance at Prentice School at the IRS statutory rate of 54.5 cents-per-mile for 2018 and 58 cents-per-mile for 2019. Mileage shall be reimbursed for one round trip between Prentice School and the transporting Parent's home for Student's dates of attendance from 2018 summer school through the end of the 2018-2019 Prentice

school year, upon proof of dates of attendance.

ORDER

1. Within 60 calendar days of the date of this Order, Irvine shall directly pay to Parents:

- a. \$4,780.00, as reimbursement for private tutors obtained for Student;
- b. \$1,370.00 for Student's assessments at Stowell Learning Center from October 2017 through February 2018;
- c. \$13,833.35 for reimbursement of Prentice School tuition from August through December 2018; \$350.00 reimbursement for purchase of Chromebook; and \$500.00 reimbursement for costs associated with registration at Prentice School;
- d. \$490.00 for costs of seven speech and language sessions Student obtained while attending Prentice School.

2. Within 60 calendar days of Parents providing Irvine with documentation, as stated below, Irvine shall reimburse Parents as follows:

- a. For costs of tuition at Prentice School for the remainder of the 2018-2019 school year at a rate of \$2,766.67 per month as reflected by invoices and proof of payment of tuition by Parents;
- b. For costs of additional speech and language therapy sessions obtained by Student at Prentice School, at a rate of \$70.00 per session, for one session per week, throughout the 2018-2019 school year, as reflected by invoices for services and proof of payment by Parents; and
- c. For costs of one-round trip transportation per date of attendance at Prentice School, on proof of dates of attendance, for mileage of 6.3 miles for Father and 12 miles for Mother, multiplied by the then current IRS mileage rate of 54.5 cents-per-mile in 2018 and 58 cents-per-mile in 2019.

3. All other relief sought by Student is denied.
4. Irvine's request to implement its June 2018 annual IEP is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issues 2(a), (c), (h), 3, 4, 5(a), (b), (g), (h), 6(a), (b), (h), (i), 8(a), (l), 9(l), 10(l), and 11. Irvine prevailed on Issues 1, 2(b), (d), (e), (f), (g), 5(c), (d), (e), (f), 6(c), (d), (e), (f), (g), 7, 8(b), (c), (d), (e), (f), (g), (h), (i), (j), 9(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), 10(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (m), (n).

RIGHT TO APPEAL

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

DATED: February 19, 2019

/s/

COLE DALTON

Administrative Law Judge

Office of Administrative Hearings