

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

COMPTON UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2014110365

**DECISION**

Parent, on behalf of Student, filed the due process hearing request (complaint) on October 31, 2014, naming Compton Unified School District.

Administrative Law Judge Sabrina Kong heard this matter in Compton, California, on February 4, 5, 9, 17, 18, 19, 20 and 23, 2015.

James Peters, advocate from the Law Office of Guy Leemhuis, represented Student. Mother attended the hearing on all days, except February 20, 2015. Elliot Field, Attorney at Law, represented District. Jennifer O'Malley, District's Administrator, and Sean Andrew, District's Program Specialist, attended the hearing on all days.

A continuance was granted for the parties to file written closing arguments and the record remained open until March 12, 2015.<sup>1</sup> Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

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<sup>1</sup> ALJ admitted the executed Stipulations Regarding Student's Schedule as D-17.

## ISSUES<sup>2</sup>

Did District, during the 2013-2014 school year, 2014 extended school year, and 2014-2015 school year, deny Student a free appropriate public education by:

1. Failing to allow appropriate parental participation in the May 9, 2013 individualized education program team meeting specifically by:
  - (a) predetermining placement and services;
  - (b) concluding the IEP abruptly; and
  - (c) ignoring parental input?
2. Failing to allow appropriate parental participation in the October 31, 2014 IEP team meeting specifically by:
  - (a) predetermining placement and services,
  - (b) concluding the IEP abruptly, and
  - (c) ignoring parental input?
3. Failing to conduct IEP's in a timely manner prior to the beginning of the 2013-2014 and 2014-2015 school years?
4. Failing to offer an appropriate assessment plan and assess in the areas of:
  - (a) psycho-educational functioning;
  - (b) mental health;
  - (c) functional behavior; and
  - (d) speech and language?
5. Failing to develop appropriate goals at the:
  - (a) May 9, 2013 IEP; and
  - (b) October 31, 2013 IEP?
6. Failing to offer appropriate parent trainings, specifically by failing to offer two conferences per year on attention deficit hyperactivity disorder (ADHD), bi-polarism and related disorders?
7. Failing to offer appropriate behavioral services?

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<sup>2</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Although vision assessment/therapy, occupational therapy and transition services were in the complaint, they were not identified as issues at the December 19, 2014 pre-hearing conference or at the hearing. Therefore, ALJ made no factual findings regarding these services.

8. Failing to offer a FAPE, resulting in unreasonable suspension?
9. Failing to offer appropriate placement at Kayne Eras Center?

### SUMMARY OF DECISION

Student did not demonstrate that District predetermined placement or services, ended the IEP abruptly, or ignored parental input in either the May 9, 2013 IEP or the October 31, 2013 IEP team meeting. Student also did not demonstrate that District failed to timely convene IEP team meetings at the beginning of the 2013-2014 and 2014-2015 school years because there was no legal requirement that IEP team meetings be convened at that specific time. However, Student demonstrated that District failed to conduct a psycho-educational, a behavioral, and a mental health assessment of Student when he was not progressing as expected to determine the factors impeding his education. Student did not demonstrate that District's failure to conduct a speech and language assessment of Student was inappropriate because Student did not exhibit any speech and language needs that triggered the need for assessment. Therefore, Student demonstrated that District failed to offer an appropriate assessment plan because it did not include all areas of Student's suspected disabilities.

Student did not demonstrate that District failed to develop proper goals at the May 9, 2013 IEP team meeting. However, Student demonstrated that District failed to develop appropriate goals at the October 31, 2014 IEP team meeting because District did not have accurate measures of IEP goal progress, and did not assess Student to ascertain the information necessary for proper goal development. Student also demonstrated that District failed to offer appropriate behavioral services from January 20, 2014, to October 31, 2014. Student did not demonstrate that District's failure to offer parent trainings, place Student at Kayne, and hold a manifestation hearing for a one-day suspension were FAPE denials.

As a remedy to District's failure to conduct a psycho-educational, a behavioral, and a mental health assessment of Student, its failure to develop appropriate goals for Student at the October 31, 2014 IEP team meeting, and its failure to offer appropriate behavioral services from January 20, 2014 to October 31, 2014, Student is entitled to an independent psycho-educational assessment, a District conducted functional behavioral assessment and a mental health assessment, and 72 hours of one-to-one academic tutoring from a non-public agency, with a credentialed teacher experienced in teaching students with ADHD and/or language processing difficulties as compensatory education.

### FACTUAL FINDINGS

#### *Jurisdiction*

1. Student is a twelve-year-old-boy who resided within District at all relevant periods. Student was found eligible for special education by the Los Angeles Unified School

District. Student was last assessed by the Los Angeles Unified School District on May 2, 2012, before transferring into District later that year.

2. District placed Student in a special day class at Tibby Elementary for the 2012-2013 school year and Student continued to be eligible for special education from District under the category of other health impairments because of his ADHD. He was mainstreamed in a fourth grade language arts general education class on February 1, 2013.

*May 9, 2013 IEP Team Meeting*

3. Mother, Principal Ontrece Ellerbe, Curriculum Specialist Darlene Goodwin, Special Day Class instructor Aundrea Farley, and Wrap Around Service Representative Lisa Nunley attended the May 9, 2013 IEP team meeting. The school psychologist did not attend this meeting and his attendance was not excused.

4. During the 2012-2013 school year, Student attended a special day class 100 percent of the day until February 1, 2013, when he was mainstreamed for one fourth grade, language arts, general education class. The IEP team reviewed Student's present levels of performance and goals, discussed draft goals and agreed to new goals for the next school year. The team discussed all placement options for Student. Student's general education teacher reported through others present that Student's reading level was approaching fourth grade standards. Student could read 73 words a minute, could answer simple comprehension questions, but struggled with multisyllabic words. Student could write a paragraph with correct spacing, but needed help with structure, format, transitions, details, and capitalization. Student had difficulty organizing his thoughts, required frequent redirection, and had difficulty combining sentences and understanding grammatical rules in writing. Student did well with math concepts and was able to add, subtract, multiply and divide, but needed more practice with fractions and decimals such as simplifying, comparing, ordering and identifying them on a number line. Student could write his first and last name, knew part of his address and telephone number, could communicate and take care of his needs, was in good health and had age appropriate gross and fine motor skills. District recommended that Student continue to be mainstreamed for language arts, and receive intensive instruction in writing. It recommended that Student utilize a reading program, Success Maker, for reading improvement. It determined that Student did not require assistive technology to meet his goals.

5. Student partially met his reading fluency goal from the previous school year. This goal required him to be able to read 85 words per minute on a fluency passage at his instructional level, with appropriate pacing, intonation, and expression, with 80 percent accuracy as measured by student fluency passages. At the May 9, 2013 IEP team meeting, Student's reading fluency goal baseline indicated that he read 73 words per minute on a fourth grade fluency passage. His next year's reading fluency goals was that by May 9, 2014, Student would be able to read 150 words per minute on a fluency passage of his instructional level with appropriate pacing, intonation, and expression with 80 percent accuracy as measured by student fluency passages.

6. Student did not meet his writing goal from the previous school year. This goal required him to write a five paragraph essay with an introduction, three body paragraphs, and conclusion. The essay was to include a topic sentence, three supporting details, and a concluding sentence, with correct spelling and punctuation with 80 percent accuracy as demonstrated by work samples and assessment. At the May 9, 2013 IEP team meeting, Student's writing goal baseline indicated that he was unable to write a five paragraph essay with the correct format, spelling and punctuation. His next year's writing goal was that by May 9, 2014, Student would be able to write a five paragraph essay that included an introduction, three body paragraphs, and conclusion with a topic sentence, three supporting details, a concluding sentence, with correct spelling and punctuation at an 80 percent accuracy as demonstrated by work samples and assessment.

7. Student did not meet his math goal from the previous school year, which required him to solve a mixture of 15 math problems with both single and multi-step solutions, and to determine how and when to break a problem into simpler parts with 85 percent accuracy as measured by work samples. He was only able to solve multi-step division problems with 80 percent accuracy. At the May 9, 2013 IEP team meeting, Student's math goal baseline indicated that he needed to be able to independently and confidently solve problems with multiple steps. His next year's math goal was that by May 9, 2014, Student would be able to solve a mixture of 15 math problems with both single and multi-step solutions, and to determine how and when to break a problem into simpler parts with 85 percent accuracy as measured by work samples.

8. At the May 9, 2013 IEP team meeting, a new math goal was added that had two subparts. The first was that by May 9, 2014, Student would be able to tell time on a standardized clock. The second was that by May 9, 2014, Student would be able to count money, bills and change to 20 dollars, and to give change with 80 percent accuracy as measured by work samples and teacher data. Student's baseline for this goal indicated that he had difficulty counting money and telling time on a standard clock consistently.

9. At the May 9, 2013 IEP team meeting, Mother did not have any concerns regarding Student's academic progress, but expressed concerns as to Student's behavior. The IEP team reported that although Student exhibited attention seeking behaviors, talked back and was easily angered when he did not get his way, such behaviors declined during his English language arts class. In that class he was generally wonderful, participated and enjoyed class group activities, and responded to redirection. The IEP team discussed all placement options and recommended that Student attend a general education class for the 2013-2014 school year with resource specialist program services instead of attending a special day class. District offered: 600 minutes of weekly specialized academic instruction in a group setting by a resource specialist; mainstreaming during language arts the rest of the 2012-2013 school year; extended school year during summer 2013<sup>3</sup>; and 180 minutes of

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<sup>3</sup> Although extended school year was identified as a relevant period at the December 19, 2014 pre-hearing conference, Student did not present any evidence specific to the extended school year at hearing, other than it was offered during the summer 2013.

weekly specialized academic instruction provided by a special education teacher in collaboration with the general education teacher in the general education class for the 2013-2014 school year. Accommodations for Student included preferential seating, peer tutoring, chunking assignments, use of visuals and manipulatives when possible, provision of more time to Student for classwork, checking for understanding when giving Student instructions and asking Student to repeat directions given. Student would take his California Modified Assessments with accommodations. District shared that Student was not academically challenged enough in his special day class. With his continued behavioral improvements in his language arts/general education class, District asserted that Student was ready for integration into the general education environment during the 2013-2014 school year. Mother asked questions about placement and services. While at first Mother was uncertain, after discussion with Program Specialist Sean Andrew, and other IEP team members, she agreed and signed the IEP.

### *2013-2014 School Year*

10. District attributed Student's low grades during the first quarter of the 2013-2014 school year to Student's adjustment from transitioning from a special day class to a general education setting. Student's report card at the end of the second quarter of the 2013-2014 school year showed that he was far below standard in all areas of academics, except for mathematics, mathematical reasoning, and algebra functions. In those subjects he was below standard. During the first quarter of the 2013-2014 school year, Student was approaching standards in the areas of mathematics and mathematical reasoning, and algebra functions. But by the end of the second quarter of the 2013-2014 school year, Student had regressed in these two areas. Student regressed in his ability to demonstrate self-control and show responsibility for his actions; his ability to work and solve problems independently; his ability to complete assignments on time; and his overall effort in mathematics from the first quarter to the second quarter of the 2013-2014 school year. At the end of both the second and third quarter of the 2013-2014 school year, general education teacher, Felicia Marks, noted in Student's report card that incomplete work and behaviors were impeding his academic performance and recommended summer school. Ms. Marks did not check the "Student is improving" box of the report card for all three quarters of the 2013-2014 school year, which showed that Student did not progress the first three quarters of the 2013-2014 school year. Her later hearing testimony that failure to check the "Student is improving" box of the report card was an oversight for all three quarters of the 2013-2014 school year, and that Student had been improving and progressing throughout the 2013-2014 school year was unpersuasive. Her hearing testimony was uncorroborated by any work samples, or other documentary measures of improvements, such as teachers' notes, or charts that Ms. Ellerbe stated were typically maintained by teachers to monitor a student's progress. Further, Ms. Mark's hearing testimony directly contradicted the report card showing that Student was not improving. This document, which she filled out at the time she was Student's teacher, expressed a more persuasive contemporaneous opinion about Student's performance.

11. Student's report card showed that from the second quarter to the third quarter of the 2013-2014 school year, with the exception of improvements from far below standard

to below standard in three areas including (1) word recognition, (2) fluency and structural features of expository materials, and (3) reading comprehension, all areas remained the same or got worse. Specifically nine out of 12 areas of social skills and work habits areas were worse in the third quarter than in the second quarter of the 2013-2014 school year.

12. District personnel opined that Student's report cards did not reflect his ability, but attributed Student's poor performance to lack of motivation, distractibility and behavioral issues. District also attributed Student's failure to meet his 2013-2014 IEP goals to lack of patience, not lack of ability. Other than the report cards, District had no documents recording Student's progress on the May 9, 2013 IEP goals, or any examples of Student's work product that purportedly indicated progress. District never provided Mother any progress reports on Student's May 9, 2013 IEP goals.

#### APRIL 1, 2014 AMENDMENT IEP TEAM MEETING

13. The IEP team met on April 1, 2014 at Mother's request. Mother attended this IEP team meeting with her attorney, Guy Leemhuis. Ms. Ellerbe, Special Education teacher Nicoline Ambe, Ms. Marks and 2013-2014 Program Specialist Todd Overton also attended. The school psychologist did not attend this meeting, and his attendance was not excused.<sup>4</sup> Mother expressed that her main concern was Student's behavior. She noted that Student's grades had generally declined. Ms. Marks stated that Student's behaviors included refusing to follow directions after multiple requests to refocus, verbal defiance, not staying on task and getting up and walking around class without permission. She noted that such behaviors had affected Student since the beginning of the year. Although Student exhibited an aggressive posture toward staff when he was defiant, he did not act aggressively toward anyone. Ms. Marks shared that Student was more productive in a small group setting, had difficulty during independent work time, and required a lot of redirection for compliance. Ms. Marks reported that at the beginning of the year, Student performed solidly in math calculations, but by April 2014 struggled with math analysis and higher level thinking skills. She also shared that Student's reading fluency improved from 60 words per minute at the beginning of the year to 106 words per minute by April 2014. She did not share the type or level of passage on which Student's fluency was based. Ms. Marks stated that Student's lower grades, ones and twos, were based on missing class and homework assignments. Mr. Overton shared that ones and twos on Student's report card alone were not a good determination of whether Student was progressing. He stated that progress on goals was typically the main measure of whether a change in IEP services were needed, and that District did not believe that Student's behaviors required a significant change in services nor additional assessment beyond a behavior support plan. Ms. Ellerbe shared that Student's behaviors were not a major area of concern for District when it recommended transitioning Student into general education with resource specialist program services. She opined that Student's behaviors could be addressed by using existing school supports. Ms. Ambe shared

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<sup>4</sup> Because this procedural violation was not an identified issue at the prehearing conference and parental participation was not an issue with respect to this IEP team meeting, this fact was not considered by ALJ.

that Student was making progress on his reading fluency goal. She was hopeful he would meet his IEP goals by the annual IEP in May 2014. Neither Ms. Marks, nor Ms. Ambe had any documents showing Student's progress on his May 9, 2013 IEP goals.

14. Mother shared that she was displeased with Ms. Mark's classroom rule for all Students, which required each student who still behaved unacceptably after a few warnings to call his or her parent. Because of Ms. Marks' classroom rule, Student called home every day at one point, and averaged about 10 calls home each month during the 2013-2014 school year. The IEP team responded to Mother's displeasure by agreeing that when Student was disruptive or had behavioral issues, Student would be sent to the school office. If District determined that Mother needed to be called, District personnel would call instead of Student. Mother informed the IEP team for the first time that Student had been diagnosed with bi-polar disorder by his physician, and had been receiving counseling from a mental health clinic.

15. Mr. Leemhuis requested an "educationally related mental health services assessment" to determine if Student qualified for mental health services because Student had been diagnosed with ADHD and bi-polar disorder. In response to Mr. Leemhuis' request, District offered a functional behavioral assessment, an updated social emotional assessment, referral to a mental health agency for school based counseling services (which in District's view was a less intensive mental health evaluation than the "educationally related mental health services" assessment), and an academic assessment. Mr. Leemhuis stated that he would file for a due process hearing if District did not place Student in a non-public school, and provide an "educationally related mental health services assessment". Because of time constraints, the IEP team agreed to reconvene at Student's annual IEP in May 2014 to develop a preliminary behavior support plan and discuss other appropriate assessments and services.

16. On April 4, 2014, District sent an assessment plan to Mother for a functional behavioral assessment, providing proper notice and description of the assessment. Mother never signed the assessment plan authorizing District to conduct the functional behavioral assessment. Therefore, District did not conduct a functional behavioral assessment. The assessment plan did not include an academic or a social emotional assessment as discussed during the April 1, 2014 IEP team meeting. A referral to a mental health agency for school based counseling services was not required on an assessment plan, and therefore was not included on the April 4, 2014 assessment plan. District believed that Mother did not want District to conduct a social emotional assessment, academic assessment, a functional behavioral assessment, or any assessment other than an "educationally related mental health assessment." District did not conduct an academic assessment, or a social emotional assessment, and did not refer Student to a mental health agency for school based counseling services.

17. Student scored in the below basic level in science in the California Assessment of Student Performance and Progress standardized test in the Spring of 2014.

## MAY 1, 2014 IEP TEAM MEETING

18. The annual IEP team meeting was convened on May 1, 2014, and attended by Mother, Mr. Leemhuis, Mr. Overton, Ms. Ellerbe, Ms. Marks, Ms. Ambe, and school psychologist Manual Morales. Mr. Morales received a release from Mother to obtain records regarding Student's psychological and emotional issues. The meeting was very short and ended when District did not agree to offer an "educationally related mental health assessment" per Mother's and Mr. Leemhuis's request. Mother and Mr. Leemhuis believed that an "educationally related mental health assessment" was necessary because of Student's behavioral and social emotional needs, and that Student's mental health was the cause of his inability to behave properly and achieve academically. Mr. Leemhuis shared that Student had been receiving counseling from a community agency. District renewed its offer of a functional behavioral assessment, but did not believe an "educationally related mental health assessment" was needed as Student had not displayed extreme behaviors at school. He had not caused injury to others or himself, had not destroyed property, and was not disruptive to a point which rendered him incapable of redirection. Mr. Overton requested that the IEP team proceed with the annual IEP to discuss Student's academic goals so that the District could comply with the legal requirements of holding an annual IEP for Student. Mother and Mr. Leemhuis declined and ended the meeting.

### *2014-2015 School Year*

19. When the 2014-2015 school year started in August 2014, Student was placed in a general education class with resource specialist support pursuant to the May 9, 2013 IEP. He was at Enterprise Middle School and taught by Ms. Mancilla and Mr. Hoff<sup>5</sup> as co-teachers in his general education class. Ms. Mancilla taught language arts and social studies. Ms. Hoff taught math and science. Student received a combination of push-in (provided in the general education class) and push-out (provided in a separate classroom from the general education class) resource specialist support services instruction in math and English from Efuru Asadullah, and her assistant, Marvella Jones.

20. On September 3, 2014, Student grabbed his privates and made an obscene gesture behind Ms. Mancilla. This was a violation of acceptable school conduct. Student received a one day, in-house, suspension that required Student to attend school and perform work in a separate classroom from the rest of his sixth grade classmates. Mother was informed of the suspension and agreed it was appropriate.

21. Mother met with Ms. Mancilla after the obscene gesture incident, concluded that Ms. Mancilla could not forgive Student, and asked that Student be moved to another class. Shortly after this incident, Student was moved to another general education class with two different teachers, Juan Flores and Sharon Turner. Mr. Flores taught math and science, and Ms. Turner taught language arts and social studies. At some point while Student was in the Flores/Turner class, Ms. Jones' services included sitting next to and prompting Student

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<sup>5</sup> The parties did not provide information on these two teachers' first names.

for behavior compliance, and to perform classwork. Approximately a month after moving to the Flores/Turner class, Ms. Turner was transferred because of low enrollment at Enterprise Middle School. Mr. Flores became the only teacher for the entire general education class in all four subjects. Mother was informed by telephone of these teacher changes, which did not involve any change to Student's placement or services.

22. Student's report card from August 18, 2014 through October 10, 2014 showed that he received Fs and Ds for all academic classes, a C in physical education, and a B in band. Student enjoyed playing football. Student scored in the first percentile in his October 31, 2014 Standardized Testing and Reporting reading test. He was flagged as a child requiring urgent intervention in that area.

23. Student did not typically turn in homework assignments, or when he turned in his math homework, the answers would be incorrect. Mr. Flores observed that Student had a greater likelihood of completing his writing homework assignment if Student had help starting the homework assignment in class. If Student perceived he could be successful in completing the homework assignment, he would more likely complete it. Ms. Asadullah attributed Student's poor grades to his failure to turn in homework assignments, and not to comprehension because she observed that Student was capable of doing the same work at school that he was later asked to complete as homework. However, Mr. Flores attributed Student's problems in reading to comprehension difficulties and initiative, sharing that at times Student may want to read, but would not know how because he did not understand the vocabulary in a reading passage.

24. As to Mother's request for a non-public school, the consensus from District personnel was that the general education environment with appropriate supports, which could include push-in or pull-out resources specialist program supports, or some special day class instruction in District, was the least restrictive environment for Student. District personnel especially held this position considering how much Student enjoyed the non-academic benefits of socially interacting with his friends and other nondisabled peers. They all agreed that a nonpublic school would be too restrictive for Student because he had no extreme behaviors and socialized well and appropriately with the other students at Enterprise Middle School. Mr. Flores shared that Student was nice, not a bully, and enjoyed "horsing around" with the other students. Both Ms. Marks and Mr. Flores were consistent in their testimony that most students in their general education classrooms were performing at Student's academic level of below standard and far below standard, and that Student was only slightly behind some of his general education peers. Mr. Flores specified that Student was capable of doing the general education assignments if they were broken down into smaller steps, and if Student received increased one-on-one instruction from Ms. Jones. Mr. Flores specified that Student could benefit from Ms. Jones's instruction in all four academic subjects of English, math, science and history, and from enrolling in District's Read 180 program. District had the ability to provide the necessary services to help Student improve his behavior, reading and math difficulties.

25. Other than the draft October 31, 2013 IEP that reported Student's baselines and proposed goals for the next year, Mother never received any progress reports on Student's May 9, 2013 IEP goals. Mother was also not provided with any information on Student's progress from the beginning of the 2013-2014 school year through October 31, 2014 beyond report cards.

#### OCTOBER 31, 2014 IEP TEAM MEETING

26. District convened an IEP team meeting on October 31, 2014. Mother attended this IEP meeting with her advocate, James Peters, who first attended by phone, then in person. District administrator Carla Geary, Ms. Asadullah, Mr. Flores, Mr. Andrew, Ms. Jones, consultant Behaviorist Dian Tackett, and Student's therapist Donna Roque also attended. Before Mr. Peters arrived in person, Ms. Tackett and the IEP team discussed strategies to help Student succeed in the general education environment. They discussed Student's behaviors, goals, and strategies to help Student focus and stay on task. They discussed increasing support from Ms. Asadullah. Ms. Asadullah proposed a reading fluency, a reading comprehension, a writing, a behavior, and two math goals. These were based on her observations of Student, her review of his May 9, 2013 IEP, and his April 1, 2014 amendment IEP. Ms. Asadullah did not speak with Student's 2013-2014 teachers about his performance during the 2013-2014 school year, or review any documents from those teachers. Even though it was her responsibility to do so, Ms. Asadullah also did not record Student's progress on his May 9, 2014 IEP goals from the beginning of the 2014-2015 school year up to October 31, 2014.

27. The draft IEP goals for reading fluency indicated that Student partially met his reading fluency goal from the May 9, 2013 IEP. His baseline indicated that Student read 75 words per minute on a fourth grade fluency passage, which showed that he was able to read two more words than he did on May 9, 2013. The next year's proposed reading fluency goal was that by October 2015 Student would be able to read 100 words per minute on a fluency passage at his instructional level with appropriate pacing, intonation, and expression with 80 percent accuracy as measured by student fluency passages. Student had a new reading comprehension goal with the baselines indicating that he was able to answer comprehension question with 50 percent accuracy. This draft goal contained a comment that Student lacked patience, and required constant probing to answer questions. His next year's reading comprehension goal was that by October 2015, Student would be able to answer comprehension questions such as who, what, where, when, why and how on reading passages at his instructional level with 70 percent accuracy as measured by student work samples and assessment.

28. Student's writing goal baseline, which was the same as at the May 9, 2013 IEP team meeting, indicated that he did not meet his writing goal from the May 9, 2013 IEP to write a five paragraph essay with the correct format, spelling and punctuation. His next year's proposed writing goal was that by October 2015, Student would use an organizational strategy, such as a Venn diagram or tree map, to write a four-to-six sentence paragraph with

80 percent accuracy in two of three trials, as measured by work samples. This goal was reduced from the previous year's goal of five paragraphs.

29. Student's math goal baseline, which was the same as that at the May 9, 2013 IEP team meeting, indicated that he needed to be able to independently and confidently solve problems with multiple steps. Student had not met his math goal from the May 9, 2013 IEP to solve a mixture of 15 math problems with 85 percent accuracy. His next year's proposed math goal was reduced down from that. It stated that by October 2015, Student would be able to solve a mixture of 10 math problems with both single and multi-step solutions, and to determine how and when to break a problem into simpler parts with 70 percent accuracy as measured by work samples.

30. Student's second math goal baseline indicated that he had difficulty consistently telling time on a standard clock. His next year's proposed goal was that by October 2015, Student would be able to tell and write time from an analog clock to the nearest minute with 80 percent accuracy in two of three trials as measured by work samples. Student's ability to count money, bills, and change to 20 dollars and give change from the May 9, 2013 IEP was absent. There was no evidence whether Student had met this goal or whether it was inadvertently left off.

31. Student had a new behavior goal with the baseline indicating that he had difficulty remaining on task. His next year's proposed goal was that by October 2015, at least 70 percent of the time measured by teacher observations, Student would: (i) comply with teacher's directions and remain on task with less than three prompts when presented with an assignment at his instructional level; (ii) raise his hand and ask for clarification when needed; (iii) write directions and assignments in a notebook; (iv) not disrupt instructional time by conversing with other students; (v) not get out of his seat when bored or frustrated, and would instead explain such feelings to the teacher.

32. Although the IEP team proposed, discussed, and revised the draft goals with Mother at the October 31, 2014 IEP team meeting, Mother was concerned that District was proposing goals and making suggestions without information as to the source of Student's problems. The IEP team noted that Student did not complete his assignments, had behavior issues and sought attention from everyone. Further, Student was easily angered when he did not get his way, talked back, required frequent redirection, and needed extra time to produce neat written work. Student was independent in that he was able to take care of grooming and personal needs. Student was in good health, had normal speech patterns, and had adequately developed gross and fine motor skills. They noted that Student could write his first and last name, and other personal information. The IEP team also proposed advancing Student's triennial assessments.

33. There was no discussion of placement until Mr. Peters arrived. Mr. Andrew ended the IEP team meeting shortly after Mr. Peters arrived. Mr. Andrew felt that the meeting was no longer productive upon Mr. Peters' insistence that Student be placed at Kayne, where Student's sibling attended. Mr. Peters and Mother refused to consider any

other placement option, including general education, general education with resource specialist program services, and special day class. The IEP team meeting did not conclude with any offer of placement and/or services because they did not have an opportunity to do so when Mr. Peters and Mother insisted Kayne was the only acceptable placement. On November 1, 2015, District offered to reconvene the IEP team meeting on November 12, 2014, and a notice for the proposed reconvened IEP team meeting was provided to Mother.

### *Student's Education and Behavioral Needs*

34. Student contended that District failed to provide him a FAPE by ignoring his special education needs. Student's expert, Dr. David Paltin, assessed Student regarding his learning abilities. Dr. Paltin reviewed Student's educational and behavioral records, assessed Student on January 23, 2015, observed Student in District's classes in February 2015, and interviewed both Student and Mother in preparation of his report. Dr. Paltin's January 2015 assessment and February 2015 school observation confirmed his opinion that Student had complex needs and that Student's needs and difficulties in the 2013-2014 and 2014-2015 school years were similar to those Dr. Paltin observed in his assessment and observations. In his opinion, Student's pervasive challenges were not those which changed much within a two-year period.

35. Dr. Paltin had been a licensed psychologist since 1992, received his bachelor's degree in psychology, a master's degree in clinical psychology, and a doctorate degree in philosophy in clinical psychology. He managed child and adolescent health clinics, where he trained doctoral students and interns and performed psycho-educational, behavioral, and social emotional assessments for over 10 years. He also provided psycho-therapy services, taught various psychology courses, and was a consultant with the Orange County school districts for over ten years.

36. Dr. Paltin conducted a developmental neuropsychological testing, known as the NEPSY II, which consisted of a battery of cognitive processing and neurocognitive assessments related to the brain functions underlying learning and attention disorders. Dr. Paltin conducted the animal sorting subtest which tested Student's cognitive fluidity by requiring Student to sort animals. He found that Student had difficulties identifying different ways to sort the cards from his initial grouping. Student scored a two when the average was 10. Dr. Paltin conducted the auditory attention subtest which tested Student's listening skills, requiring Student to point to a target word "red" when he heard it from a list of words read to Student. Student scored a one when the average was 10 because he was unable to focus on the target word and pointed to the wrong words, which showed that Student could not understand, focus and follow through. However, Student scored a nine, which was within the average range, in the response set subtest that required him to listen and identify three target words amongst two pages of targets and distractors. This showed that Student was capable of sustaining enough attention to understand and apply the instructions given. The difference between the one and nine scores in Student's auditory attention and response set subtests showed that sometimes Student was capable of performing harder tasks if he could attend, but that his attention was inconsistent.

37. Dr. Paltin also conducted the comprehension of instruction subtest that tested Student's receptive language processing skills. This required Student to listen to instructions and point to answers with increasing difficulty, and Student scored a two when the average was a ten. Dr. Paltin noted that Student tried to focus on the instructions given, but pointed to the incorrect answers because he was not hearing or comprehending the instructions, which could translate to an inability to follow classroom instructions. His extremely low score in this area indicated that Student was not processing the information provided. Dr. Paltin conducted the orometer sequence subtest that measured Student's ability to produce speech and to segment words and language by repeating various words and phrases. Student scored below the second percentile, indicating that he had difficulty with speech mechanics, and/or underlying processing or production of language. For example, Student could have difficulties hearing/processing the words in his brain, and therefore could be incapable of replicating the sounds. Dr. Paltin suggested a speech and language assessment to determine the existence and extent of Student's speech mechanic difficulties. Dr. Paltin conducted the phonological processing subtest that tested Student's ability to break down and rearrange language segments. Student scored a one when the average was a 10, also indicating that Student had underlying language processing difficulties. The last subtest required Student to accurately depict a mechanical clock, with a circle and numbers indicating the time. Student scored a one when the average was a 10, indicating difficulty with executive skills of perception, comprehension and organization.

38. Dr. Paltin concluded that Student had neurocognitive processing differences affecting his ability to use and access language, to shift and transition smoothly during cognitive tasks, and to hear and follow directions accurately. While Dr. Paltin was not a qualified speech and language assessor, he was qualified to assess Student's language processing skills within the purview of his psycho-educational testing. He found that Student had significant difficulties in processing, understanding and responding to instructions, as well as language processing impairments.

39. Based on Student's low grades and behavioral difficulties at school and a prior bi-polar diagnosis (which was changed to mood disorder not otherwise specified by Student's physician), Dr. Paltin opined that District should have assessed Student in the areas of academic achievement, intellectual development, speech and language communication development, social emotional, and functional behavior by April 2014. District's proposed functional behavioral assessment would not provide a complete picture of Student's difficulties because cognitive and attention differences and language segmentation problems would not necessarily appear in a functional behavioral assessment. Without proper assessments, District was unable to identify Student's areas of difficulties and unable to provide proper interventions and develop appropriate goals.

40. Dr. Paltin concluded that the reading fluency goal in the draft October 31, 2014 IEP team meeting was inappropriate because it misidentified the target problem as reading speed without identifying the underlying processing difficulty that impacted Student's inability to read faster. Likewise, the reading comprehension goal in the October 31, 2014 draft IEP team meeting was inappropriate because it did not address

Student's underlying phonological difficulties that impacted Student's inability to understand what he was reading. Dr. Paltin also opined that Student's mood symptoms could be internalized and not surface in his external behaviors, such that it would not be observable, but could nonetheless affect Student's ability to learn.

41. Dr. Paltin recommended that Student receive a speech and language assessment, that Student be placed in a highly structured educational environment, specifically a non-public school such as Kayne, and that Student be provided with: (a) a positive behavioral support plan from the results of a functional behavioral assessment; (b) behavioral and counseling interventions to assist in self-control and emotional regulation; and (c) supports in solving pragmatic, organizational and task oriented problems. To allow Student to catch-up on his academic skills, Dr. Paltin opined that Student was capable of benefiting from two hours per week of academic tutoring by a teacher trained in working with students with special needs, and experienced in working with students with attention deficit and/or processing differences. Dr. Paltin recommended these services to teach Student how to handle processing difficulties and practice handling such difficulties with accommodating behaviors. To compensate Student for the lack of mental health services provided to Student in the last two years, Dr. Paltin also opined that Student could benefit from two hours per week of mental health therapy in the form of social emotional counseling to address Student's difficulties with pragmatic communication in the following three categories, with a specific time recommendation for each category to be determined based on Student's progress in each area: (a) training Student; (b) providing Student with socialization supports; (c) providing Student with opportunities to practice pragmatic communication. District did not disagree with Dr. Paltin's recommendations, and suggested that they could be provided by District.

42. Dr. Paltin had never visited Kayne, never visited any of Student's classes during the 2013-2014 school year, and was not familiar District's programs, services and supports. However, based on Student's needs, behaviors, and the placement and services Student received from District during the 2013-2014 and 2014-2015 school years, Dr. Paltin opined that Student was not receiving the interventions needed to address Student's special needs. Dr. Paltin did not believe general education placement during the 2013-2014 school year was appropriate for Student because of the higher student/teacher ratio and a faster instructional pace. His recommendation of non-public school placement was based on his understanding that a non-public school setting would provide Student with a comprehensive program to address Student's behavioral difficulties and mood issues. He did not recommend a special day class placement because based on his experience most special day classes focused on students with one area of need, and Student had multiple areas of needs including learning, behavior, attention and emotional functioning. However, Dr. Paltin was not aware of District's programs and had no knowledge of whether District's special day class could address Student's multiple areas of needs.

43. Further challenging District's IEP offers was Ms. Tackett. Ms. Tackett received a master's degree in special education, a bachelor's degree in psychology, a California teaching credential, a board certified behavior analyst certificate and was working

toward a doctorate degree in special education. She worked in special education for last 25 years in various capacities, including working for Kayne as a job coach and a classroom behavior assistant from 1989-1991. She also worked for Kayne as an autism consultant, supervisor and coordinator from 2000-2002, where her duties included developing IEP goals, attending IEPs, conducting functional behavioral assessments, training staff, and supervising staff who provided one-to-one services in the classroom and at home. She again worked for Kayne as an autism teacher in 2004 for seven months, two month spent teaching one summer school class of sixth, seventh, and eighth graders. She conducted approximately 75 functional behavioral assessments throughout her career for the purpose of creating a behavioral support plan.

44. Ms. Tackett attended the October 31, 2014 IEP team meeting and spoke with various IEP team members, reviewed Student's records, interviewed Mother and Student in January 2015, but did not conduct any formal testing of Student in preparation of her January 25, 2015 consultant's report. She visited Kayne approximate four times in the past 12 months, was aware that during the 2014-2015 school year, Kayne had one sixth grade class, and was familiar with Kayne's program and services. She did not visit any of Student's classes at District, did not observe Student socializing with his peers, was not familiar with District's staff's level of training, and was not familiar with District's programs and services.

45. Ms. Tackett opined that Student should be placed at Kayne because of the availability of multiple in-house psychologists, small classes, availability of trained staff for immediate response to behavioral outburst in a positive, non-punitive manner, availability of rooms for overwhelmed students to relax, availability of staff to role-play and pre-teach social skills to pre-empt negative behaviors, and capacity to structure an academic day to meet all of a Student's individual needs. Ms. Tackett also opined that Kayne was an appropriate placement because it allowed Student to be educated in an environment where all students had special needs and Student would not need to hide his disabilities. Further, Student required proper supports and strategies to succeed. She recommended the following to assist in behavior regulation: (a) task cards (which broke down instructions into smaller steps for Student); (b) assignment color coded notebooks, one for school and one to take home, to promote organizational skills; (c) direct instructions; (d) cognitive behavioral therapy; (e) self-monitoring techniques; (f) widget seat; and (g) manipulatives for fidgety behaviors. She did not know whether District was capable of providing these strategies, but noted that they were not provided in Student's May 9, 2013 IEP. Further, at the October 31, 2013 IEP team meeting, the IEP team members shared with her that gestural prompts such as a tap on the shoulder by an aide sitting next to Student was the only strategy District used to obtain Student's compliance with in-class proper behavior.

46. She opined that that District should have conducted a functional behavioral assessment in the 2013-2014 school year when his grades were falling and his behaviors were impeding his education to determine the cause of Student's behaviors. District could not identify proper intervention strategies because the IEP team never conducted a reinforcement inventory of Student to determine what motivated Student to behave properly. The purpose of a functional behavioral assessment was to identify problem behaviors to

develop a support plan that would teach Student to substitute negative behaviors with positive/appropriate behaviors. Behaviors and antecedents to behaviors needed to be identified, behavioral data needed to be collected to develop a hypothesis as to why the behaviors occurred so that ultimately a behavior support plan could be implemented. She noted that as of October 31, 2014, the IEP team had not taken any data tallying the nature of Student's improper behavior and the occurrence or frequency. Ms. Tackett also noted that District failed to document Student's progress on goals, which impacted its ability to develop proper goals for Student at the October 31, 2014 IEP team meeting.

47. Ms. Tackett opined that District's functional behavior assessment would have been invalid if a mental health assessment was not conducted first. Her overreaching interpretation of the order of the mental health and functional behavioral assessment was unsupported and unpersuasive. She extrapolated her interpretation from the instructions in functional behavioral assessments that provided that the assessor needed to review a student's records and obtain all pertinent information before conducting a functional behavioral assessment. Ms. Tackett's opinion that a mental health assessment would be relevant in providing a more complete picture as to the cause of Student's behaviors in addition to a functional behavior assessment was persuasive and considered. Although she opined that Mother could benefit from ADHD and bi-polar disorder trainings, she did not opine that the trainings were necessary for Mother's support of the implementation of Student's IEP.

48. Further in support of Student's contention as to District's failure to provide a FAPE was Donna Roque. Ms. Roque has a bachelor's degree in psychology and a master's degree in clinical psychology, and was qualified to diagnose children with ADHD by the California board of behavioral sciences. She worked for Exceptional Children's Foundation which was affiliated with Kayne. She had treated children with ADHD for over 15 years. Mother requested mental health services from Ms. Roque primarily to address Student's oppositional defiance, argumentativeness, constant use of profanity, rebellious behaviors and physical aggression toward his siblings, and to address Student's problems with attention and impulse control. On July 15, 2014, Ms. Roque conducted a full child/adolescent assessment of Student. This included assessing Student's psychological and social needs. She described Student as restless and fidgety, highly distractible with difficulties concentrating and focusing on one task. He required repeated redirection, and was irritable with mood shifts occurring without provocation. This could produce physical and verbal aggression. He sometimes had difficulty controlling mood. As a result of the assessment, Ms. Roque began treating Student in August 2014. She provided one hour per week of individual therapy to Student, to help increase attention span and coping skills, and to deal with his distractibility and mood irritability. She also provided family therapy on an as needed basis. During therapy, Ms. Roque addressed Student's social, emotional and educational areas of functioning across all settings, the home, community and classroom. Ms. Roque did not opine as to proper academic interventions for Student. She recommended that a school psychologist assess Student for learning deficits, including auditory processing disorder.

## MOTHER

49. Mother shared that Student had problems with school work, liked math, but refused to do writing assignments. She shared that Student was tall and strong, and that she had difficulty controlling him physically. She also shared that at home Student threw tables and chairs, hit his little brother, swore, cursed, broke windows at home and at a neighbor's house, and was generally verbally combative and argumentative. She wanted Student to leave District by the end of the 2013-2014 school year because Student was not doing well academically, and its offer of placement and services was inadequate to address Student's needs. Mother was unhappy with District's personnel communication style, stating that she communicated well only with the gym teacher because he was the only one who was positive about Student. She disagreed with District's opinion that Student's behaviors were not extreme because of the frequency with which Student was asked to call home because of a behavioral issue in Ms. Marks' classroom.

50. Student's triennial would be due on May 2, 2015.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework under the IDEA<sup>6</sup>*

1. This due process hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006)<sup>7</sup>; Ed. Code, § 56000, et seq.; and Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to 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); Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34

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

<sup>7</sup> All subsequent references to the Code of Federal Regulations are to the 2006 edition.

C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are 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, and which sets forth 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); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 200 [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.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “‘meaningful’ educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents or 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) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C) & (D); Ed. Code, § 56505, sub. (l).) At the hearing, the party filing the complaint, in this case Student, has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].)

*Issues 1(a), (b) and (c)--Parental Participation at the May 9, 2013 IEP Team Meeting*

5. In Issues 1(a), (b) and (c), Student contends that District committed a procedural violation when it prevented appropriate parental participation in the May 9, 2013 IEP team meeting by predetermining placement and services, improperly ending the IEP team meeting, and ignoring parental input. District contends that parent had the opportunity to meaningfully participate in the IEP decision making process.

6. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum, and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

7. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir.2004) 392 F.3d 840, 858.) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.)

8. An IEP is a "snapshot" and must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

9. A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484

superseded by statute on other grounds, as stated in R.B. v. Napa Valley Unified School Dist. (9th Cir.2007) 496 F.3d 932, 939.)

10. Student did not present any evidence establishing that Mother was denied the opportunity to meaningfully participate in the May 9, 2013 IEP team meeting by predetermining placement and services, improperly concluding the IEP team meeting, or ignoring parental input. After discussing with Mother all placement options, District recommended that Student be mainstreamed during the 2013-2014 school year with resource specialist program support. Mother had the opportunity to ask questions about the appropriateness of Student's placement and services. The school psychologist's unexcused absence at this IEP team meeting was inconsequential because the facts did not support that Student required the expertise or services of the school psychologist at this time. Student's contentions that District predetermined placement and services and ignored her input at the May 9, 2013 IEP team meeting were not supported by any evidence. There was also no evidence that the May 9, 2013 IEP team meeting was improperly concluded. Therefore, Student did not meet his burden of demonstrating that District predetermined placement and/or service, improperly concluded the IEP team meeting, or ignored parental input at the May 9, 2013 IEP team meeting.

*Issues 2(a), (b) and (c)--Parental Participation at the October 31, 2014 IEP Team Meeting*

11. In Issues 2(a), (b) and (c), Student contends that District committed a procedural violation when it prevented appropriate parental participation in the October 31, 2014 IEP team meeting by predetermining placement and services, improperly ending the IEP team meeting, and ignoring parental input. District contends that parent had the opportunity to meaningfully participate in the IEP decision making process.

12. Legal Conclusions 6 through 9 are incorporated by reference.

13. Student did not present any evidence establishing that District predetermined placement and services at the October 31, 2014 IEP, that the meeting was inappropriately ended, or that District ignored parental input. Mother was accompanied by Student's therapist and behaviorist, and Mr. Peters who participated by phone and in person, and had the opportunity to ask questions and voiced their opinions in the IEP team meeting. The IEP team discussed Student's progress and proposed goals, accepted Mother's input and proposed changes to the proposed goals. The IEP team also proposed increasing support from Ms. Asadullah, discussed developing strategies to help Student stay on task, and offered to advance the triennial assessments in response to Mother's concern over Student's academic performance and inappropriate behaviors. Although District disagreed with Mr. Peter's insistence that Kayne was the only appropriate placement for Student, such disagreement was not tantamount to a predetermination. District had discussed services for Student with Mother before Mr. Peter's arrival and was also prepared to discuss the continuum of appropriate placements for Student. However, when Mr. Peters insisted that Kayne was the only acceptable placement, refusing to discuss other placement options, Mr. Andrew appropriately concluded the IEP team meeting to reconvene on another date.

District did not violate any law by concluding the IEP at that point and reconvening it at a later time when the parties would be more amenable to discussion. Mother and Mr. Peters both expressed their opinions in the October 31, 2014 IEP team meeting even though District did not agree with placement. Therefore, Student did not meet his burden of demonstrating that District predetermined placement and/or service, improperly concluded the IEP team meeting, or ignored parental input at the October 31, 2014 IEP team meeting.

### *Issue 3— Timely IEPs*

14. In Issue Three, Student contends that District failed to timely conduct IEP team meetings because they were not held prior to the beginning of the 2013-2014 and 2014-2015 school years. District contends it timely held annual IEP team meetings, and it was parent and her attorney who refused to participate in the May 1, 2014 annual IEP team meeting.

15. An IEP team meeting must be held at least annually to review the pupil's progress, whether the annual goals are being achieved, and the appropriateness of placement. (Ed. Code, § 56343, subd. (d).) The meeting must be held at a mutually agreed-upon time and place. (Ed. Code, § 56341.5, subd. (c).) The Supreme Court has noted that the IDEA assumes parents, as well as school districts, will cooperate in the IEP process. (*Shaffer v. Weast, supra*, 546 U.S. at 53 [noting that “[t]he core of the [IDEA] ... is the cooperative process that it establishes between parents and schools”]; *see also, Patricia P. v. Bd. of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 486; *Clyde K. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 35 F.3d 1396, 1400, fn. 5, *superseded on other grounds by* Individuals with Disabilities in Education Act, Pub.L. No. 105-17, 111 Stat. 37 [rejecting a “my way or the highway” approach by parents' attorney].) Parents who refuse to cooperate in a district's efforts to formulate an IEP are generally not entitled to relief. (*See, e.g., Loren F. v. Atlanta Indep. Sch. Sys.* (11th Cir.2003) 349 F.3d 1309, 1312; *MM v. Sch. Dist. of Greenville Cty.* (4th Cir.2002) 303 F.3d 523, 535; *M.S. v. Mullica Tp. Bd. of Educ.* (D.N.J. 2007) 485 F.Supp.2d 555, 568 [denying reimbursement because parents failed to cooperate in completion of IEP]; *E.P. v. San Ramon Valley Unified School Dist.* (N.D.Cal., June 21, 2007, Case No. C05-01390) 2007 WL 1795747, pp. 10-11.). When parental non-cooperation obstructs the process, courts usually hold that violations do not deny the pupil a FAPE. (*See C.G. v. Five Town Community School Dist.* (1st Cir. 2008) 513F.3d 279.)

16. District held Student's annual IEP team on May 9, 2013, where Student's progress, goals and appropriateness of placement and services were discussed, with which Mother agreed and signed. This May 9, 2013 IEP governed Student's placement and services for the 2013-2014 school year. There was no legal requirement that another IEP team meeting be held before the commencement of the 2013-2014 school year, or evidence demonstrating that an IEP team meeting was needed at that time. District also held an IEP team meeting on April 1, 2014 pursuant to Mother's request where Student's academic progress, behaviors and needs were discussed. The IEP team agreed to continue discussions to May 1, 2014, Student's annual IEP, to discuss assessment, services and development of an appropriate behavior support plan after assessment. The annual IEP team meeting was

timely convened on May 1, 2014, but Mother and Mr. Leemhuis refused to participate and concluded the meeting when District did not agree to their request for an “educationally related mental health assessment”. Student did not present any evidence supporting that after terminating the May 1, 2014 annual IEP meeting, Student was willing to reconvene and discuss placement and services before October 31, 2014. After being uncooperative and refusing to complete the May 1, 2014 annual IEP, Student could not fault District for not holding and completing the May 1, 2014 annual IEP. Student did not meet his burden by the preponderance of evidence that District had committed a procedural violation by not timely convening annual IEP team meetings during the 2013-2014 and 2014-2015 school years.

#### *Issue 4 –Assessments and Appropriate Assessment Plan*

17. Student contends he was denied a FAPE because District failed to conduct a psycho-educational assessment, a mental health assessment, a functional behavioral assessment, and a speech and language assessment when he was not progressing. Student also contends he was denied a FAPE because District failed to offer an appropriate assessment plan on April 4, 2014, when District offered only a functional behavioral assessment instead of assessments in all areas of Student’s suspected disabilities. District contends that it properly offered only a functional behavior assessment plan on April 4, 2014 offering to assess Student’s functional behavior at school as a first step to identify factors impacting Student’s education when Student’s triennial assessments were not due until May 2, 2015.

18. Legal Conclusions 8 and 9 above are incorporated by reference.

19. Assessments are required to determine eligibility for special education, and what type, frequency and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child’s educational or related services needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

20. A school district’s failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.)

21. To assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).)

The assessment plan must be understandable to the student, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) A school district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The proposed written assessment plan must contain a description of any recent assessments that were conducted, including any available independent assessments and any assessment information the parent requests to be considered, information about the student's primary language and information about the student's language proficiency. (Cal. Code Regs., tit. 5, § 3022.) Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(B)(i); Ed. Code, § 56321, subd. (a)(2).)

22. A school district cannot eschew its affirmative duties under the IDEA by blaming the parents. (*Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055.)

#### PSYCHO-EDUCATIONAL AND FUNCTIONAL BEHAVIORAL ASSESSMENTS

23. In 1990, California passed Education Code section 56520, et seq., which was commonly known as the Hughes Bill, concerning behavior interventions for pupils with serious behavior problems.<sup>8</sup> Effective July 1, 2013, the Hughes Bill was repealed upon the passing of Assembly Bill 86 (AB 86). Under AB 86, an educational agency is no longer required to conduct a functional analysis assessment or create a behavior intervention plan for students exhibiting "serious behavior problems." Instead, the educational agency must follow the IDEA which provides that IEP teams must address behavior when it impedes a student's or other students' access to education. (Ed. Code, § 56520, amended.) In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324; Ed. Code, § 56341.1, subd. (b)(1).) This type of behavior intervention is referred to as a behavior services plan in California, although there is no statute or regulation that uses that term. A person recognized by the National Behavior Analyst Certification Board as a board certified behavior analyst may, but is not required to, conduct behavior assessments and provide behavior intervention services for individuals with exceptional needs. (Ed. Code, § 56525, subs. (a) and (b), amended.)

24. Student's triennial evaluations were not due until May 2, 2015. Because Student did not exhibit any serious behavior problems and was actually improving in the general education setting, District's need to assess was not triggered at the May 9, 2013 IEP team meeting. However, after the change of Student's placement to a general education class with special education supports, Student failed to progress academically and made minimal progress toward his goals, which District had been aware of by January 20, 2014, the end of the second quarter of the 2013-2014 school year. At that time, District should have

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<sup>8</sup> The Hughes Bill was used in analyzing Student's behavioral needs before July 1, 2013.

commenced the process of conducting a psycho-educational and a functional behavioral assessment to find out what was impeding Student's educational performance. District personnel's testimony that Student made progress towards his IEP goals during the 2013-2014 school year was not credible when balanced in light of overwhelming evidence of Student's low grades, minimal progress on goals and repetitive disruptive class behaviors impeding his education.

25. District should have commenced the process of assessing Student's psycho-educational and behavioral function no later than January 20, 2014. Although Mother refused to consent to a functional behavior assessment when District offered it in the April 4, 2014 assessment plan, this did not excuse District from providing Mother with a plan to assess Student's academic ability and behaviors by January 20, 2014. District's failure to do so deprived Student of educational benefit in that he continued to be unsuccessful and showed little to no improvement both behaviorally and academically. In addition to his poor report card grades, Student scored in the below basic level in science in the California Assessment of Student Performance and Progress standardized test in the Spring of 2014, and he scored in the one percentile in his October 31, 2014 Standardized Testing and Reporting reading test, and was flagged as a child requiring urgent intervention in that area. His right to a FAPE was impeded because the IEP team did not have the necessary information to develop proper intervention strategies for him to learn. This absence of data also substantially interfered with District's ability to develop appropriate goals, and its offer of proper placement and services at the October 31, 2014 IEP team meeting because District had no understanding what Student's educational needs were. Student met his burden by the preponderance of evidence that District committed a procedural violation by not timely assessing Student's psycho-educational and functional behavioral needs, and that the violations resulted in a FAPE denial as Mother lacked information to appropriately participate in the educational decision making process, and Student was denied an educational benefit because District did not know what he required to receive a FAPE.

#### MENTAL HEALTH ASSESSMENT

26. When Mother called an IEP team meeting on April 1, 2014, and informed District of Student's bi-polar disorder and requested an "educationally related mental health assessment", District was objectively reasonable in offering a social emotional assessment and a referral to a mental health agency for Student to receive school based counseling services. Student had not exhibited any observable mental health needs or any extreme behaviors triggering the need for an in-depth mental health evaluation at that time, and the evidence did not support that District was aware of Student's mental health needs before April 1, 2014. This was supported by Dr. Paltin's opinion that Student's bi-polar/mood disorder would not necessarily exhibit itself with observable symptoms. District's contention that they believed Mother was only interested in obtaining an in-depth "educationally related mental health assessment", instead of the less comprehensive referral to a mental health agency for Student to receive school based counseling services did not excuse District from not commencing the social emotional assessment process by offering it in the April 4, 2014 assessment plan, and not making a mental health agency referral shortly after the April 1,

2014 IEP. Despite recognizing Student's need for a social emotional assessment and a mental health agency referral, District never assessed him in these areas.

27. District should have commenced the process of assessing Student's social emotional needs by including it on the April 4, 2014 assessment plan, and should have provided him a mental health referral for school based counseling shortly after April 1, 2014, when Mother informed District of Student's bi-polar diagnosis and asked for an "educationally related mental health assessment". Student's mental health diagnosis together with the District's knowledge that Student's behaviors were impeding his education, and that he had made minimal progress with his grades and IEP goals should have triggered assessment in the area of mental health to determine if it was also an area affecting his education. District's failure to do so substantially interfered with Mother's ability to participate in the decision-making process at the October 31, 2014 IEP team meeting because she did not have a complete picture of Student's deficits and needs. Further, District did not have the necessary information, specifically if mental health impacted Student's educational needs, to address Student's special needs so he could progress and benefit from his education. Student met his burden by the preponderance of evidence that District committed a procedural violation by not timely assessing Student's mental health needs by April 2014, and the violations resulted in a FAPE denial as Mother lacked information to appropriately participate in the educational decision making process, and Student was denied an educational benefit because District did not know what he required to receive a FAPE.

#### SPEECH AND LANGUAGE ASSESSMENT

28. A child who demonstrates difficulty understanding or using spoken language, to such an extent that it adversely affects his or her educational performance and such difficulty cannot be corrected without special education services, has a language or speech impairment or disorder that is eligible for special education services. (Ed. Code, § 56333.)

29. Student did not present any evidence supporting that District knew or should have known that Student had any speech and language difficulties triggering assessment until Dr. Paltin recommended it in January 2015. Because Dr. Paltin's opinion that Student could have language processing difficulties which required assessment was shared with District after the relevant period in the complaint, and was the only purported basis of District's knowledge of Student's speech and language difficulties, Student did not meet his burden of demonstrating that District had committed a procedural violation by not assessing Student in the area of speech and language.<sup>9</sup>

30. In conclusion, Student met his burden by the preponderance of evidence that District failed to timely assess in the area of psycho-educational functioning, functional behavior, and mental health, but did not meet his burden of demonstrating that District failed to timely assess in the area of speech and language. Further, District's April 4, 2014

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<sup>9</sup> This decision makes no finding whether District needs to conduct a speech and language assessment after October 31, 2014.

assessment plan was inappropriate because it did not include assessments in all areas of Student's suspected disabilities, including psycho-educational functioning, functional behavior, and mental health.

*Issue 5(a)(b)—Appropriate Goals*

31. Student contends that the goals were improper because they were the same each year and District did not properly monitor Student's progress to develop appropriate goals for Student. District contends that the goals were proper because they measured Student's progress through work samples and reading fluency charts kept by teachers.

32. Legal Conclusions 8 and 9 above are incorporated by reference.

33. An IEP must contain 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)(ii); Ed. Code, § 56345, subd. (a)(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)(viii); 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. (c).) Inappropriate goals are procedural violations of the IDEA. (*Park v. Anaheim Union High School Dist.*, *supra*, 464 F.3d at p. 1031).

*Issue 5(a)—Goals at the May 9, 2013 IEP Team Meeting*

34. There was no evidence supporting that the goals appearing in the May 9, 2013 IEP were inappropriate. While the May 9, 2013 IEP did not contain a behavioral goal, there was not enough evidence presented that at the time of the May 9, 2013 IEP Student required a behavioral goal. Instead, the evidence presented showed that Student was capable of being redirected and his disruptive behaviors had decreased in the general education environment. Therefore, Student did not meet his burden of demonstrating that District failed to develop appropriate goals for the 2013-2014 school year at the May 9, 2013 IEP team meeting.

*Issue 5(b)—Goals at the October 31, 2014 IEP Team Meeting*

35. The draft goals from the October 31, 2014 IEP team meeting were inappropriate because they were not based on an accurate measure of Student's progress. The draft goals on the October 31, 2014 draft IEP were similar to those on the May 9, 2013 IEP, with the exception of one additional behavioral goal. While the draft IEP goals stated baselines and goals for the next year, there was no persuasive evidence that District accurately monitored Student's progress on the May 9, 2013 IEP goals. District did not include Student's goal progress reports in either the May 9, 2013 IEP or the April 1, 2014 amendment IEP. Therefore, District did not have the necessary information to produce accurate baselines and appropriate goals for Student and did not know the extent to which

Student's behaviors had impacted Student's education in the 2013-2014 school year. Since District stated IEP goal progress as the main measure of whether a change of Student's IEP services was necessary, failure to maintain accurate, accessible records of Student's IEP goal progress impeded Student's right to a FAPE because the IEP team did not have accurate data to develop an appropriate IEP. Further, Student's experts credibly established District's failure to take data on Student's behaviors prevented District from proposing appropriate goals. Also, it was irrelevant that the October 31, 2014 IEP was only a draft, since the proposed goals appearing on the draft was the basis for discussion of the appropriate placement and services at the meeting. Therefore, Student met his burden by the preponderance of evidence that District failed to develop appropriate goals for Student for the 2014-2015 school year at the October 31, 2014 IEP team meeting, and that failure impeded Student's right to a FAPE.

36. Student did not meet his burden of demonstrating that District committed a procedural violation by failing to develop appropriate goals for the 2013-2014 school year. However, he demonstrated by the preponderance of evidence that District failed to develop appropriate goals for the 2014-2015 school year at the October 31, 2014 IEP team meeting, and that failure substantially interfered with Student's access to a FAPE.

#### *Issue 6—Parent Trainings*

37. Student contends that District failed to offer parent trainings on ADHD, bipolarism and related disorders. District contends that Mother and her legal representatives never asked for those trainings.

38. A school district is required to provide parent trainings when they assist parents in understanding the special needs of their child, provide parents with information about child development, *and* help parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP. (34 C.F.R. § 300.34(c)(8); Ed. Code, § 56363, subd. (b)(11) (Emphasis added).

39. Student did not present any evidence that parent trainings on ADHD, bipolarism and related disorders were educationally necessary to support Student's IEP implementation. District was not legally required to provide such trainings without a showing that they helped Mother acquire the necessary skills to support the implementation of Student's IEP. Student did not meet his burden of demonstrating that District's failure to offer parent trainings was a FAPE denial.

#### *Issue 7—Failing to Offer Behavioral Services*

40. Student contends that District should have provided him with additional behavioral services because his disruptive behaviors impeded his ability to learn. District contends that Student was provided with the proper behavioral services at all times because he was capable of redirection and did not exhibit any extreme behaviors requiring additional services. District further contends that it offered a functional behavior assessment on

April 4, 2014, to develop a behavior support plan and provide other behavioral services, but was unable to proceed because Mother did not consent.

41. When Student exhibited increased disruptive behaviors during the first quarter of the 2013-2014 school year, District failed to take appropriate steps to address the disruptive behaviors. District failed to monitor Student's behaviors, taking data to identify strategies to address the behaviors, especially as he moved from a special day class to a general education class. By the end of the second quarter of the 2013-2014 school year, District should have taken steps to provide additional behavioral supports beyond mere redirection and preferential seating as the evidence established that Student's behavior was impeding his ability to learn based on information from District personnel.

42. The only step District took to address Student's disruptive behaviors was requesting Mother's consent to a functional behavioral assessment on the April 4, 2014 assessment plan. When Mother did not consent to the functional behavioral assessment, District did not take additional steps to offer a FAPE to Student knowing that the behavioral approaches specified in Student's May 9, 2014 IEP had been inadequate. As of October 31, 2014, District did not offer appropriate behavioral supports and did not implement a behavioral strategy for Student to access and benefit from his education. Mother's refusal to consent to the functional behavioral assessment did not absolve District from providing Student a FAPE. Student was denied a FAPE from January 20, 2014 through October 31, 2014 because despite knowing that the behavioral supports of redirection and preferential seating in Student's IEP were ineffective, District never addressed the behaviors that impeded his access to a FAPE.

43. Student met his burden by the preponderance of evidence that District failed to offer appropriate behavioral services from January 20, 2014 to October 31, 2014.

#### *Issue 8—Unreasonable Suspension*

44. Student contends that his suspension for making an obscene gesture during class was a manifestation of his disability, and District was unreasonable in suspending him without a manifestation hearing. District contends that a one-day suspension was reasonable and did not require a manifestation hearing.

45. A "change of placement" is a fundamental change in, or elimination of, a basic element of a pupil's educational program. The removal of a special education student from his placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(i).) When a school district changes the placement of a student receiving special education services for specific conduct in violation of a student code of conduct, the student is entitled to certain procedural protections. The district is required to conduct a review to determine if the conduct that is subject to discipline is a manifestation of the student's disability. This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) Under California Education Code section 48915.5, an individual with exceptional needs may be suspended or expelled from school in accordance with title 20 of

the United States Code, section 1415(k). The IDEA prohibits the expulsion of a student with a disability for misbehavior that is a manifestation of the disability. (20 U.S.C. § 1415(k); 34 Code of Fed.Reg. § 300.530, *et seq.*; *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470.)

46. Here, Student's one-day suspension for unacceptable conduct did not constitute a change of placement warranting a manifestation hearing. Student did not meet his burden of demonstrating that his one-day suspension was a FAPE denial.

#### *Issue 9—Placement at Kayne*

47. Student contends that he was denied a FAPE because District did not offer placement at Kayne. District contends that Kayne was inappropriate because a non-public school was not the least restrictive environment for Student.

48. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education, supra*, 993 F.2d 1031, 1041.)

49. In determining the educational placement of a child with a disability a school district must ensure that: (1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; (2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; (3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; (4) in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.) "Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services" and that providing a continuum of alternative placements includes "the alternative placements listed in the definition of special education" and "supplementary services" to be provided in conjunction with regular class placement." 34 C.F.R. § 300.115. (See *E.F. and J.F. v. New York City Department of Education* (E.D.N.Y., August 19, 2013, No. 12-CV-2217(MKB)) 2013 WL 4495676 and *A.D. v. New York City Department of Education*, (S.D.N.Y., March 19, 2013,

No. 12-CV-2673 (RA)), 2013 WL 1155570 , \*8 [Once the district determined the appropriate least restrictive environment where student could be educated, it was not obligated to consider and inquire into more restrictive options such as nonpublic programs].)

50. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate: (1) that children with disabilities are educated with non-disabled peers; and (2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) 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 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3*, *supra*, 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette’s Syndrome].) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.*, *supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

51. There was no evidence showing that a non-public school, or specifically Kayne, was the appropriate placement for Student. The highly structured, educational environment with behavioral supports and counseling interventions that Dr. Paltin and Ms. Tackett opined as appropriate for Student could be provided by District. The least restrictive environment required that Student be educated with his non-disabled peers unless his disability was such that it would be unachievable with proper supports and services. Neither Dr. Paltin’s, nor Ms. Tackett’s reasons for concluding that Kayne was the appropriate placement for Student were persuasive. Dr. Paltin’s recommendation of Kayne over District’s programs and services was not persuasive because he was not familiar with either Kayne’s or District’s programs. Ms. Tackett’s recommendation of Kayne so that Student could be in an environment where every student had special needs contradicted the basic tenor of the least restrictive environment stricture. Mother’s preference for Kayne was also unpersuasive because it was based on Student’s sibling’s attendance there, and District’s failure to provide Student with the necessary supports to access his education in the 2013-

2014 and 2014-2015 school years. Student failed to produce sufficient evidence supporting why Kayne was the appropriate, least restrictive placement for Student beyond parental preference.

52. While Student could have mental, behavioral, and processing issues that impacted his education, these issues could be addressed by the continuum of placements and services available at a District education environment with more assistance and supports. Another benefit for remaining in District was that Student had friends and enjoyed the non-academic benefits of socializing with the other general education students there. Placement at a non-public school would be more restrictive and would unreasonably deny Student exposure to typical children, especially when all evidence show that Student could be educated partially in the general education environment if he was properly assessed and provided with appropriate special education supports and services. Upon consideration of the academic and non-academic benefits of being in a general education environment, even for part of the school day, neither Kayne, nor a non-public school, would be the appropriate least restrictive environment for Student.

53. Student did not meet his burden of demonstrating that District's failure to offer placement at Kayne was a FAPE denial.

## REMEDIES

1. Student requests independent assessments and compensatory education to compensate for the assessments and services Student would have received if District provided a FAPE. District contends no remedies are appropriate because Student did not meet his burden of persuasion on any issue.

2. Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington v. Department of Education* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996, 85 L.Ed. 2d 385].) In addition to reimbursement, school districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p.1496.)

3. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

4. Student requested independent assessments and compensatory education, in the form of intensive one-to-one academic instruction from trained teachers. Student demonstrated that District failed to timely assess in the areas of psycho-educational functioning, functional behavior, and mental health, which rendered District unable to identify Student's areas of difficulties and unable to provide proper interventions and goals resulting in a FAPE denial.

5. Based on the above, District shall fund an independent psycho-educational assessment of Student to determine the appropriate placement and services for Student. Additionally, District shall conduct a functional behavioral assessment and, at its discretion, either conduct or refer to another agency to conduct a mental health assessment of Student to determine if he needs any mental health services to receive a FAPE. Parent's refusal to consent to District's offered functional behavioral assessment was considered in ordering a District conducted functional behavioral assessment, in lieu of an independent functional behavioral assessment. The agency that conducts the mental health assessment of Student shall determine the type and amount of mental health therapy Student requires, if any, to access his education. Because Student did not exhibit any observable mental health symptoms at school, District was not aware that Student had mental health issues until the April 1, 2014 IEP team meeting, and there was no evidence that Student's mental health needs suggested by Dr. Paltin were educationally related, no compensatory mental health therapy shall be awarded.

6. Based on the period during which District knew that Student's behaviors were impeding his access to education from January 20, 2014 through October 31, 2014, Student is awarded a total of 72 hours of one-to-one academic instruction from a non-public agency, with a credentialed teacher experienced in teaching students with ADHD and/or language processing difficulties. Because of the extent of FAPE denials to Student, no time was deducted for the portion of time when school was not in session in calculating the compensatory academic tutoring hours of approximately 36 weeks, multiplied by two hours per week yielding 72 hours.

7. No evidence was provided regarding appropriate providers. However, to afford parent the flexibility to use the compensatory hours at times when school is not in session, use of a certified non-public agency to provide the services is reasonable. In recognition of parent choice and flexibility in using the hours, District will not be responsible for the cost of transporting Student to access the compensatory hours. This block of 72 hours of non-public agency, one-to-one academic tutoring will expire if not used by December 31, 2016.

## ORDER

1. Within 20 days of the date of this decision, Student shall communicate to District the name of the assessor Student has chosen to conduct the independent psycho-educational assessment. Within 30 days of receiving Student's preference of a psycho-

educational independent assessor, District shall arrange for direct payment with the independent assessor. Within 30 days after District's receipt of the independent assessor's report, District shall convene an IEP team meeting to determine placement, goals and services as appropriate for Student in accordance with the IDEA. Within 10 days of this decision, District shall commence to conduct a functional behavioral assessment pursuant to the April 4, 2014 assessment plan and, at its discretion, either conduct or refer to another agency to conduct a mental health assessment of Student to determine if he needs any mental health services to access a FAPE. District shall convene an IEP team meeting in accordance with the IDEA after its assessments.

2. Within 20 days of the date of this decision, Student shall communicate to District the name of the non-public agency Student has chosen for the one-on-one academic tutoring services. Within 30 days of receiving Student's preference, District shall contract with the non-public agency of Student's choice to provide 72 hours of one-to-one academic tutoring services that can be used even during times when school is not in session.

3. Any compensatory education time awarded by this Decision must be used by December 31, 2016, or it will be forfeited.

4. All other requests for relief are 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 was the prevailing party in part as to Issues 4(a), 4(b), 4(c), 5(b), and 7, and District was the prevailing party as to Issues 1(a)(b)(c), 2(a)(b)(c), 3, 4(d), 5(a), 6, 8 and 9.

