

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SACRAMENTO CITY UNIFIED  
SCHOOL DISTRICT.

OAH Case No. 20141255

**DECISION**

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on November 21, 2014, naming Sacramento City Unified School District (Sacramento City) as respondent. On December 1, 2014, this case was consolidated with *Sacramento City Unified School District v. Student*, OAH Case No. 2014080831 and the consolidated matter was continued for good cause. Prior to the first day of hearing, Sacramento City dismissed its portion of the case and the matter proceeded to hearing on Student's case only.

Administrative Law Judge Joy Redmon heard this matter in Sacramento, California, on April 13, 14, 16, 21, 22, 23, 28, and May 1, 5, and 6, 2015.

Attorney Richard F. Ruderman represented Student. Student's mother attended each hearing day.

Attorney Sarah Garcia represented Sacramento on all hearing days. Attorneys Jessi Gasbarro and Ryan Tung also represented Sacramento at various times throughout the hearing. Becky Bryant, Sacramento's Director of Special Education, attended the hearing on Sacramento City's behalf.

A continuance was granted and the record was left open until Monday, June 1, 2015, for the parties to file written closing arguments. Written closing arguments were received, the record was closed, and the matter was submitted for decision.

## ISSUES<sup>1</sup>

ISSUE 1:<sup>2</sup> Did Sacramento City Unified School District deny Student a free appropriate public education, both procedurally and substantively, during the 2012-2013 school year, from November 21, 2012, through the 2013 extended school year by failing to:

- a. make a clear written IEP offer;
- b. provide adequate present levels of performance data about Student;
- c. offer or provide measurable goals in all areas of need, including social-emotional functioning, behavior, executive functioning, reading comprehension, and written expression;
- d. appropriately address Student's executive functioning deficits;
- e. offer or provide appropriate mental health services;
- f. offer or provide appropriate behavior supports and services;
- g. offer or provide appropriate speech services including a structured social skills program;

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<sup>1</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.) Additionally, during the hearing the parties informed the ALJ that they had reached a settlement agreement regarding Sacramento City's alleged failure to conduct legally compliant assessments in the areas of academic achievement, executive functioning, social emotional functioning, a functional behavior assessment, an occupational therapy assessment, and a speech and language assessment that assessed Student's social skills. Accordingly, Student withdrew assessment issues related to the forgoing and the remaining issues were renumbered accordingly.

<sup>2</sup> Both contention (a) regarding the offer's adequacy, and contention (b) regarding Student's then present levels of performance, are procedural allegations arising at the time Student's individualized education program was offered. Student's operative IEP from November 2012 through January 2013 was offered in February 2012; therefore, any procedural allegations regarding that offer are outside of the statute of limitations period and not addressed in this decision. These allegations are addressed for the 2012-2013 school year regarding Student's January 29, 2013 IEP.

- h. offer or provide an appropriate placement in the least restrictive environment; and
- i. Implement the accommodations and modifications contained in Student's IEP's?

ISSUE 2: Did Sacramento City Unified School District deny Student a FAPE, both procedurally and substantively, during the 2013-2014, and 2014-2015 school years, from February 20, 2014, through the extended school years by failing to:

- a. conduct a legally compliant mental health assessment;
- b. make a clear written offer in the March 20, and May 29, 2014 IEP's;
- c. offer or provide measurable goals in all areas of need, specifically social-emotional functioning, behavior, executive functioning, reading comprehension, and written expression;
- d. appropriately address Student's executive functioning deficits;
- e. offer or provide appropriate mental health services;
- f. offer or provide appropriate behavior supports and services;
- g. offer or provide appropriate speech services including a structured social skills program;
- h. offer or provide an appropriate placement in the least restrictive environment; and
- i. implement the accommodations and modifications contained in Student's IEP?

### SUMMARY OF DECISION

This Decision holds that Sacramento City offered and provided Student a FAPE regarding all contested components of her IEP's during the 2012-2013 school year and extended school year. The decision further holds that her unique needs changed significantly during the 2013-2014 school year. Sacramento City then denied Student a FAPE by failing to conduct a legally compliant, educationally related mental health assessment in 2014;

failing to make a clear IEP offer regarding middle school placement; failing to make an offer that met her unique mental health needs; and failing to offer Student extended school year services for the 2014 extended school year, and an appropriate program for the 2014-2015 school year.

Student established that to remedy these denials, she is entitled to an independent educational evaluation to accurately identify her mental health needs, reimbursement for tuition at Springstone, a nonpublic school, for one school year, and living expenses (exclusive of television and internet) from August 14, 2014, through November 2014, and mileage reimbursement for one round trip per week during that time period. Student's other claims for relief are denied.

## FACTUAL FINDINGS

### *Jurisdiction and Background*

1. Student is a 13-year-old girl who resided in the jurisdictional boundaries of the Sacramento City Unified School District while attending elementary school from kindergarten through sixth grade, which she attended during the 2013-2014 school year.<sup>3</sup>

2. Student is eligible for special education and related services under the category of autistic-like behaviors, and received services under an IEP continuously from kindergarten through sixth grade.

3. Student's elementary school of residence was Theodore Judah but she attended general education classes at David Lubin elementary school from kindergarten through fifth grade. Pursuant to her IEP's she received occupational therapy, specialized academic instruction, speech and language services, and behavior intervention services (both consultation and a one-to-one aide) provided by Learning Solutions, a non-public agency.

4. At the beginning of sixth grade during the 2013-2014 school year, Student was enrolled in an independent study charter school program. On February 20, 2014, Student was reenrolled at David Lubin where she attended through the end of sixth grade. The time Student attended the charter school is not at issue in this case.

5. Student's parents unilaterally placed Student at Springstone, in Lafayette, California for the 2014-2015 school year and had her repeat sixth grade. Springstone is a California certified non-public school and is located approximately 75 miles from Student's Sacramento home.

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<sup>3</sup> Specific residency findings for the 2014-2015 school year are addressed below.

6. In approximately August 2014, Parents rented an apartment near Springstone where Student stayed with one parent from Sunday through Thursday while the other parent stayed in Sacramento with Student's older sister. Student and the parent spending the week with Student in Lafayette returned to Sacramento for weekends and holidays.

7. In November 2014, Parents closed escrow on a home near Springstone and outside Sacramento City's boundaries. Shortly thereafter, they began remodeling that home and intended to relocate there permanently during the summer of 2015, after Student's sister graduated from eighth grade and Father moved his business to that area. They intended to rent their home in Sacramento after they moved into the new home.

### *2012-2013 School Year-Fifth Grade*

#### STUDENT'S NEEDS

8. Sacramento City conducted Student's triennial assessment in December 2012 and January 2013, while Student was in the fifth grade. Consistent with prior assessments, Student's cognitive ability tested in the average range (standard score 98, which falls within the 45th percentile). Student's academic achievement was assessed using the Woodcock Johnson III Test of Achievement. She obtained cluster scores in the average range in all areas except written expression which was in the low average range.

9. Student's fifth grade teachers were Michele Rossi for math, Betsy Ronsheimer for homeroom, and English language arts. They both described her as having a superior vocabulary compared to her typically developing peers. She frequently raised her hand and participated in class. Student had difficulty with verbal multi-step instructions and shifting from topic to topic. Her overall academic achievement in all subjects placed her in the middle to just below the middle of her peers. Both teachers established that Student's academic performance was commensurate with fifth grade standards and their expectations. Student's cognitive and academic scores, as measured during her triennial assessment, were consistent with Student's demonstrated ability in the classroom as described by her teachers.

10. Student had age appropriate phonemic and spelling skills, but struggled with reading fluency. She did well with memorized or rote tasks, but struggled with contextual learning and being able to extend rote knowledge to inferential thinking.

11. Student's triennial assessment also revealed needs in the area of executive functioning. Student had challenges with organization and task completion. Her difficulty with organization extended to written language where she often required visual cues and prompts to start and complete written assignments.

12. Behaviorally, Student was generally polite and happy at school, but displayed frustration when confronted with non-preferred tasks or abrupt transitions. She also exhibited behaviors associated with autism that impacted her social interaction with typically developing peers. She had language and communication needs, primarily difficulty engaging in reciprocal conversation; using “who,” “what,” “when,” and “where” questions; and understanding others’ perspectives. Student was socially included by her typically developing peers as a friend and playmate at school, but had limited peer-initiated social contact outside of school. To combat this, Parents enrolled Student in numerous social activities that included competing on her neighborhood swim team, and participating in a running club called Girls on the Run.

13. Student had a heightened sense of fairness that led to perseveration and rigidity. Student also exhibited behaviors consistent with attention deficit hyperactivity disorder. Specifically, she was distracted and off task at times. Student had the need for sensory breaks to help her regulate or re-set behaviors before completing a non-preferred task. Student was able to follow classroom routines and rules with prompting.

14. Parents reported that Student became angry and frustrated at home and that they were exploring with physicians whether or not Student was clinically depressed or had other mental health concerns. Homework was particularly challenging for her, and she was frequently non-compliant with Mother’s requests regarding homework. Student’s non-compliance included crying, tantruming, slamming doors, and sometimes leaving the house without permission. Parents were concerned for her safety because they lived close to a park and busy streets.

15. According to Student’s fifth grade teachers and service providers, including Courtney Coffin (inclusion specialist who provided weekly direct services to Student), Ms. Rossi, and Ms. Ronsheimer Student did not typically exhibit these behaviors at school. Student’s social emotional needs included becoming anxious at times. When this occurred, Student’s behaviors included facial grimacing and becoming tearful. According to Ms. Rossi and Ms. Ronsheimer, these behaviors were infrequent and did not interfere with Student’s ability to access curriculum or participate in class. Student would perseverate on a particular topic and have difficulty moving on until she was able to have it addressed. To address this need, her teachers and service providers implemented a journal where Student was able to “park” ideas until the appropriate time to share. This was a successful strategy. More importantly, Student’s teachers established that Student did not tantrum, leave class without permission, or exhibit other behaviors that led them to suspect Student had mental health needs. When off task she was easily redirected with prompting from teachers, Student’s aide, or her classmates. Based on the credible testimony of Student’s teachers and service providers, despite having behavioral needs, such as being off task, grimacing and tearing up during the 2012-2013 school year, Student did not exhibit mental health needs in the school environment that impacted her ability to access her education.

16. As the fifth grade school year progressed, Student became more independent and showed less of a need for one-to-one aide support during speech and language therapy, at recess, and during periods of direct instruction in the classroom. Overall, Student had academic needs in the areas of reading, written expression, and executive functioning. She had pragmatic speech and language needs. Student also had social-emotional and behavior needs, specifically regarding re-direction or breaks when off task or anxious. Although academic and social demands steadily increased through the 2012-2013 school year, Student's unique needs described above were generally consistent throughout the school year.

#### STUDENT'S FEBRUARY 2012 IEP

17. Student's operative annual IEP from November 2012 through January 2013 was dated February 1, 2012. That IEP contained six goals addressing critical thinking/executive functioning, reading fluency, reading comprehension, written language, pragmatic language, and expressive language. Student's IEP offered resource specialist program services as specialized academic instruction for 30 minutes per day four times per week. As related services, her IEP offered 120 minutes per month of full inclusion services consisting of classroom observations, consultation with Student's teachers and support service providers, including her aide and speech and language therapist. Student was offered 60 minutes per week of speech and language services focusing on expressive language and pragmatics and 30 minutes per quarter of occupational therapy consultation services.

18. To address Student's behavior needs and facilitate peer interactions, Student was offered a behavior support plan containing goals to reduce facial grimacing and tearing up, a one-to-one aide for six hours per day; and 30 minutes per month of consultative behavior intervention services provided by the non-public agency (Learning Solutions) through which Student's aide was provided. Student's IEP included placement in a general education setting for 97 percent of the school day. The accommodations and supports in Student's IEP included using an Alpha Smart device to help with writing; visual strategies to support the curriculum's language based portions; providing concrete examples to assist teaching abstract concepts; using manipulatives to make connections to high interest topics; task cards, token boards, schedules, and frequent breaks that were either earned or for Student to reorganize using sensory strategies; non-verbal cuing and prompts; verbal cues; social stories; positive reinforcement for on-task behavior; and access to a nutritious snack mid-morning. Student also had a positive behavior support plan drafted by Learning Solutions's behaviorists. In addition to the forgoing IEP services and supports, various members of Student's IEP team, including Parents, Student's inclusion specialist, general education teachers, RSP teacher, Learning Solutions's behavior consultant, and other service providers held routine meetings throughout the school year to continually reflect on Student's progress and adjust her program and homework expectations.

19. Student's February 2012 IEP correctly identified Student's school of attendance as David Lubin. The IEP incorrectly indicated that all special education services were to be provided at Student's school of residence since Theodore Judah was her school of residence and not David Lubin. However, all members of Student's IEP team, including Parents understood that Sacramento City was offering Student placement at David Lubin for the 2012-2013 school year.

20. Student's February 2012 had measurable goals addressing each of Student's identified areas of need contested in this hearing.

#### STUDENT'S JANUARY 29, 2013 IEP

21. Following her triennial assessments, Student's IEP team met on January 29, 2013, March 7, 2013, and April 3, 2013, and developed another IEP (identified as the January 29, 2013 IEP) to which Parents consented on April 18, 2013. To address Student's needs, that IEP contained six goals addressing reading comprehension, word recognition, written expression, and three auditory processing goals specific to developing story titles which demonstrate the main idea, summarizing and correctly retelling stories in sequence, and formulating verbal questions from textbook passages using visual cues. Student's IEP also offered resource specialist program services as specialized academic instruction for 60 minutes per week consisting of 30 minutes of pull-out direct instruction to focus on pre-teaching and re-teaching and 30 minutes push-in to collaborate with the general education staff to support Student's goals. Student's IEP offered 960 minutes per year of full inclusion services. These services consisted of classroom observations, consultation with Student's teachers and support service providers (including her aide and speech and language therapist), and attending routine meetings regarding Student. The IEP also offered Student 60 minutes per week of speech and language services for 30 weeks per year, and 60 minutes per year of occupational therapy consultation services. To support Student behavior needs, Student's IEP offered 30 minutes per month of consultative behavior intervention services provided by the non-public agency (Learning Solutions) through which Student's aide was provided. Student's IEP included placement in a general education setting for 97 percent of the school day.

22. The accommodations and supports in Student's January IEP were generally the same as in the prior IEP but also included reduced work requirements based on teacher judgment, use of teacher or peer notes and outlines to supplement Student's own notes, dictation to an adult or peer buddy instead of writing out answers, and the option to complete work in the resource room. The IEP also called for access to the Circle of Friends program, sensory and occupational therapy breaks, and coping strategies using a ROPES-like curriculum (Recall, Organization and planning, Prioritizing and goals setting, Evaluation and critical thinking skills, Self-management).

23. Saxony Dominguez, a board certified behavior analyst with a bachelors and master's degree in psychology, is Learning Solutions's clinical director. Ms. Dominguez explained that the ROPES program was developed by Patty Schetter specifically for high functioning children like Student who are on the autism spectrum. It relies on visual strengths to improve an individual's ability to organize, plan, process, and execute tasks. It also utilizes a cognitive behavior approach that is appropriate for both children with autism and attention deficit hyperactivity disorder.

24. Student also had a positive behavior support plan drafted by Learning Solutions's behaviorists that included behavior goals. In addition, various members of Student's IEP team, including Parents, the inclusion specialist, general education teachers, resource specialist program teacher, Learning Solutions's behavior consultant, and other service providers, held routine meetings throughout the school year to continually reflect on Student's progress and adjust Student's program and homework expectations.

25. The January 2013 IEP described Student's direct aide services in the, "Aids, Services, Program Accommodations/Modifications, and/or Supports," section of the IEP. It marked a change in the focus for the aide services offered. Ms. Coffin persuasively established that the Sacramento City members of Student's IEP team intended for Student to transition from having full-time aide support to greater independence as she prepared for middle school, beginning in seventh grade. In preparation for that transition, Student's January 2013 IEP included one-to-one aide support with the frequency listed as "daily as needed." The IEP reiterated that the staff support was being provided by designated agency personnel (from Learning Solutions) to, "foster/support independence and goal achievement."

26. Student's January 29, 2013 IEP correctly identified Student's school of attendance as David Lubin. The IEP incorrectly indicated that all special education services were to be provided at Student's school of residence because Theodore Judah was her school of residence and not David Lubin. However, all members of Student's IEP team, including Parents, understood that Sacramento City was offering Student placement at David Lubin for the remainder of the 2012-2013 school year and into the 2013-2014 school year.

*CLEAR WRITTEN OFFER*

27. Student asserted that Sacramento City failed to make a clear written offer of placement and service in its January 29, 2013 IEP. Specifically, Student asserts that the IEP failed to clearly specify the frequency and duration of resource specialist program services, the Circle of Friends program, executive functioning skills program, the behavior support plan, and aide services.

28. The notes page in the IEP indicates that the team discussed that the amount of resource services in Student's February 2012 IEP (30 minutes, four times per week), and determined that this was appropriate and would be continued. The Offer of FAPE page, however, states that Student was ultimately offered 60 minutes per week resource of specialist services consisting of 30 minutes pull-out instruction outside of the general education classroom and 30 minutes push-in instruction in the general education classroom. Ms. Coffin established that over the course of the IEP team meetings that culminated in Sacramento City's IEP offer, parents expressed concern that Student not be pulled out of her general education setting too frequently because she risked losing valuable academic instruction. This testimony was consistent with the IEP team notes that state the agreement for the 2012-2013 school year would be, "Wednesday 30 minutes after LAX [language arts exchange] Student will go to RSP [resource specialist program] to get support with writing and vocabulary. GE [general education] will will [sic] send Student with appropriate materials. RSP will work with doing push in to enhance what is being done in class to support to the goals." The IEP team discussed the available options and determined that it was appropriate for the overall amount of time for resource specialist program services to be reduced and the focus would shift to pre-teaching and re-teaching grade level curriculum. The IEP team meeting process is intended to be fluid and happened over multiple meetings. The fact that the notes reflect the initial thoughts of team members does not render the ultimate offer of services contained in the Offer of FAPE page unclear. The 60 minutes per week offer of resource specialist program services, delivered 30 minutes pull-out and 30 minutes push-in, is specific and clear.

29. The January 29, 2013 IEP notes in the aides, services, program accommodations/modifications, and/or supports section of the IEP state that Student would have access to the school's Circle of Friends program. Ms. Coffin established that the Circle of Friends program was designed at David Lubin specifically to help foster relationships among students with special needs and their typically developing peers. It was conducted during lunch recess two to three times per week and was facilitated by an aide from Learning Solutions or an aide from another non-public agency assigned to assist other students. The program was open to Student, other students receiving special education services, and typically developing peers to socially engage with one another during their lunch recess. The evidence established that this was not a special education service. Rather, it was a program open to Student and her general education peers. Moreover, the evidence established that to have specified that Circle of Friends would be rigidly implemented for a certain number of minutes so many days per week could have defeated the underlying authenticity of the program. Additionally, as will be discussed below, Student did not meet her burden to establish that during the 2012-2013 school year she had a need for a structured social skills program. As such, Circle of Friends was not a required special education component and not required to meet Student's social skills needs for her to receive a FAPE. Therefore, the greater specificity was not required to be included in Student's IEP.

30. Student's executive functioning deficits were addressed in Student's goals, by her aide, teachers, and other service personnel. Additionally the ROPES curriculum was provided to Student to supplement other components of her overall IEP. Student's executive functioning needs were met through her goals and other IEP services; she did not require a separate executive functioning program. Accordingly, greater specificity was not required to be included in Student's IEP.

31. In addition to the multiple IEP team meetings held during the 2012-2013 school year, specified members of Student's IEP team including Parents, Ms. Coffin, Student's teachers, and representatives from Learning Solutions met for routine meetings to discuss and adjust components of Student's program. Parents concerns were also addressed in this forum. Meeting participants specifically discussed, and made minor adjustments to, Circle of Friends throughout the year. Therefore, Parents meaningfully participated in the January 2013 IEP development and also on an ongoing basis throughout the IEP's implementation. The weight of the evidence did not show that to receive educational benefit, Student required a social skills program or an executive functioning program during the 2012-2013 school year.

32. The January 29, 2013 IEP states that Student's behavior impedes her learning due to lack of focus and attention. The notes further state, "see NPA report." The report was not attached to the IEP. Sacramento City contracted with Learning Solutions to draft Student's behavior support plan and coordinate its implementation. The behavior support plan was drafted by Student's then behavior consultant Alisa Rife, in January 2013. The specific behaviors addressed in the plan include reducing facial grimacing, tears/whining/whimpering; and increasing Student's ability to transition from one task to another, to begin assignments, and to complete work. The document was part of Student's file that was contained in the classroom. The Learning Solutions aides collected data daily on the specific components of the plan. The report, because it contained the behavior support plan, should have specifically been attached to Student's IEP.

33. Student's parents and her teachers were informed, however, about the behavior support plan and its contents. Parents worked closely with Learning Solutions because it had been a service provider for Student since she was in preschool and Parents were familiar with the owner and Student's service providers. Data was collected daily regarding the behaviors contained in Student's February 2012 and January 2013 behavior support plans. A representative working directly with Student attended her IEP team meetings as well as the routine meetings held between IEP team meetings and presented data collected regarding Student's progress on her behavior goals. Parents were provided a copy of the proposed behavior support plan prior to consenting to the IEP in April 2013. Additionally, Student's teachers and service providers testified persuasively about their knowledge of the behaviors that were being tracked as part of the behavior support plan. Student's behavior services

were implemented as identified in her IEP and behavior support plan. Even though the behavior support plan should have been attached to Student's IEP, that failure did not impact Parents' participation in the IEP's development because Parents were given a copy and attended several meetings where they were given the opportunity to discuss the plan. Student was not denied educational benefit by this omission because the behavior support plan was appropriate and was implemented.

34. Student contends that the aide services included in the IEP dated January 29, 2013, were unclear because it did not specify whether or not the aide would be considered a "confederate aide" or a one-to-one "Velcro" aide. Mother, Ms. Coffin, and Student's teachers testified consistently regarding their definition of a "confederate aide" versus a one-to-one "Velcro" aide. Essentially, a "confederate" aide is introduced to the students as a classroom aide; however, unbeknownst to the class their focus is on a particular student. The purpose of this type of aide is to create greater independence for the identified student while continuing to offer dedicated support as needed. With a one-to-one "Velcro" aide, the aide is in closer proximity to the student and the student and his or her peers are aware that the aide is there to support an individual student.

35. The Sacramento City members of Student's IEP team strongly believed that it was important for Student to work toward greater independence from her aide. Toward that end, Student was provided a confederate aide at the beginning of the 2012-2013 school year, a time period not at issue in this case. Mother was upset about the decision to provide Student a confederate aide as she believed Student was offered a "Velcro" aide in the February 2012 IEP. According to Ms. Coffin, by November 2012 the aide's "cover was blown" as Student realized the aide was assigned to her rather than the class. Therefore, from that time until the January 29, 2013 IEP Student received one-to-one aide support utilizing a "Velcro" model.

36. During the IEP team meetings that culminated in the January 29, 2013 IEP, Learning Solutions data indicated Student was showing greater independence during lunch, physical education, going to resource specialist program services, and speech and language services. The IEP specifically states that, "continued fading and creating/fostering independence to be an important initiative with student." It also states that appropriate fading and monitoring aide services will be "monitored bi-annually."

37. The January 2013 IEP was offered in the middle of a school year while Student was already aware the aide was assigned to her specifically. It would not have been feasible to transition that aide from a direct one-to-one aide to a confederate aide given Student's awareness and reliance on the aide at that time. Ms. Coffin was aware of Parents' concerns and the aide issue was continually addressed during the regular team meetings. The evidence established that "monitored bi-annually" meant that Student's IEP team would

specifically address the issue of fading the aide prior to the beginning of Student's sixth grade year (2013-2014) and again following winter break before her next scheduled annual IEP was due.

38. The totality of the evidence established that the January 29, 2013 IEP was clear regarding the aide services Student was to be provided. Therefore, Parents were not deprived the opportunity for meaningful parental participation in the IEP development process.

#### PRESENT LEVELS OF PERFORMANCE

39. Student generally asserted that Sacramento City failed to adequately identify her present levels of performance in the January 29, 2013 IEP but did not provide evidence in support of the contention.

40. This IEP was created after a comprehensive triennial assessment that accurately identified Student's academic achievement, functional, behavioral, and social emotional performance. Student's communication, behavioral, health, and daily living skills were noted. Her present levels of performance were substantiated by her then teachers and service providers. The IEP clearly identified Student's present levels of performance.

#### MEASURABLE GOALS AND AREAS OF NEED

##### *FEBRUARY 2012 IEP*

41. Student asserts that the February 1, 2012 IEP goals are not measurable. A review of the six goals belies this assertion. Each of Student's six goals identifies the topic (i.e. reading comprehension), the number of trials (i.e. 9 out of 10), the accuracy needed to achieve the goal (i.e. 90%), and a statement of how it will be measured (i.e. teacher-charted observations and student work samples).

42. Student also contends that the goals do not address all areas of need including social-emotional functioning, behavior, executive functioning, reading comprehension, and written expression. Student's goal in the area of critical thinking/executive functioning addressed Student's social emotional functioning, behavior, and executive functioning needs. Specifically, this goal called for Student to increase her ability to identify her own behavior issues such as task completion, organization, transitioning, peer relations, and peer interactions. To achieve this goal, it called for Student to use graphic organizers such as worksheets from the ROPES program including Evaluating and Resolving Problematic Behaviors and Basic Critical Thinking Skills. Ms. Dominguez established that both the goal, and utilizing the ROPES program, addressed Student's social emotional functioning, behavior, and executive functioning needs.

43. Student's allegation that the goals failed to address her reading comprehension and writing needs was also not supported by the evidence. Student's operative IEP in November 2012 had a reading comprehension goal that focused on her ability to formulate accurate predictions about text as described previously. The IEP also included a written language goal calling for Student to produce a correctly indented multiple paragraph composition that included an opening paragraph with a topic sentence, 1-2 supporting paragraphs with details and explanations, and a concluding paragraph. Ms. Ronsheimer, established that these goals were designed to and did meet Student's reading comprehension and writing needs.

January 2013 IEP

44. Student contends that the January 2013 IEP goals are not measurable and that the goals do not address all areas of need including social-emotional functioning, behavior, executive functioning, reading comprehension, and written expression. This assertion was not supported by the evidence in this case.

45. The goals in the January 2013 IEP are measurable. Each identifies the area of need, the number of trials, the accuracy needed to achieve the goal, and a statement of how each goal will be measured.

46. Student's social-emotional, behavior, and executive functioning needs were addressed in Student's January 2013 auditory processing goals and positive behavior support plan goals prepared by Learning Solutions. The baselines for Student's auditory processing goals indicate that Student had difficulty organizing verbal information to accurately recall and sequence information, sort relevant from irrelevant information, and formulate the main ideas or greater concepts. This skill deficit increased Student's frustration and impacted her social-emotional functioning. When frustrated, Student's behavioral response included becoming teary and exhibiting facial grimacing. Regarding executive functioning, Student's behavior support plan indicated she had difficulty independently transitioning from one work task to another, beginning assignments after instructions were given, and completing work tasks. Student's IEP contained goals addressing each of these skill deficits.

47. Student's reading comprehension and writing needs were also addressed in her goals. Student's January 2013 IEP had a reading comprehension goal that focused on her ability to correctly read grade-level text with appropriate pacing, intonation, and expression as described above. The IEP also included a written language goal calling for Student to produce a multiple paragraph composition that sequences events in chronological order providing details and transitional expressions that link one paragraph to the next. Ms. Ronsheimer, Student's fifth grade language arts teacher, established that these goals were designed to and did meet Student's reading comprehension and writing needs.

## *EXECUTIVE FUNCTIONING DEFICITS*

48. In addition to goals, Student asserted that Sacramento City failed to adequately address Student's executive functioning deficits in the 2012-2013 school year. Student called licensed school psychologist Lisa Pippin in support of this contention. Dr. Pippin assessed Student mid-way through the 2014-2015 school year. The questions she was asked to address in that assessment were whether or not Sacramento City's offer for the 2014-2015 school year constituted a FAPE and what would be the least restrictive environment for Student at that time. During the hearing, Dr. Pippin testified generally that Student's IEP's during the 2012-2013 school year failed to offer goals and services to meet her executive functioning needs; however, Student's unique needs changed significantly during the spring of 2014. Further, Dr. Pippin's report did not specifically address Student's February 2012 or January 2013 IEP's other than the general assertion that her assessment identified several executive function deficits, "that have not been previously identified or addressed via measurable IEP goals." This assertion is not correct in that Student's goals in prior IEP's, as found above, contained measurable goals that addressed Student's executive functioning deficits. Moreover, Dr. Pippin did not know Student at that time nor did she speak to her former teachers or service providers. Therefore, her opinion is given little weight regarding Student's IEP's during the 2012-2013 school year.

49. Ms. Coffin, Ms. Rossi, and Ms. Ronsheimer worked with Student directly during the 2012-2013 school year and observed her executive functioning abilities and deficits. They provided persuasive testimony regarding Student's executive functioning needs and the supports and services provided to Student to meet those needs. As was determined above, Student's February 2012 and January 2013 IEP's contained goals addressing executive functioning. In addition, Ms. Dominguez established that Student's Learning Solutions's aides utilized the ROPES curriculum with Student both in and out of class during a facilitated lunch group to help improve Students executive functioning. Ms. Coffin confirmed this assertion by directly observing Student using the program during both Circle of Friends and speech and language therapy.

50. Ms. Rossi and Ms. Ronsheimer established that they addressed Student's executive functioning needs. They each broke down and repeated information to Student in smaller parts, identified as chunking, and utilized graphic organizers with Student. It was also established that to provide consistency, one of the graphic organizers used by Student with both Ms. Rossi and Ms. Ronsheimer for writing was directly from the ROPES curriculum. Ms. Rossi and Ms. Ronsheimer also established that Student's aides helped support her executive functioning needs by helping organize individual assignments, classwork, and ensuring she had the necessary items from school to complete homework.

### *MENTAL HEALTH SERVICES*

51. From November 2012 through the 2013 extended school year, Student did not have mental health needs that had to be addressed to assist Student in accessing her education. The IEP's in effect during this time provided Student behavior supports and services that appropriately addressed her social/emotional needs. Accordingly, Sacramento City was not required to offer or provide mental health services at that time.

### *BEHAVIOR SUPPORTS AND SERVICES*

52. Student's IEP's during the 2012-2013 school year included a full time one-to-one aide and a positive behavior support plan. The February 2012 behavior support plan targeted reducing facial grimaces when Student was confronted with a non-preferred task. It also included goals to help facilitate peer interaction and minimize anxiety or frustration by having Student complete worksheets to evaluate her stress triggers, actions, and outcomes.

53. Student's January 2013 behavior support plan focused on reducing Student's facial grimacing, crying, and increasing independence during task transitions, and assignment beginning and completion. Ms. Rossi and Ms. Ronsheimer established that they, along with Student's aide, used social stories, pre-warnings, breaks, occupational therapy activities, visual organizers, and access to an alternate work room to complete assignment and tests when given extended time. These strategies reduced Student's facial grimacing and crying.

54. As issues with peers or academic stressors naturally occurred, Student's speech and language pathologist worked directly with Student to debrief using worksheets created during Circle of Friends thereby integrating the ROPES program into speech and language as well. The combination of one-to-one aide support, positive behavior support plans, the accommodations implemented by Student's general education teachers, and related service providers appropriately addressed Student's behavior needs.

### *SPEECH AND LANGUAGE SERVICES*

55. Student's IEP provided for 60 minutes per week of speech and language services. Student's February 2012 IEP included a pragmatic language goal. This goal called for Student to demonstrate social interaction by asking questions and making supportive comments to peers. It also called for Student to bridge a conversation by moving to a different topic. These skills are foundational for Student to engage with others. The evidence showed that Student was given an opportunity to practice this goal both during speech and language sessions and also in the classroom, and during unstructured time like recess and lunch. The evidence established that Student made significant progress on this goal without a structured social skills program.

56. Student's January 2013 IEP included auditory processing goals that addressed Student's need to appropriately respond to verbal information and requests. These goals also provided foundational skills necessary for Student to engage with her typically developing peers and participate in reciprocal conversations.

57. Primarily, it was Mother who testified that Student required a social skills program. During the 2012-2013 school year, Student did not telephone friends to schedule play dates nor did her friends call her. Mother acknowledged, however, that Student participated in activities outside of school that included her classmates such as Girl Scouts, Girls on the Run, and her swim team. Mother also acknowledged that she herself arranged for Student to have a few playdates with peers during that year that included having two peers celebrate Student's birthday with her.

58. Student also called speech and language pathologist Donna Grimm. Ms. Grimm assessed Student during July 2014. Ms. Grimm previously conducted an independent educational evaluation of Student's speech and language needs in 2009 and from January through June 2009, provided Student's school-based speech and language services at David Lubin and approximately 14-15 private sessions to Student under contract with Sacramento City's during the summer of 2010

59. Ms. Grimm concluded that in 2014 Student required a structured social skills program. This recommendation was specific to Student's needs in 2014. As discussed previously, Student's mental health needs changed significantly during the 2013-2014 school year and that change impacted Student's social skills needs as well.

60. No evidence was presented that Ms. Grimm recommend or implemented a structured social skills program with Student during the time she was providing services to Student during first grade and the summer after second grade. Ms. Grimm's recommendation regarding a structured social skills program is not applicable to Student's needs as they existed during the 2012-2013 school year.

61. Student engaged with her typically developing peers at school both inside and outside of the classroom. Ms. Coffin, Ms. Rossi, and Ms. Ronsheimer established that Student had friends that she sought out and who played with her. When students were able to self-select classmates to complete a project, Student was selected by peers and was not left out. In addition, David Lubin offered the Circle of Friends program during lunch recess two to three times per week, and Student willingly participated in and enjoyed the program. Moreover, it is not uncommon for some 10 year-olds to rely on parents to coordinate social engagements outside of school. It is even more likely that parental support would be provided for children with social skills deficits. While social skills were still an area of need, Student did not establish that she required a structured social skills group to make progress on her goals.

62. Student's February 1, 2012 and January 20, 2013 IEP's met Student's pragmatic language and social skills needs. The speech and language therapy coupled with the other supports and services in Student's IEP's, met her pragmatic language needs and Student did not require an additional structured social skills program to meet her needs and receive educational benefit.

*LEAST RESTRICTIVE ENVIRONMENT*

63. Student argued that she required a special day class program for high functioning students with autism. Student further contended that she was isolated in her general education classroom and learned to be prompt dependent on her aide to function in a school environment. This was not supported by the evidence for the 2012-2013 school year.

64. Ms. Coffin and Lori Thomas, Student's general education teacher in both 4th and sixth grades, established that David Lubin had a school-wide culture that embraced students with special needs. Students eligible for special education who are placed at David Lubin are fully included and assigned to general education classes at each grade level with varying levels of supplemental supports and services. To help facilitate integration, typically developing students are assigned to individual students as specially selected peers. Mother confirmed that Student was paired with a boy who she described as being particularly nice to Student. Although Student had social and pragmatic language needs stemming from autism, Student was not socially isolated.

65. According to Mother, Student did not demonstrate academic progress or the ability to access the general education curriculum. Mother believed this was because Student's work was modified, and that her academic abilities were below her sister's academic abilities when Sister had been in fifth grade. Although Mother is a college graduate and very articulate, she is not a credentialed educator. There was no credible evidence presented that Student's educational curriculum was modified or that she was prompt dependent on her aide during the 2012-2013 school year. Moreover, even a student whose work is modified so he or she is working below grade-level can still make academic progress and obtain educational benefit.

66. Additionally, Sister is typically developing and has no special needs so she does not have similar educational, behavioral, and social challenges as Student. Finally, Sister attended private schools and not public schools within Sacramento City or any public school district. There was no evidence presented to establish that the academic expectations in these two unrelated educational systems are consistent. For the foregoing reasons, Mother's observation does not establish that Student failed to make academic progress during her fifth grade year.

67. Ms. Rossi and Ms. Ronsheimer also established that Student herself made academic progress in reading, math, social studies, and during the language arts exchange program and that her work was not modified. According to both teachers, Student frequently raised her hand to participate in class discussions or provide an answer to a question without aide prompting. Ms. Ronsheimer noted that during language arts exchange, Student initially protested silent reading, but as the year progressed her independent silent reading time increased from fewer than five minutes to approximately 20 minutes. Both teachers established that Student's overall academic performance fell within the class's average to just below average range and not near the bottom as compared to her grade level peers. The evidence also established that Student was able to access the general education curriculum with the supports and services provided in her IEP. She was not prompt dependent upon her aide.

68. The evidence established that Student and her typically developing peers benefited from Student's inclusion in a general education setting. Ms. Rossi and Ms. Ronsheimer established that Student was accepted by her typically developing peers and that she actively participated in the school environment during the 2012-2013 school year.

69. There was no evidence presented regarding the cost of educating Student in the general education environment.

#### FAILING TO IMPLEMENT IEP ACCOMMODATIONS AND MODIFICATIONS<sup>4</sup>

70. The accommodations and supports in Student's February 2012 IEP included visual strategies to support the curriculum's language based portions, providing concrete examples to assist teaching abstract concepts, using manipulatives to make connections to high interest topics. To motivate Student and help her stay organized her IEP included task cards, token boards, schedules, frequent breaks both earned breaks and for Student to reorganize using sensory strategies, non-verbal cuing and prompts, verbal cues, social stories, positive reinforcement for on-task behavior, and access to a nutritious snack mid-morning. There was no evidence that these accommodations were not provided.

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<sup>4</sup> In her closing brief, Student asserts that Sacramento City, "rarely implemented speech and language services, resource services, and the Circle of Friends program in the 2012-2013 school year." This contention is outside the scope of the issues litigated in this case. The order following the prehearing conference identified Sacramento City's failure to implement Student's IEP accommodations and modifications but not related services. The issues were reviewed on the record at the outset of the hearing and Student did not seek to change or expand this issue as identified in the Order following the Prehearing Conference.

71. Student's January 2013 IEP contained virtually identical accommodations and modifications but also added access to teacher and peer notes, as well as the ability for Student to dictate to an adult or peer buddy instead of writing out answers. This latter accommodation was within the teacher's discretion depending upon the subject matter taught. Ms. Rossi and Ms. Ronsheimer, both established that they implemented the accommodations contained in Student's IEP's during the 2012-2013 school year.

#### EXTENDED SCHOOL YEAR 2013

72. Student presented no argument or evidence that the extended school year program following the 2012-2013 school year was not appropriate. Parent requested, and Sacramento City agreed, to fund the POPS program (Praxis, Organization, and Problem Solving) for the extended school year. The POPS program addresses visual spatial skills, fine motor skills, executive functioning, and providing language to spatial concepts. This program was appropriate for Student because her needs were likely to continue for a long period of time. Interruption in her educational program may have caused regression that, when coupled with her limited recoupment capacity, made it unlikely that Student would have attained a level of expected self-sufficiency and independence without an extended school year program like the POPS program.

#### *2013-2014 School Year and Offer for 2014-2015 School Year*

#### STUDENT'S NEEDS

73. Mother believed that by the end of fifth grade Student had not acquired the reading comprehension and analytical skills necessary for the demands of middle school that was still over one year away. Mother established that it was a difficult decision for Parents but they removed Student from Sacramento City at the end of the summer and enrolled her in a home-based charter school program. Mother provided the majority of the direct instruction to Student. Student met with a general education teacher approximately one time per week. IEP team meetings were held for Student at the charter school; however, Parents never consented to their IEP offers.<sup>5</sup>

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<sup>5</sup> Sacramento City's closing brief argued that upon Student's return it was obligated to, and did, implement the IEP goals from the charter school. Sarah Winton, Student's resource specialist program teacher upon returning to David Lubin, testified that she did not receive a signed IEP from the charter school and therefore implemented the goals from the Student's January 29, 2013 IEP. The IEP's from the charter school in the record do not include signed copies. Accordingly, this ALJ does not rely on the argument made in Sacramento City's closing brief but on the testimony of Ms. Winton and the unsigned IEP's in the record.

74. During the fall of 2013, Student's needs began to change significantly, particularly in the area of behavior and mental health. During the time Student worked with Mother in independent study, Student became more argumentative, defiant, and non-compliant with demands. She became more inflexible and intransigent in her convictions, and less able to understand other's perspectives. She also became verbally and physically aggressive toward Parents.

75. In addition to Student's increasingly maladaptive behaviors, she began to exhibit delusional and paranoid thinking. In approximately January 2014, Student started to fixate on her maternal grandfather. She began to tell people that she knew Mother killed Student's grandfather and that he was contacting her from the grave. Student never met Grandfather because he actually died of cancer before Student was born. In addition to the delusion regarding Grandfather, Student became convinced that her sister was shrinking and that Sister would eventually disappear. Additionally, she began to believe Parents were not her biological parents and that they murdered her biological parents and kidnapped her after birth. Student also believed she was the daughter of the Goddess of War. Student also responded to internal stimuli by talking and laughing to herself under her breath.

76. Student had been under the care of her treating neurologist, Dr. Chez, since she was originally determined to have autism. Prior to Student exhibiting delusional symptoms, Parents were concerned that Student might have mental health issues stemming from anxiety and depression. Dr. Chez recommended Student see a pediatric psychiatrist who also had experience with children on the autism spectrum so the underlying cause of Student's new behaviors and delusional thinking (e.g. autism or mental health issues or both) could accurately be determined.

77. It took several months to locate a psychiatrist that met the criteria recommended by Dr. Chez. Ultimately, in early 2014, Student was seen by Dr. Mark Pakuyrek. Dr. Pakuyrek diagnosed Student with a severe mood disorder, psychosis, and confirmed Student's prior diagnosis of attention deficit hyperactivity disorder and autism. Mother believed that Student had, "slipped into psychosis." Student was prescribed numerous medications including Abilify, Klonopin, Lamictal, Strattera, and Namenda for irritability, anxiety, mood stabilization, impulse control, and neurological symptoms.

78. In February 2014, Parents re-enrolled Student at David Lubin. Student began attending David Lubin on February 20, 2014. She was assigned to Ms. Thomas's sixth grade class. Ms. Thomas knew Student because she had been Student's fourth grade general education teacher. Mother informed Richard Dixon, David Lubin's principal, and Ms. Thomas about Student's newly presented symptoms, and specifically warned them that they were likely to hear from Student that Mother murdered Student's grandfather.

79. At the beginning of the 2013-2014 school year David Lubin implemented the State's newly adopted common core standards. According to Ms. Thomas, the way information was taught changed, and the academic expectations were more rigorous than before. In addition to this school-wide change, Student re-enrolled at David Lubin in the middle of a unit in both language arts and math. Student struggled academically when she returned to school, in part because of the shift to common core, and also because she was not able to start at the beginning of language arts and math units with her peers. Shortly after returning to David Lubin, Student told Ms. Thomas and Mr. Dixon about Mother killing her grandfather and some of the other delusions.

80. Student's last agreed upon and implemented IEP was the January 29, 2013 IEP from Sacramento City because Parents had not consented to an IEP while Student attended the charter school. Sacramento City implemented that IEP for the first 30 days Student was enrolled at David Lubin, with the exception of aide services for approximately two weeks. Parents agreed to the delay in aide services while Sacramento City and Learning Solutions located a new aide for Student.

81. Student's aide started tracking data on the specific behaviors in Student's January 29, 2013 behavior plan. From March 6, 2014, through March 31, 2014, the aide recorded seven episodes of crying lasting an average of 14 minutes and 30 seconds. The data also noted 12 incidents of self-talk lasting approximately 4 minutes per episode. The data provided for this time period only reported incidents for 4 of 18 school days.

82. In addition to the data tracked above, Student's aide prepared session notes providing a general description of Student's day in approximately 6 to 10 sentences. Information was provided for eight school days (March 7, 10, 11, 12, 13, 14, 17, and 18, 2014). Two summaries document days generally without incident. The other days describe behavioral, emotional, and attentional challenges. For example, on March 7, 2014, a teacher blew a whistle near Student's ear during recess causing her to, "breakdown and cry." Ms. Thomas intervened and had Student journal about the incident. It took approximately 30 minutes for Student to, "get back on track." Another day Student was described as, "easily upset," and having, "no focus." Another note indicates that Student has, "been talking to herself and laughing instead of paying attention."

83. During the first 30 days after Student returned to school, she struggled more academically than in prior years due to the shift in standards and because she entered in the middle of unfamiliar units in both language arts and math. Additionally, although Ms. Thomas generally believed Student to be happy, she established that Student was more defiant and emotionally deregulated than when she had taught Student previously.

84. In sum, Student continued to have similar needs as during the 2012-2013 school year except mental health needs were an area of concern based on behaviors not previously observed in the school environment. Additionally, the degree of Student's academic needs increased due to the shift to common core and entering mid-units.

85. Ms. Winston, the resource specialist program teacher assigned to Student upon her return to David Lubin, implemented the goals from Student's January 29, 2013 IEP. In certain respects, Ms. Winston believed the goals were not rigorous enough because they were outdated for Student's then present levels of performance. Ms. Winston, in consultation with Ms. Thomas, worked on the same targeted area contained in a goal, but advanced the level of difficulty to more accurately reflect Student's higher academic levels.

86. Sacramento City implemented a program consistent with Student's January 2013 IEP for 30 days following re-enrollment except for the excused aide services.

IEP DATED MARCH 20, 2014 IEP<sup>6</sup>

87. At the beginning of the 2013-2014 school year, the inclusion model for Ms. Coffin's services changed school wide. Ms. Coffin described it as a "culture shift." Formerly she was the point person for coordinating the program and related services, and helping to foster greater inclusion for a student with an IEP. By the time Student re-enrolled, this responsibility was transferred to the resource teacher and other team members. The shift was intended to further integrate students with special needs so their inclusion became the responsibility of each individual working with the student, as opposed to being Ms. Coffin's primary responsibility. In that regard, Ms. Coffin consulted with the other adults, but no longer worked directly with Student. The services under Student's IEP that had previously been provided by Ms. Coffin were now provided by Ms. Winston in collaboration with Ms. Thomas, Student's other service providers, and they were supported by Ms. Coffin. Ms. Coffin continued to attend IEP team and routine team meetings for Student. Although somewhat different, the changed model of service was not inconsistent with Student's prior IEP.

88. Student's IEP team met on March 20, 2014, to develop a new IEP for the remainder of sixth grade and continuing into middle school. By that time, Mother established that Student was aware the aide was assigned to her rather than the class. By March 20, 2014, the aide was a direct one-to-one aide rather than a classroom or "confederate" aide.

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<sup>6</sup> The IEP dated March 20, 2014, was the culmination of two IEP team meetings. One meeting was held on March 20, 2014, and the second meeting was held on April 10, 2014. The IEP that was the product of the two meetings is called the March 20, 2014 IEP.

89. By March 20, 2014, Parents were increasingly concerned about Student's ability to function in a general education class on a middle school campus when the next school year began. They wanted to know what school site options would be available for Student for middle school. Additionally, they were concerned about Student's increasing mental health needs. Parents notified Student's IEP team that they had found a non-public school, Springstone, that specializes in serving children on the autism spectrum who are high functioning, but have executive functioning deficits. Parents asked that Student's IEP team consider Springstone as Student's placement for middle school. No decisions regarding middle school were finalized during the March 20, 2014 IEP team meeting. At the meeting Mother also reported concerns that Student's one-to-one aide was not a good fit for Student. The team agreed to look at changing her aide.

90. After meeting for nearly two hours without completing the IEP, Student's team agreed that Ms. Winston would send a draft IEP home for Parents to review. The initial intent was to finalize the IEP without the need to meet again. However, Mother did not believe the draft accurately captured Parents' concerns and another in-person IEP team meeting was scheduled for April 10, 2014. Prior to the meeting on April 10, 2014, Student's aide was changed to Jennifer Caldera.

91. Between March 20, 2014, and April 10, 2014, Student's mental health needs became increasing apparent at school. It was reported by Ms. Thomas that on several occasions Student arrived at school upset about something that had occurred prior to arriving at school. When that happened, Ms. Thomas would encourage Student to journal. If that was not successful, Student and her aide would leave the classroom and talk or walk in the school's "peace garden" until Student was able to return to class and begin her day. When these episodes occurred it usually took from 10 to 30 minutes for Student to re-set and begin class work.

92. Student's IEP team met again on April 10, 2014. Tami Fien, Student's program specialist from Sacramento City, also attended the meeting. Parents were offered and consented to an educationally related mental health assessment to determine Student's mental health needs. After that assessment was complete, the IEP team agreed that another meeting would be conducted prior to the end of the school year to finalize Sacramento City's offer of a FAPE for middle school. During this meeting, Ms. Fien suggested that Parents visit and observe California Middle School because it has a full-inclusion model for special education that aligns with David Lubin's model. Parents agreed to observe that program.

93. Student's IEP team finalized an IEP during the meeting for the remainder of the 2013-2014 school year but agreed to meet again before the end of the year. The IEP contained seven goals addressing language concepts to relay math reasoning, language concepts related to correctly identify the question asked, executive functioning, and the use

of a homework planner to promote organization and task completion. Student's other auditory processing goal addressed greater inferential thinking and social pragmatic skills for Student to improve awareness of her verbal and non-verbal social cues, and perspective taking. Student's IEP offered 25 resource specialist program services, each lasting 25 minutes, for 625 minutes yearly as specialized academic instruction providing consultation to the general education teacher and push-in observation and academic support where needed. It also offered 55 sessions of speech and language consisting of 40 pull-out, and 15 consultation sessions for 1,650 minutes yearly to support pragmatic generalization. Four 30-minute occupational therapy consultation sessions were offered. In addition, the IEP provided for a full-time one-to-one aide, and 540 minutes per month of behavior supervision hours to support the daily aide and attend regular meetings. No inclusion services were offered in the IEP. Student's IEP included placement in a general education setting for 97 percent of the school day. The accommodations and supports in Student's IEP included using an Alpha Smart device to help with writing, providing notes ahead of time and, as applicable when Student did not have enough time to complete tasks, a graphic organizer, chunking assignments, giving directions directly to Student, and journaling topics that trigger anxiety but limit "excess journaling." Student was also provided proximity to and gentle touch by teacher to return to work if off task, occupational therapy breaks if Student wiggled in her seat, outside breaks as needed, and permitting her to write down off-topic thoughts to share with her teacher later. The IEP did not offer extended school year services.

94. This IEP correctly identified Student's school of attendance as David Lubin, but again incorrectly indicated that all special education services were to be provided at Student's school of residence which was Theodore Judah, not David Lubin. However, all members of Student's IEP team, including Parents, understood that Sacramento City was offering Student placement at David Lubin for the remainder of the 2013-2014 school year.

#### EDUCATIONALLY RELATED MENTAL HEALTH ASSESSMENT

95. Following the April 20, 2014 IEP team meeting, Sacramento City assigned a three member team to conduct an assessment of Student's educationally related mental health needs and to determine if she met the special education criteria of emotional disturbance. That team included Dr. Sheava Zadeh, school psychologist, Jim Downing MSW, social worker, and Diana Otterson, Behavior Intervention Specialist.

96. The assessment was conducted on multiple days in various settings. It was comprehensive with respect to the standardized assessment tools used. It was, however, fatally flawed in two respects. First, as will be discussed in more detail below, the team inadequately requested medical information that was directly related to Student's mental health diagnosis and condition. Second, the team misapplied the criteria for eligibility under

emotionally disturbed. Student did not contest the eligibility determination in this hearing; however, had the criteria been correctly applied, it is likely additional options for services and placement would have been considered by Student's IEP team.<sup>7</sup>

97. While Student's mental health assessment was pending, she continued to demonstrate significant mental health needs at home and to a lesser degree at school. On one occasion a traveling theater company gave a performance on campus. After the show was over, Student initially refused to return to class and became very agitated. She requested to speak with one of the actors. Student told Ms. Thomas that it was actually her deceased grandfather who performed, and that he was there because he needed to talk to Student. Student was convinced that the actor was there to confirm that Mother had murdered him. Ms. Thomas and Student's one-to-one aide were ultimately able to get Student to calm down and return to class.

98. On May 18, 2014, Student physically attacked her parents at home. The police were notified and took Student to the hospital where she was placed on a 72-hour involuntary psychiatric hold. She was not released after 72 hours, but was transferred to a juvenile psychiatric facility. Student was hospitalized through May 23, 2014, when she was released to her parents subject to physician conditions that resulted in Parents contracting with Learning Solutions privately to provide in-home behavior support. She missed approximately a week at school.

99. On May 21, 2014, while Student was hospitalized, Mr. Downing conducted a telephone interview with Mother. Mother informed him of the incident of May 18, and the hospitalization. Mr. Downing asked Mother if she would agree to release Student's mental health records, "to which she declined consent." At that moment, Student's family was in crisis. Their 11 year-old daughter was hospitalized on a psychiatric hold. Mother convincingly explained that *at that time* she did not know what was in the records, whether or not it was appropriate to release them, and if she had consented to release, what lasting impact that may have had on Student. Except for the verbal request in a moment of crisis, no one from Sacramento City ever followed up requesting the medical information. More importantly, no written request for a release of records was ever provided to Parents. After Student was released from the hospital and returned to school, no one followed up with an additional request. Parents had a history of being forthcoming and open with Student's records. Under the specific facts of this case, Sacramento City was obligated to send a

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<sup>7</sup> In Student's closing brief, she attempts to contest the emotionally disturbed eligibility determination. That issue was not included in the issues identified for hearing. This decision does not address whether or not Student was incorrectly identified as not meeting the criteria for emotionally disturbed. Rather, this decision analyzes only the appropriateness of the assessment and offered services.

written request for a release of medical records. Had that been sent, Parents would have had an opportunity after the acute crisis had passed to thoroughly consider whether or not to release the information.

100. An IEP team meeting was held on May 29, 2014, at which Sacramento City's mental health assessment was presented. Near the end of the meeting, Mother stated that she found it odd no members of the IEP team asked about the psychiatric hold and that she felt like it was the "elephant in the room." Dr. Zadeh told Mother it was not discussed because she declined consent to sign a release for medical records. Mother then asked the IEP team whether or not the records would have an impact on placement, and an unidentified member of the team said, "No." Ms. Fien then followed up and explained that the records were not necessary because Student was not presenting with significant mental health needs at school. She went on to describe other students with greater mental health needs and how if Student had similar needs the records would be relevant.

101. Student's mental health information was critical to complete a comprehensive assessment. The fact that Mother declined consent during a moment of crisis does not obviate Sacramento City's obligation to provide a written release of information. Further, it does not explain why the Sacramento City declined to have a psychiatrist assess Student's mental health needs and then decline to follow up when Mother specifically brought up the records during the IEP meeting. Had the IEP team obtained consent for the records' release when Mother inquired regarding the relevancy of the records during the May 29, 2014 IEP team meeting, their initial error could have been remedied and an amended report could have been issued incorporating Student's mental health records. Mr. Downing considered the records significant enough to request verbally but the team disregarded them even when Mother was willing to discuss the records and hospitalization during the May 29, 2014 IEP team meeting.

102. The assessment was also fatally flawed because it misapplied the law regarding eligibility under the category of emotionally disturbed. The report, consistent with Dr. Zadeh's testimony, states that, "Student recently re-entered the formal classroom environment in February 2014. With the ED criteria, behaviors must be present and documented over a long period of time (i.e. a minimum of 6 months.)" Accordingly, the assessment disregarded Mother's reports about Student's increasing mental health needs beginning in the fall, instead concentrating on Student's return date to David Lubin in 2014 as the beginning of the sixth month period.<sup>8</sup> Therefore, the date of re-enrollment was incorrectly used as the starting point for determining whether Student had mental health needs for a long period of time.

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<sup>8</sup> No finding is made that six months is the correct definition of "long period of time."

103. The assessment states that, “the school reports are not commensurate with reports from the home, indicating Student may exhibit more clinically significant social/emotional and behavioral concerns at home than at school, limiting the pervasiveness of her emotional difficulty.” However, the fact that she exhibits more extreme needs at home does not reduce the significance of her emotional needs in the school environment. Further, the record is replete with examples of Student displaying mental health needs in the school environment after Student re-enrolled at David Lubin, but her teachers and service providers seemed to focus on the fact that Student often came to school upset and, accordingly, attributed it to a home issue rather than school issue. Finally, Ms. Thomas’s answers to various assessment instruments demonstrate Student’s mental health needs were evident across environments. For example, Ms. Thomas was asked to complete the Differential Test of Conduct and Emotional Problems. It was determined based on her results that Student, “appears to present with behaviors more related to the potential risk of serious emotional disturbance problems, rather than the presence of conduct disorder problems.” The items marked by Ms. Thomas regarding emotional problems include, “withdrawn/aloof/unresponsive; unusual fears of such things as the dark, thunderstorms, being alone, etc.: exhibits odd/strange behavior; consistently obsesses with unpleasant thoughts; and perfectionistic-must do everything right.” The behaviors marked for conduct problems include, “defies parents/is unmanageable; and cannot control temper/blows up.” The excerpts of test result included here are only used as examples of how Student’s mental health needs were present in the school environment. Student’s mental health needs were pervasive.

104. Her teachers and service providers focused on the fact that Student often came to school upset and, accordingly, attributed it to a home issue rather than school issue. The fact that Student could not begin work on several days until after either writing in her journal or going outside with her aide means that her emotional needs impacted Student’s ability to access her education regardless of the cause. Moreover, Student was hospitalized for her mental health needs and missed a week of school. That impacted her ability to access her education. Therefore, the determination that Student’s mental health needs were not evident across environments is incorrect.

105. Sacramento City’s mental health assessment failed to consider Student’s hospitalization and her medical records; applied the wrong legal standard; viewed Student’s newly manifested mental health needs as entirely behaviorally based; and disregarded Student’s mental health issues at school.

#### MAY 29, 2014 IEP PLACEMENT OFFER

106. Student argues that the May 29, 2014 IEP fails to make a clear offer of a FAPE because it fails to identify the middle school being offered. Sacramento City argues that the offer is clear because it indicates that all special education services will be provided at Student’s school of residence and that her middle school of residence is Sutter Middle

School. The school of attendance is listed as David Lubin despite there being only two weeks left before Student was promoted to middle school. Under the facts of this case, specifically, Sacramento City's argument is not persuasive.

107. The issue of placement for middle school was discussed during all three IEP team meetings that took place during the spring of 2014. Several Sacramento City witnesses testified that during the May 29, 2014 IEP team meeting the specific offer of Sutter Middle School was made. However, that assertion was not consistent with the audio recording of the IEP meeting and meeting notes contained in the IEP. Several schools, including the specific program at California Middle School, were discussed. Parents relayed to the IEP team that they had looked at California Middle School, Kit Carson, Sutter Middle School, and other kindergarten through eighth grade schools. At no time during the May 29, 2014 IEP team meeting were any specifics of the Sutter program discussed or provided. No Sacramento City IEP team member actually stated that any particular school was being offered.

108. The programs at the different middle schools discussed varied greatly in size, configuration, and location. For example, some Sacramento City kindergarten through eighth grade schools have as few as 120 middle school students and Kit Carson has approximately 320. Sutter Middle School has over 1,100 students on campus. The configuration and delivery of special education services also varies. Ms. Coffin established that during the 2014-2015 school year, Sutter began the "culture shift" that David Lubin had undergone during the 2013-2014 school year. Specifically, Sutter Middle School was moving from self-contained special day classes to having all special education students fully integrated into core academic classes co-taught by a credentialed special education and general education teacher. This information was not provided to Parents during the three IEP team meetings held during the 2013-2014 school year.

109. Typically, the fact that the box was marked indicating that all services will be provided at a student's school of residence would be persuasive. In this case, however, it is not. As noted previously, each of the prior IEP's in this case indicated that services would be provided at Student's school of residence. Student's school of residence was always Theodore Judah but she continuously attended David Lubin, but for the time she was enrolled in independent study through the charter school. It was also clear in the preceding years that Sacramento City was continually offering David Lubin as placement. Sacramento City cannot now say that Parents were expected to understand that "school of residence" for middle school meant something different than it did in the IEP's throughout the several prior years. Sacramento City did not make a clear offer in its May 29, 2014 IEP of the specific location for middle school.

110. Other than while Student attended the charter school, she had always attended David Lubin with the same students and teachers. She was familiar with the school, its routines, and expectations. Despite that familiarity, Student continued to have significant academic, behavioral, social emotional, pragmatic and executive functioning needs. Because

each possible placement was so different, Parents could not evaluate the offer because it was not specific enough to provide them an opportunity to meaningfully participate in the IEP development process.

#### OTHER FLAWED COMPONENTS OF THE MAY 29, 2014 IEP

111. In light of the factual finding above regarding the clarity of the offer, it is not necessary to make factual findings regarding each component of Sacramento City's offer. That being said, the IEP was substantively flawed regarding mental health services and extended school year services.

112. The IEP of May 29, 2014, offered Student one monthly 30-minute session of counseling. Dr. Zadeh explained that the Sacramento City members of the IEP team started with a minimal amount of mental health services and could have increased it had Student's needs required an increase. Dr. Zadeh also explained that she is not a proponent of "pulling kids out" of their academic classes to receive supplemental services. Dr. Zadeh's preference that students not be removed was not based on Student's unique needs. The determination regarding the amount of mental health services was based on a general philosophy of starting with minimal services to avoid removing a student from their academic classes and possibly increasing from there. The offer of mental health services, therefore, did not consider what *Student* needed to assist her to benefit from special education. This was not an appropriate strategy in Student's case given the significant nature of her mental health needs.

113. Student's May 29, 2014 IEP also eliminated extended school year services. Up to this point, Student had been provided extended school year services to avoid regression of her skills throughout the summer months. There was no discussion during the IEP team meeting as to why Student's extended school year services were eliminated. As noted above, Student continued to have significant academic, behavioral, social emotional, pragmatic and executive functioning needs. Sacramento City specifically provided the POPS program the prior extended school year to help Student avoid regression of her executive functioning skills. Student was transitioning to middle school where, had she attended Sutter Middle School, she would have had multiple class periods per day with different teachers in different classrooms. The demands on Student's executive functioning needs would have increased in middle school.

114. As of May 29, 2014, Student had developed mental health needs that adversely impacted her ability to access her education. Student's needs were likely to continue for a long period of time. Interruption in her educational program over the summer may have caused regression that, when coupled with her limited recoupment capacity, made it unlikely that she would have attained a level of expected self-sufficiency and independence without any extended school year services.

### *Springstone*

115. Parents notified Sacramento City that they intended to place Student at Springstone for the 2014-2015 school year more than 10 days prior to placing her. Parents elected to have Student repeat sixth grade at Springstone. She began attending on approximately August 14, 2014.

116. Springstone is located in Lafayette, California, more than 90 miles from Student's home in Sacramento. Parents rented an apartment near the school. One parent stayed from Sunday through Friday with Student while the other parent stayed in Sacramento with Student's older sister.

117. Springstone has small class sizes of approximately eight students with one teacher. The program is designed for students with high functioning autism who have executive functioning deficits. Executive functioning techniques are imbedded throughout the entire school day. A component of the program is also experiential where students go for monthly outings into the community. The program does not have a mental health component.

118. Mother persuasively established that Student's maladaptive behaviors, while not eliminated, have been reduced since she began attending Springstone. Her emotional state has improved. It is *not* determined in this Decision that Student requires placement in a non-public school setting with no typically developing peers to meet her needs. That said, at the time Student enrolled at Springstone she had been on a downward spiral behaviorally and emotionally, and she continues to have mental health needs that are not fully addressed. For example, she was hospitalized again on an involuntary psychiatric hold in November 2014. However, the small class size, focus on executive functioning techniques, and less demanding social interactions, reduced Student's anxiety and stress to a such a degree that she could access her education. Therefore, it is determined that Student has made educational progress at Springstone.

### *Residency*

119. Shortly after Student enrolled at Springstone, Parents retained a realtor to help them locate a home near the school. Parents purchased a home and closed escrow in November 2014. Thereafter they undertook a major renovation of the house without ever having moved into the house.

120. Student's sister attended a kindergarten through eighth grade school in Sacramento and was scheduled to graduate in June 2015. The family intends to move permanently to the new home during the summer of 2015. Thereafter, the family will rent their home in Sacramento.

121. At all times relevant to this decision, Parents received their mail at the Sacramento home, filed taxes under the Sacramento address, and spent weekends, holidays, and times of repose in Sacramento. The family continued to be members of their local swim and tennis club. Additionally, Parents rotated weekly who stayed in the Lafayette apartment with Student and who returned to the family home in Sacramento. No one parent stayed in the apartment in Lafayette for an extended period of time. The family considered their residence to be the home in Sacramento for the 2014-2015 school year.

122. It is determined that Parents' express intent was for their family's residence to remain in Sacramento until after Sister graduated from eighth grade in June 2015, and Father relocated his business.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework under the IDEA<sup>9</sup>*

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and their implementing regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>10</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment, higher education, and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are

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<sup>9</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>10</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the FAPE definition 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. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the

complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 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 administrative hearing decision is preponderance of the evidence].)

5. Under the IDEA, in cases alleging a procedural violation, an ALJ may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or deprived the Student educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii).) California has enacted a similar statute that prohibits an ALJ from basing a decision solely on non-substantive procedural errors, unless the ALJ finds that those errors resulted in a loss of educational opportunity to the pupil or interfered with the parent or guardian's right to participate in the process of formulating the IEP. (Ed. Code, § 56505 subd. (j).)

*Issue 1: Denial of FAPE during the 2012-2013 school year, from November 21, 2012, through the extended school year.*

#### JANUARY 29, 2013 IEP OFFER'S CLARITY

6. A district must present parents a formal, specific, written offer of placement that allows them to make intelligent decisions for their child. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F. 3d 1519, 1526 (*Union*).) "The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any." (*Ibid.*)

7. Student asserted Sacramento City failed to make a clear written offer of placement and service in its January 29, 2013 IEP. Specifically, Student asserts that the IEP failed to clearly specify the frequency and duration of resource specialist program services, structured social skills program, executive functioning skills program, the behavior support plan, and aide services.

#### RESOURCE SPECIALIST PROGRAM

8. It was determined that the notes from the January 29, 2013 IEP team meeting capture ongoing discussion regarding the frequency and length of student's resource specialist program services. Ultimately, however, the Offer of FAPE page is clear that Student was offered 60 minutes per week resource specialist services consisting of 30 minutes pull-out and 30 minutes push-in. The fact that the notes reflect the initial thoughts of team members does not render the ultimate offer of services contained in the Offer of FAPE page unclear. Therefore, the offer for resource specialist program services is clear and did not result in a denial of a FAPE.

*STRUCTURED SOCIAL SKILLS AND EXECUTIVE FUNCTIONING PROGRAM*

9. The evidence established that the frequency and duration of Circle of Friends was not required to be quantified to constitute a clear offer for Student. The January 29, 2013 IEP includes a reference to Circle of Friends in the IEP portion that describes aides, services, program accommodations/modifications, and/or supports. Despite the inclusion in Student's IEP, the evidence established that Circle of Friends was a general education program to which Student and her typically developing peers were able to participate during lunch. Student did not meet her burden to establish that she had a need for a structured social skills program beyond the speech and language services offered in her IEP. Accordingly, Sacramento City was not required to include the frequency and duration of Circle of Friends to have a clear IEP offer.

10. The evidence demonstrated that Student's goals, speech and language services, and the ROPES curriculum that was integrated in multiple settings, including in her general education class along with her aide support, was sufficient to meet her executive functioning needs. Student did not meet her burden to establish that she required an executive functioning program in addition to what was offered and provided in her IEP's during the 2012-2013 school year. Accordingly, Sacramento City was not required to include an executive functioning program to constitute a clear offer.

*BEHAVIOR SUPPORT PLAN*

11. Student's January 29, 2013 IEP states that Student's behavior impedes her learning due to lack of focus and attention and says, "see NPA report." Student asserts that the IEP offer was unclear because the report was not attached to the IEP. The document was part of Student's file that was contained in the classroom. Ultimately, however, it should have specifically been attached to Student's IEP. This omission constitutes a procedural violation of the IDEA and does not conform to the requirements from *Union* as set forth above.

12. The United States Supreme Court highlighted the importance of the IDEA's procedural requirements. (*Rowley*, at p. 200). Despite that importance, a procedural violation is not automatically considered a FAPE denial. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 n.3; *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) Procedural inadequacies that result in a loss of educational opportunity or seriously infringe on parents' opportunity to participate in the IEP formulation process clearly result in a denial of FAPE. (*Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078; see also *Amanda J. v. Clark County School Dist.*, (9th Cir. 2001) 267 F.3d 877, 892.) "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].)

13. In this case, the failure to attach the behavior support plan to the IEP did not seriously infringe on Parents' opportunity to participate in the IEP formulation process. Parents did not consent to the IEP until April 18, 2013. By that time they had already reviewed the proposed behavior support plan developed by Learning Solutions. They continued to participate in regular meetings outside of the IEP team process with multiple team members including representatives from Learning Solutions. The evidence established that Parents had an opportunity to ask questions and provide feedback regarding the plan before they consented to the IEP including the behavior support plan.

14. Additionally, Student was not denied educational benefit by this error because the document was included in her school records, and Student's teachers were informed about the behavior support plan and its contents. Additionally, the behavior support plan was implemented after Parents consented, as evidenced by the data collected regarding the behaviors tracked in the plan. It is determined that failing to attach the behavior support plan to the IEP was an IDEA procedural violation; however, it did not result in a denial of FAPE because it did not impact Parents' participation in the IEP development nor deprive Student educational benefit.

#### *AIDE SERVICES*

15. Student argued that the aide services included in the January 29, 2013 IEP was unclear because it did not specify whether or not the aide would be considered a confederate aide or a one-to-one aide. The record established that from January 29, 2013, through the end of the school year Student was offered a direct one-to-one aide. It adequately specified the frequency and duration. Student cited no authority that *Union* requires the aide services to have a specific name, such as "confederate" or "Velcro." The IEP set out the activities and purpose of the aide. The IEP also specified that the decision about shifting to a confederate aide would be addressed twice per year. This is sufficient to meet the specificity requirements under *Union*.

16. Consistent with the IEP, Student's one-to-one aide was present but continued to fade back during lunch, physical education, resource specialist program services, and speech and language services as needed. Parents were aware of this and provided feedback to Student's IEP team during the IEP development.

17. The January 29, 2013 IEP was not unclear regarding aide services nor did it deprive Parents of an opportunity for meaningful parental participation in the IEP development process. The aide services were effective and supported Student's behavioral needs; therefore, Student received educational benefit.

18. As discussed above, Student did not meet her burden to establish that the January 29, 2013 IEP was not a clear offer regarding resource specialist program services, the Circle of Friends program, executive functioning skills program, the behavior support plan, and aide services. Therefore, Student was not denied a FAPE regarding these services during the 2012-2013 school year.

#### PRESENT LEVELS OF PERFORMANCE

19. Student generally asserted that Sacramento City failed to adequately identify her present levels of performance in the January 29, 2013 IEP but did not provide evidence in support of the contention. Federal and state law specify that an annual IEP must contain a statement of the student's present levels of academic achievement and functional performance, including the manner in which the student's disability affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).)

20. This IEP was created after a comprehensive triennial assessment that accurately identified Student's academic achievement, functional, behavioral, and social emotional performance. Student's communication, behavioral, health, and daily living skills were noted. The goals and services offered in the IEP were based upon the assessment data that was substantiated by her then teachers and service providers. The IEP also included the manner in which the student's disability affects her involvement and progress in the regular education curriculum. Therefore, Student failed to meet her burden to support this allegation.

#### MEASURABLE GOALS IN ALL AREAS OF NEED

##### *OPERATIVE IEP IN NOVEMBER 2012*

21. Student alleged the goals contained in the February 2012 IEP were not measurable and that they failed to address all areas of need, specifically including social-emotional functioning, behavior, executive functioning, reading comprehension, and written expression. The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general curriculum; and (2) meet each of the student's other educational needs that result from his disability. (20 U.S.C. §1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the student's goals will be measured. (20 U.S.C. §1414(d)(1)(A)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of

performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) Each of the goals contained in Student's February 2012 IEP was measurable.

22. Student contends that the goals do not address all areas of need including social-emotional functioning, behavior, executive functioning, reading comprehension, and written expression. This assertion was not supported by the evidence in this case. The law requires that an IEP include goals addressing each of Student's educational needs. There is no prohibition against goals designed to meet multiple needs. For Student, there is significant overlap in her behavior, social-emotional, and executive functioning needs. Student's operative IEP in November 2012, had a goal in the area of critical thinking/executive functioning that addressed Student's social emotional functioning, behavior, and executive functioning needs. Specifically, this goal called for Student to increase her ability to self-identify behavior issues such as task completion, organization, transitioning, peer relations, and peer interactions. To achieve this goal, it called for Student to use graphic organizers such as worksheets from the ROPES program including Evaluating and Resolving Problematic Behaviors and Basic Critical Thinking Skills. The ROPES curriculum, which was implemented in multiple settings, relies on visual strengths to improve an individual's ability to organize, plan, process, and execute tasks.

23. Student's allegation that the goals failed to address her reading comprehension and writing needs was also not supported by the evidence. Student's operative IEP in November 2012 had a reading comprehension goal that focused on her ability to formulate accurate predictions about text as described previously. The IEP also included a written language goal calling for Student to produce a correctly indented multiple paragraph composition that included an opening paragraph with a topic sentence, 1-2 supporting paragraphs with details and explanations, and a concluding paragraph. Ms. Ronsheimer, Student's fifth grade language arts teacher, established that these goals were designed to and did meet Student's reading comprehension need.

24. Each of Student's goals indicated the area of need that resulted from Student's disability to enable her to be involved and progress in the general curriculum. The goals explained the relationship to Student's then present level of performance in each area. The goals also specified how they were to be measured and the tool for measurement.

25. It is determined that the goals contained in Student's February 2012 IEP, were measurable and designed to meet Student's social-emotional functioning, behavior, executive functioning, reading comprehension, and written expression needs and were reasonably calculated to provide educational benefit.

*JANUARY 2013 IEP*

26. Student made the same contentions regarding goals from her January 2013 IEP regarding measurability and areas of need. This assertion was not supported by the evidence in this case.

27. As with the prior IEP, each of Student's goals contained in her January 2013 IEP indicated the area of need that resulted from Student's disability to enable her to be involved and progress in the general curriculum. The goals explained the relationship to Student's then present level of performance in each area. The goals also specified how they were to be measured and the tool for measurement.

28. Student's social-emotional, behavior, and executive functioning needs were intertwined and Student's January 2013 auditory processing goals and positive behavior support plan goals prepared by Learning Solutions met those needs. The baselines for Student's auditory processing goals indicate that Student had difficulty organizing verbal information to accurately recall and sequence information, sort relevant from irrelevant information, and formulate the main ideas or greater concepts. This skill deficit increased Student's frustration and impacted her social-emotional functioning. When frustrated, Student's behavioral response included becoming teary and exhibiting facial grimacing. Regarding executive functioning, Student's behavior support plan indicated she had difficulty independently transitioning from one work task to another, beginning assignments after instructions were given, and completing work tasks. Student's IEP contained goals addressing each of these skill deficits. It is determined that Student's January 2013 IEP goals addressed her social-emotional, behavior, and executive functioning needs.

29. Student's allegation that the goals failed to address her reading comprehension and writing needs was also not supported by the evidence. Student's January 2013 IEP had a reading comprehension goal that focused on her ability to correctly read grade-level text with appropriate pacing, intonation, and expression. Student also had a written language goal that required her to produce a multiple paragraph essay. These goals met Student's reading comprehension and written expression needs and was reasonably calculated to provide educational benefit.

30. It is determined that the goals contained in Student's January 2013 IEP were measurable and designed to meet Student's social-emotional functioning, behavior, executive functioning, reading comprehension, and written expression needs and were reasonably calculated to provide educational benefit.

#### APPROPRIATELY ADDRESS EXECUTIVE FUNCTIONING

31. Student argued that she required a specialized executive functioning program to meet her needs stemming from this deficit during the 2012-2013 school year. The term “related services” (designated instruction and services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) Related services must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.)

32. Student failed to meet her burden in this regard. As noted above, the law requires that an IEP contain measurable goals addressing Student’s areas of need. It was determined above that Student’s executive functioning needs were addressed in the goals contained in both operative IEP’s during the 2012-2013 school year. Moreover, Sacramento City provided Student with the POPS program during the 2013 extended school year. In addition to Student’s goals and program that integrated a focus on executive functioning throughout the school day, Student’s executive functioning needs were specifically addressed during the extended school year. Student failed to meet her burden that she required an additional or specialized program to benefit from her education. The evidence established that Student made progress regarding her executive functioning needs during the 2012-2013 school year including the extended school year. She also received educational benefit regarding her executive functioning needs.

#### APPROPRIATELY ADDRESS MENTAL HEALTH NEEDS

33. Student intermittently exhibited anxiety when confronted with non-preferred tasks. To address this need, Student’s IEP’s included social emotional and pragmatic language goals. Additionally, Student’s IEP’s provided accommodations that permitted Student to journal or take breaks as needed. These services, along with the support of her one-to-one aide were sufficient to meet Student’s social and emotional needs during the 2012-2013 school year. Student did not exhibit mental health needs in the school environment during the 2012-2013 school year that required developmental, corrective, and supportive services for her to benefit from her education. Therefore, Student failed to meet her burden that she had additional mental health needs that required additional services during the 2012-2013 school year.

#### APPROPRIATE BEHAVIOR SUPPORTS AND SERVICES

34. Student argued that the ambiguity regarding the aide offered and provided, “confederate” aide versus a “Velcro” one-to-one aide rendered the offered and provided services inappropriate. At all times at issue during the 2012-2013 school year, Student was offered and provided a one-to-one aide. Student knew the aide was assigned to her exclusively. Ms. Rossi and Ms. Ronsheimer established Student’s assigned aide faded back at appropriate times (speech and language, resource, and occasionally during direct instruction) but did not provide services to students other than Student and was there to assist Student at all times. The goal that the aide support ultimately be transitioned to a confederate aide was shared by the Sacramento City members of Student’s IEP team and not Parents. The Sacramento City IEP team members ultimately yielded to Parent’s requests by changing the offer in the January 2013 IEP to one that agreed to revisit the aide status bi-annually. That was not scheduled to happen again until Student entered sixth grade.

35. It is determined that Student’s behavior supports and services, in particular the aide service, were clearly offered, met Student’s needs, and permitted her to benefit from her education during the 2012-2013 school year from November forward. It is also determined that Student was not denied a FAPE regarding her behavior services.

#### APPROPRIATE SPEECH SERVICES

36. Student argued that her speech and language services were not appropriate because she required a structured social skills program. Student’s needs did not require a structured social skills program during the 2012-2013 school year. Student’s teacher and Ms. Coffin established that Student was accepted by her classmates and was socially and academically included. Student was an active participant who contributed willingly in class. During group learning activities in fifth grade, Student self-initiated group pairings and those requests were granted. During recess and lunch, Ms. Coffin established that Student interacted with a group of same-age peers. It is established that Student did not require a structured social skills program to benefit from her education. The services that were offered and provided were reasonably calculated to provide educational benefit.

#### LEAST RESTRICTIVE ENVIRONMENT

37. Student argued that she required a small class setting with a low teacher-to-student ratio to meet her needs. She further argued that a general education setting with a one-to-one aide is more restrictive setting than a special day class. Student did not present legal authority in support of that contention. Regardless, Student failed to meet her burden on this issue because she continued to receive educational benefit during the 2012-2013 school year while fully mainstreamed with her typically developing peers.

38. Local educational agencies must ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services. (Ed. Code, § 56360.) School districts are required to ensure that a variety of potential educational placements are available to special education students, including placements in general education classes, special day classes, and resource classes at district schools, and placement at certified non-public schools if appropriate. There is no requirement that every possible program option available in a school district be addressed at an IEP meeting.

39. Federal and State law requires school districts to offer a program in the least restrictive environment for each special education student. (See 34 C.F.R. §§ 300.114, et. seq. (2006).) A special education student must be educated with non-disabled peers “[t]o the maximum extent appropriate,” and may be removed from the regular education environment only when the nature or severity of the student’s disabilities 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); 34 C.F.R. § 300.114(a)(2)(i) & (ii) (2006).) A placement must foster maximum interaction between disabled students and their non-disabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031.) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045; see also § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) However, if it is determined that a child cannot be educated in a general education environment, then the 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.)

40. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the “least restrictive environment” for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting. ” (*Rowley, supra*, 458 US at 197.) *Gregory K. v. Longview School Dist.* (9th Cir.1987) 811 F.2d 1307, 1314.) As long as the school district’s offer was reasonably calculated to provide educational benefit, it constitutes an offer of a FAPE. (*Rowley, supra*, 458 U.S. at 200.) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K., supra*, 811 F.2d at 1314.)

41. In this case, the evidence established that during the 2012-2013 school year that even considering the nature and severity of Student’s disabilities, education in regular classes with supplementary aids and services was achieved satisfactorily. Student benefited

academically and socially from her general education setting. Student's presence in the class enhanced and did not negatively impact her teacher or other children in her general education class. Additionally, no evidence was presented regarding the cost of Sacramento City's program. The evidence established that throughout the entire school year she continued to make progress in all areas of need including academic, social, behavioral, pragmatic language and executive functioning. Student's one-to-one aide helped redirect Student when she was either off task or demonstrated anxiety in school.

42. It is determined that Student's needs were met and she received educational benefit during the 2012-2013 school year while fully included with her typically developing peers for 97 percent of the school day. Student failed to meet her burden that she required a more restrictive environment to receive a FAPE.

#### FAILURE TO IMPLEMENT ACCOMMODATIONS AND MODIFICATIONS

43. Student argued that Sacramento City failed to implement accommodations and modifications contained in Student's two operative IEP's during the 2012-2013 school year. A failure to implement an IEP may deny a child a FAPE and thereby give rise to a claim under the IDEA. (*Van Duyn v. Baker Sch. Dist. 5J* (9th Cir. 2007) 502 F.3d 811 (*Van Duyn*).) Minor implementation failures are not actionable given that special education and related services need only "conform" to the IEP. A school district is not statutorily required to maintain perfect adherence to the IEP. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs "when there is more than a minor discrepancy between the service a school provides to a disabled child and the service required by the child's IEP." (*Id.* at pp. 815, 821-822.) *Van Duyn* specifically rejected a "per se" standard whereby any failure to implement the IEP as written gave rise to an automatic IDEA violation. Instead, when implementation failures occur, it requires analysis of the nature, extent and impact of the failure. (*Id.* at pp. 824-825.) The evidence established that Student's teachers and service providers implemented her accommodations and modifications contained in her 2012-2013 IEP. Therefore, Student failed to meet her burden that her accommodations and modifications were not implemented during the 2012-2013 school year. Student was not denied a FAPE in this regard.

#### EXTENDED SCHOOL YEAR

44. In addition to special education instruction and services during the regular school year, school districts must provide extended school year services in the summer if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106 (2006); Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, title 5, section 3043, provides that extended school year services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Pupils to whom

extended school year services must be offered under section 3043 “. . . shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil’s educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.” (See also 34. C.F.R. § 300.106 (2006); Ed. Code, § 56345, subd. (b)(3).)

45. Student did not specifically argue that Sacramento City failed to offer appropriate extended school year services during the 2013 extended school year. Student did allege, however, in her overall issue a denial of FAPE for the school year including the extended school year. During the 2013 extended school year, Sacramento City provided Student the POPS program. The POPS program addresses visual spatial skills, fine motor skills, executive functioning, and providing language to spatial concepts. It is determined this program was appropriate for Student and was designed to prevent regression and promote recoupment of Student’s educational progress. Accordingly, Student failed to meet her burden that her extended school year program was not appropriate.

46. It is determined that Sacramento City did not deny Student a FAPE from November 21, 2012, through the 2012-2013 extended school year regarding any contested component of her special education program and related services.

*Issue 2: Denial of FAPE during the 2013-2014 school year from February 20, 2014, through the extended school year and for the 2014-2015 school year.*

#### MENTAL HEALTH ASSESSMENT

47. A local educational agency must assess a special education student in all areas of suspected disability including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. (20 U.S.C. § 1414(b)(2)(A)). Assessments must be sufficiently comprehensive to identify all of the child’s special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical and developmental factors have on the student’s functioning. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) The IEP team must consider the assessments in determining the child’s educational program. (34 C.F.R. § 300.324(a)(1)(iii)).

48. Student re-enrolled in Sacramento City on February 20, 2014. Student's mental health needs changed significantly between the time she left and returned to David Lubin. Student exhibited paranoid and delusional thinking. Some examples include Student believing that Mother killed Grandfather and Grandfather trying to communicate with Student from the grave. Student also believed that her sister was shrinking and would eventually disappear. Mother established that Student's needs began to change during the fall of 2013. In addition to delusional and paranoid thoughts, Student became verbally and physically aggressive toward Parents. Mother shared her concerns with David Lubin's principal and teacher before the first day Student attended.

49. Student began to exhibit mental health needs in the school setting shortly after starting school. Ms. Thomas established that Student was also defiant, anxious, and more easily agitated at school than she was in fourth grade during which Ms. Thomas was also Student's teacher.

50. Sacramento City was on notice that Student was suspected of having mental health needs within the first 30 days following her re-enrollment at David Lubin. It is determined that Sacramento City was required to offer Parents an assessment plan no later than March 20, 2015, when Student's IEP team met following her 30 day transition into David Lubin. Sacramento City delayed offering the plan to conduct the assessment until Student's IEP team reconvened on April 10, 2014.

51. Student's parents signed providing consent for Sacramento City to conduct a mental health assessment of Student and determine whether or not she met the criteria for emotionally disturbed. Once Sacramento City commenced the assessment, it was required to meet all legal requirements.

52. Federal regulations state that the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." (34 C.F.R. Sec. 300.304(c)(6).) The school district must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the child. In general, the school district must use "assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child." (34 C.F.R. Sec. 300.304(c)(7).)

53. Student's educationally related mental health assessment conducted by Sacramento City was fatally flawed in two respects. The flaws were not with the instruments selected. Rather, the primary flaw was that the assessment was not sufficiently comprehensive to accurately identify Student's mental health needs because it lacked critical

medical information. Second, the assessors incorrectly applied the legal standard for emotionally disturbed eligibility. Although no decision is reached regarding whether or not Student met the criteria, the misapplication of the standard ensured that Student's IEP team did not consider all relevant information.

54. Regarding the assessment's comprehensiveness, no one from Sacramento City ever provided Parents a written request or a waiver of information to obtain Student's mental health records. While the assessment was pending, Student was hospitalized on a 72-hour involuntary psychiatric hold because it was determined she was a danger to herself or others. Her mental state was such that Student was not released after the 72 hour hold but was transferred to a psychiatric facility for a total of five days.

55. Mr. Downing spoke with Mother while Student was hospitalized. Mother did not provide consent for the records release when initially questioned by Mr. Downing. No other attempts to obtain the records were made. No written request or release was ever sent. Mother was in the height of a family crisis with her eleven-year-old daughter involuntarily committed to a mental health facility for attacking Mother when Mr. Downing broached the topic. It is reasonable that Mother would have been reluctant at that moment to agree to release records. Sacramento City, however, was obligated in this case to follow-up with a formal request and it did not. Alternatively, Sacramento City could have requested permission for the diagnostic services of a physician or other health professional because it was suspected Student's newly developed needs were medically related. Sacramento City made no such request. (34 C.F.R. Secs. 300.34(a), (c)(5).)

56. In this case, Student's mental health records were critically important. As noted earlier, Dr. Chez, Student's treating neurologist, specifically recommended that Parents locate a psychiatrist with experience treating both autism and mental health issues. This recommendation was made, in part, to differentiate the underlying cause of Student's behavior. In this case, that would have been necessary information for Student's IEP team to consider in designing her educational program. Student's IEP team approached her social emotional needs from a behavioral perspective utilizing Learning Solutions's behaviorists and aides. Having access to Student's mental health records, including her specific diagnosis and recommended treatments, could have lead Student's team to consider adding more services or an alternative approach to addressing Student's mental health needs. The failure to include this information rendered the assessment insufficiently comprehensive.

57. The defect regarding the failure to formally request or obtain Student's mental health records could have been cured. Near the end of Student's May 29, 2013 IEP team meeting where the assessment was discussed, Mother specifically commented that she thought it was odd no one asked about Student's hospitalization. Mother was reminded that she had not provided consent for those records to be released. Mother then asked specifically

whether or not the records would be relevant to Student's placement. Rather than ask for the records to be provided before making a final determination, one member of the team said, "no" and another explained that Student's needs were not as severe in the school setting as other students'. Had the team requested the release at that time, the medical information could have been included and an amended assessment report produced that would have been sufficiently comprehensive to identify all of the child's special education and related service needs.

58. The second reason the assessment was flawed was that Dr. Zedah misapplied the eligibility criteria for emotionally disturbed. A student is eligible for special education and related services in the category of emotional disturbance when she exhibits one or more of the following characteristics over a long period of time, and to a marked degree, which adversely affect educational performance:

- (a) An inability to learn which cannot be explained by intellectual, sensory, or health factors;
- (b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (c) Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations;
- (d) A general or pervasive mood of unhappiness or depression; or
- (e) A tendency to develop physical symptoms or fears associated with personal or school problems.

(Cal. Code Regs., tit. 5, § 3030, subd. (i).)<sup>11</sup>

59. Dr. Zadeh's report and testimony made clear her belief that "long period of time" means at least six months. She considered Student's re-enrollment at David Lubin in February 2014 as the starting point for the six month period. That is not a requirement under the law. By applying the standard as she did, the mental health needs that Parents observed during the fall and early winter in 2014 were discounted because the proverbial clock did not

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<sup>11</sup> The eligibility definition for emotionally disturbed is the one in effect at the time addressed in this Decision. The definition has since been amended. (See Cal.Code Regs., tit. 5, § 3030, subds. (b)(4), (b)(9) [effective July 1, 2014].)

start ticking until February 20, 2014, when Student re-enrolled. The evidence established that Student had manifested mental health needs for a long period of time (in excess of six months).

60. Dr. Zadeh also misapplied the standard “to a marked degree.” Under her application of this standard, the fact that Student exhibited more severe mental health needs in the home than in the school somehow limited the pervasiveness of the need. Sacramento City did not provide authority to support this legal interpretation. The question was not where the greater mental health needs manifested. Rather, the question was whether Student’s mental health needs were to a marked degree in the school environment such that it adversely affected Student’s educational performance. Based on the testing, as well as both teacher and parent reports, Student’s educational performance was adversely affected. Student intermittently missed educational instruction due to her newly developed mental health needs, and while hospitalized for five days.

61. This decision does not reach a conclusion regarding Student’s eligibility for special education under the category of emotionally disturbed because that was not an issue in this hearing. The inaccuracies and omission of critical information, however, renders the assessment invalid. This was more than a procedural error because Student’s IEP team relied on an assessment that did not meet all legal requirements in reaching its recommendations. Student’s IEP team offered her 10 annual counseling sessions of 30 minutes each. The decision to offer this amount was based upon a faulty assessment, and the belief that when offering mental health services, the frequency should be determined with an eye toward lessening the amount of time away from a student’s academic classes. That is not the appropriate legal standard.

62. It is determined that Sacramento City’s mental health assessment did not meet all legal requirements. The determination regarding services was not based on an analysis of the necessary amount of services Student required to be able to benefit from her educational program. Accordingly, she was denied educational benefit. In this case, the specific deficiencies were significant enough that Student was denied a FAPE.

#### MARCH 20, 2014 AND MAY 29, 2014 IEP’S

63. Student argued that Sacramento City failed to make a clear written offer of FAPE in the March 20, 2014, and May 29, 2014 IEP’s. Specifically, Student argues that neither IEP makes a clear placement offer indicating which middle school Student was to attend for the 2014-2015 school year. A district must present parents a formal, specific, written offer of placement that allows them to make intelligent decisions for their child. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F. 3d 1519, 1526 (*Union*).)

64. Student's March 20, 2014 IEP identified Student's school of attendance as David Lubin and checked the box that all special education services would be provided at Student's school of residence. This was not correct because Student's school of residence for the remainder of the 2013-2014 school year was Theodore Judah. Student's May 29, 2014 IEP listed the same information. Sacramento City asserts that a clear offer of placement was made for middle school because Sutter Middle School was Student's middle school of residence. Under the specific facts of this case, Sacramento City's argument is not persuasive.

65. Student's parents were very concerned about Student's transition to middle school. During the spring of 2014 Student's mental health and behavior needs had increased both at home and at school. Student had previously been in only two school environments; at home for approximately six months and at David Lubin. Student knew the routines, the teachers, service providers, and students at David Lubin. Despite this familiarity, Student had difficulty throughout that spring both academically and behaviorally. It was critically important for Parents to know exactly which placement was being offered for middle school so they could meaningfully participate in the IEP development process. The evidence established that the size and configuration of the middle school options available to Student varied significantly in size and configuration. For example, the middle school enrollment could vary from fewer than 120 in a kindergarten through eighth grade school to over 1,100 students at Sutter Middle School. Parents needed to know which of these options was specifically offered for them to meaningfully participate in the IEP development and make an informed decision about whether to accept or reject Sacramento City's placement offer.

66. The record, including the audio recording of the May 29, 2014 IEP team meeting establishes that no specific school site was offered. In some cases, marking the box that all special education and related services would be provided at a student's school of residence would be sufficient to put the parents on notice of such. In this case, the May offer cannot be considered in a vacuum. Each prior Sacramento City IEP provided to Parents during the time period at issue in this case incorrectly indicated that all services were offered at Student's school of residence when, in fact, they were offered at David Lubin. These prior errors did not create a substantive denial of FAPE because all members of Student's IEP team, including Parents, were aware that David Lubin and not Theodore Judah was actually offered. It is disingenuous to expect Parents to disregard that prior history, however, and rely on the accuracy of the checked box for middle school despite this prior history.

67. It is determined that under the specific facts of this case, Sacramento City did not meet the requirements of *Union* in that it failed to offer Student a specific placement for middle school. This error significantly infringed on Parent's opportunity to participate in the IEP development process and was a fatal flaw that rose to the level of a substantive denial of FAPE.

OTHER COMPONENTS OF THE MARCH 20, 2014 AND MAY 29, 2014 IEP'S

68. In light of the above findings it is not necessary to consider each of Student's contentions regarding a substantive denial of FAPE. In order to craft an appropriate remedy, however, some of the contentions will be considered.

*IEP DATED MARCH 20, 2014*

69. It was determined above that by March 20, 2014, Sacramento City was obligated to provide an assessment plan to Parents to assess Student's mental health needs and failed to do so. Other components of Student's IEP dated March 20, 2014, but completed on April 10, 2014, were flawed in other respects as well.

70. Ms. Thomas established that in addition to emerging mental health needs, Student was struggling academically upon her re-enrollment at David Lubin. Rather than offer more support to help Student transition and catch up, the offer of direct resource program specialist services was virtually eliminated. Her previous services were 60 minutes per week with 30 minutes pull-out and 30 minutes push in. That offer, in the face of increased academic needs was cut by more than half and converted primarily a consult model. Moreover, Ms. Coffin and Ms. Winston convincingly established that responsibility for Student's inclusion services shifted from the inclusion specialist to the resource specialist program teacher, in this case Ms. Winston. Student's inclusion and resource services were an integral component to meeting Student's academic, executive functioning, and social emotional needs. Responsibility for those services shifted to the resource program specialist teacher; however, the evidence establishes that not enough time was offered to provide the necessary services.

71. In light of the forgoing, it is determined that the IEP dated March 20, 2014, was not designed to meet Student's academic, executive functioning, and social emotional needs. Student's March 20, 2014 IEP was not reasonably calculated to provide Student educational benefit.

*MAY 29, 2014 IEP*

72. Student's May 29, 2014 IEP constituted Sacramento City's offer of FAPE to Student for the remainder of the 2013-2014 school year, extended school year, and for the 2014-2015 school year through March 2015. Although not all aspects of the IEP are analyzed herein, to appropriately craft a remedy some components are addressed.

73. Student's May 29, 2014 IEP eliminated the offer of extended school year services for the 2014 extended school year. It appears this was an arbitrary determination not considered by Student's IEP team as there was no discussion regarding extended school year

during the May 29, 2014 IEP team meeting. Student had previously received extended school year services. The evidence established that Student's needs increased during the 2013-2014 school year. Student was about to transition to middle school where there would be greater demands on her executive functioning and social emotional needs. It is likely Student's needs would continue for a long period of time interrupting her education program during the 2014 extended school year may have caused regression that, when coupled from her limited recoupment capacity, made it unlikely he would attain an expected level of self-sufficiency and independence. Failing to offer those services denied Student a FAPE.

74. Student's May 29, 2014 IEP offered Student 10, 30 minute counseling sessions annually. It is determined that this offer was based on an assessment that was not legally complaint. Additionally, Student had significant mental health needs that were not fully recognized, understood, or validly considered by her IEP team. In light of the forgoing, the offer of mental health services denied Student a FAPE.

75. In sum, it is determined that Student was denied a FAPE from March 20, 2014 through the extended school year. It is also determined that Sacramento failed to offer Student a FAPE for the 2014-2015 school year.

### *Residency*

76. Sacramento City argued that even if it denied Student a FAPE, Student was not a resident of Sacramento from October 2014 forward and thus it was not required to provide Student a FAPE. For the reasons set forth below, this argument fails.

77. Under the IDEA, a local education agency is charged with "providing for the education of children with disabilities within its jurisdiction." (20 U.S.C. § 1413(a)(1).) California law requires students to attend the public school "in which the residency of either the parent or legal guardian is located." (Ed. Code, § 48200; *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57.) That district usually becomes the local education agency responsible for providing an eligible student a FAPE. (20 U.S.C. § 1401(19); 34 C.F.R. § 300.28(a)(2006); Ed. Code, § 56026.3.) The IDEA's residency determination is made under state law and is no different from the residency determination in other types of cases. (*Union, supra*, 15 F. 3d 1519, 1525.) A parent's residence is determined as follows: (1) it is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which she returns in seasons of repose; (2) there can only be one residence; (3) a residence cannot be lost until another is gained; and (4) the residence can be changed only by the union of act and intent. (Gov. Code, § 244.)

78. Mother established that by October 2014 she was working with a realtor to purchase a home near Lafayette. Parents completed escrow on a new home in November 2014, and promptly undertook a major renovation. Sacramento City asserts that at that point Parent's residency changed because they no longer had the intent to return to Sacramento. Sacramento City notes that in determining residency, courts place substantial weight on intent stating that, "to effect a change of residence, there must be the concurrence in the act of abandonment of one residence with the intent to establish a new residence elsewhere. It is mainly a question of intent..." (*Eriksen v. Eriksen*, (1943) 57 Cal.App.2d 532, 534-535, quoted in *Newport-Mesa Unified Sch. Dist.* (OAH 2006) No. 2005120547, p.8).

79. Sacramento City argues that *Newport-Mesa's* facts are similar to the underlying case and should lead to the conclusion that Mother's residence changed when she retained a realtor and ultimately purchased a house outside of Sacramento City's boundaries. The facts in this case, however, are distinguishable from *Newport-Mesa*. In *Newport-Mesa*, the school district argued that the student's family was feigning residency in the new district to obtain better services. To obtain those services, it asserted that student's mother rented an apartment in the new school district but actually remained a resident of San Clemente where she owned a home. It was determined in that case that the student and his mother slept in the apartment during the week, and returned to their San Clemente house only when Mother was not working. Student's father remained at the San Clemente house and was only a guest in the apartment. Mother maintained a business within Newport-Mesa's jurisdictional boundaries and her subjective intent was to purchase a new house in in Newport-Mesa boundaries after which she would give up the apartment. It was determined in that case that due to the marriage of intent and action, Mother's residence did change to *Newport-Mesa*.

80. In the instant action, Mother did not stay in the Lafayette apartment on an ongoing basis as the mother did in Newport-Mesa. Rather, Mother and Father rotated weekly who stayed in the apartment and, more importantly, returned to the Sacramento residence every other week. Mother established that her subjective intent was to remain a resident of Sacramento until after Sister graduated from eighth grade in June 2015. Mother and Father's overt action was to each spend approximately only 4 out of every 14 nights at the Lafayette apartment and then return to Sacramento. It is determined that during the 2014-2015 school year, there was no union of action and intent that Parents abandon their Sacramento residence and obtain a new one outside of Sacramento City's boundaries. Accordingly, Student remained a resident of Sacramento during the time period at issue in this case.

## REMEDIES

1. Student prevailed on Issue 2 and established that Sacramento City failed to conduct a legally compliant educationally related mental health assessment, failed to offer and provide her a FAPE from March 20, 2014, through the extended school year, and that it

failed to offer her a FAPE for the 2014-2015 school year. As a remedy, Student seeks an independent educational evaluation of her mental health needs, compensatory education, and reimbursement for her private placement at Springstone, including all related expenses such as transportation and housing. Sacramento City argues that Student is not entitled to reimbursement for the Springstone placement because the program did not provide her educational benefit and meet her need for mental health services because there is no therapeutic component to the program.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

3. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L.Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district’s proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, pp. 11 & 14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress].)

4. Reimbursement may be reduced or denied if the parents’ actions were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).) For example, in *Patricia P. v. Board of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 469 (*Patricia P.*) the Seventh Circuit Court of Appeals held that a parent who did not allow a

school district a reasonable opportunity to evaluate a child following a parental unilateral placement “forfeit[ed] their claim for reimbursement.” In *Patricia P.* reimbursement was denied where the parent had enrolled the child in a private school in another state and at most offered to allow an evaluation by district personnel if the district personnel traveled to the out-of-state placement. (*Ibid.*)

#### INDEPENDENT MENTAL HEALTH ASSESSMENT

5. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) “Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an assessment obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

6. If an independent educational evaluation is at public expense, the criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments, must be the same as the criteria that the public agency uses when it initiates an assessment, to the extent those criteria are consistent with the parent’s right to an independent educational evaluation. (34 C.F.R. § 300.502(e)(1).)

7. In this case, Sacramento City’s educationally related mental health assessment did not meet the legal requirements. Accordingly, Student established that she is entitled to an independent educationally related mental health assessment at public expense. By the time this decision is rendered, Student may no longer reside in the Sacramento area. Despite Student’s then current location, if she avails herself of this independent educational evaluation at public expense, it will be subject to Sacramento City’s criteria as the public agency rather than the criteria that may exist in Student’s new district of residence.<sup>12</sup>

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<sup>12</sup> No finding is made in this Decision regarding whether or not Sacramento City’s independent educational criteria is legally compliant. This order is intended to establish which public agency’s criteria governs the evaluation’s parameters.

## COMPENSATORY EDUCATION AND REIMBURSEMENT

8. ALJ's have broad discretion in crafting appropriate remedies for FAPE denials. The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School District v. T.A.* (2009) 129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168].) This ALJ considered carefully the specific FAPE denials, the parties' conduct, the reasonableness of Parents' decision to enroll Student at Springstone, and the appropriateness of the Springstone program in light of the specific denials of FAPE.

9. Sacramento City denied Student a FAPE from March 20, 2014, through the end of the extended school year by delaying the educationally related mental health assessment, and failing to offer a sufficient amount of time, either through resource specialist program services or inclusion services to meet her academic, executive functioning, social emotional, and pragmatic language needs for the 2013-2014 school year. Sacramento City also failed to offer any extended school year services despite Student's prior documented need for such and in the face of increasing academic, executive functioning, and social emotional/mental health needs. Additionally, Sacramento City failed to offer Student a program that constituted a FAPE for the 2014-2015 school year by not offering a specific placement and failing to offer appropriate mental health services to meet her needs because, in part, the offer was based on a faulty assessment.

10. In light of the failures documented above, it is deemed reasonable that Parents rejected the March 20, 2014 and May 29, 2014 IEP offers. Parents timely and appropriately notified Sacramento City regarding their intent to place Student at Springstone. On the placement continuum, Springstone is considered very restrictive in that it is a non-public school and Student does not have access to typically developing peers. Student did not establish that she requires such a program to receive a FAPE prospectively. That said, during the spring of 2014, Student was in a downward spiral both behaviorally and emotionally in the home and school environments. Regardless of whether or not Springstone would have constituted a FAPE, the small class size, focus on executive functioning, and decreased social demands relieved Student's anxiety and resulted in her ability to successfully access her education. This placement did not obviate Student's need for mental health services, the primary deficiency in Sacramento City's offer. However, despite the lack of needed mental health services, the Springstone environment itself permitted Student to make educational progress because her mental health condition did not impact her education as greatly as it would have under the District's proposed IEP for the 2014-2015 school year. Therefore, Student is entitled to tuition reimbursement. Student's May 29, 2014 IEP only offered placement and services through March 20, 2015, when Student's next annual IEP would have been due. Parents established that they were responsible for one full year's tuition at Springstone upon enrollment. Since their actions were reasonable and Springstone conferred Student educational benefit, Student is awarded the total cost of tuition for the 2014-2015 school year.

11. Student also seeks reimbursement for rent, electricity, television and internet services, and transportation from Student's home in Sacramento to the apartment in Lafayette for the entire 2014-2015 school year. Student's home is more than 70 miles from Springstone. Renting an apartment near Springstone was reasonable in light of the distance between the two locations. As found previously, Parents purchased a new home near Springstone in November 2014. Student did not establish that the new home was uninhabitable upon purchase. Parents chose to renovate the newly purchased home and continue renting the apartment rather than staying at the home four nights per week. They could have mitigated their expenses by staying in their newly purchased home.

12. Balancing the equities under these facts, it is determined that Sacramento City is only required to reimburse Student for related expenses of rent and electricity from the time Student started school on August 14, 2014, through November 30, 2014. Student did not meet her burden to establish that she required either television or internet services to access her education at Springstone. Student is also entitled to reimbursement for the cost of rent and utilities on the Lafayette apartment exclusive of television and internet services from August 14, 2014, through November 30, 2014.

13. Sacramento City will be required to reimburse Student at its then approved mileage rate for one round trip per week from Student's home in Sacramento to her Lafayette apartment for the weeks she actually attended school at Springstone from August 14, 2014, through November 30, 2014. Student did not allege, nor it is determined, that she required transportation to and from school (from her apartment to Springstone daily) as a related service.

14. For the reasons set forth above, reimbursement for one year of Springstone's tuition is considered both compensatory education and an appropriate remedy for the failure to offer an appropriate program for the 2014-2015 school year. Additionally, Student will be reimbursed for the apartment rental and one round trip per week transportation reimbursement between her home in Sacramento and the Lafayette apartment from August 14, 2014, through November only.<sup>13</sup>

15. All of Student's other claims for relief are denied.

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<sup>13</sup> The total tuition and rent reimbursement will be based upon the receipts admitted into evidence. No further documentation will be required to substantiate the amounts. Mileage will be based on Sacramento City's approved mileage rate in effect from August through November 2014.

## ORDER

1. Within 15 days of the date of this Order, Sacramento City will provide Parents with its criteria for obtaining an independent educational evaluation at public expense.
2. Within 10 days of Parents providing Sacramento City the name of their selected assessor to assess Student's mental health needs, Sacramento City will contact that provider and expeditiously complete the contracting process.
3. Sacramento City will pay for the independent educationally related mental health assessment directly and ensure that a copy is provided to Parents. The assessment will also include the assessor attending an IEP team meeting, either in person or via telephone at the assessor's election, during which the assessment will be discussed either within Sacramento City or the school district in which Student resides as the time the assessment is completed.
5. Within 45 days of the date of this Decision, Sacramento City shall reimburse Student the cost of tuition actually paid to Springstone for the 2014-2015 school year consistent with the receipts in evidence.
6. Within 45 days of the date of this Decision, Sacramento City shall reimburse Student the prorated cost of the Lafayette apartment rental, including electricity, from August 14, 2014, through November 30, 2014, consistent with the receipts in evidence. Sacramento City is not required to pay for television and internet service at the apartment.
7. Within 45 days of the date of this Decision, Sacramento City shall reimburse Student at its approved mileage rate in effect from August through November 2014, the cost of one round trip per week from Student's residence in Sacramento to the apartment in Lafayette from August 14, 2014, through November 30, 2014, for the weeks Student actually attended Springstone.
8. All of Student's other claims 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, Sacramento City was the prevailing party on Issue 1. Student was the prevailing party on Issue 2.

RIGHT TO APPEAL

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

DATED: July 6, 2015

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JOY REDMON  
Administrative Law Judge  
Office of Administrative Hearings