

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2013120202

v.

TEMECULA VALLEY UNIFIED SCHOOL
DISTRICT,

TEMECULA VALLEY UNIFIED SCHOOL
DISTRICT,

OAH Case No. 2014010234

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

On December 3, 2013, Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, naming Temecula Valley Unified School District in OAH Case No. 2013120202. On January 7, 2014, District filed a complaint in OAH Case No. 2014010234 naming Student. On January 14, 2014, OAH consolidated the two matters, to be heard on the timeline for decision set in OAH Case No. 2014010234.

Administrative Law Judge Judith L. Pasewark heard this matter in Temecula, California, on February 6, 7, 10, 11, 12, 24, and 25, 2014.

Wendy M. Housman, Attorney at Law, represented Student. Theresa Sester, Advocate, assisted Ms. Housman. Student's mother (Mother) attended each day of hearing. Student's father (Father) attended several days of hearing.

Jack B. Clarke, Jr., Attorney at Law, represented District. Kim Velez, District's Director of Special Education, and Breck Smith, assistant director, attended the hearing on behalf of District.

At the close of hearing the matter was continued at the parties' request for the filing written closing arguments on or before March 17, 2014. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision. At the parties' request, the time for decision was extended until April 18, 2014.

PREHEARING MOTIONS

Prior to commencement of testimony, District raised an objection and motion to strike a proffered placement remedy, not included in Student's complaint. District's motion to strike was denied as OAH may utilize appropriate equitable remedies, prayed for or not, to craft relief. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496-1497; see also *Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

District then requested a continuance, on the ground that the Independent Psychoeducational Evaluation prepared by Dr. Mitchell Perlman, had only recently been received, and the parties had not yet been able to schedule or conduct an Individualized Educational Plan team meeting to discuss Dr. Perlman's findings and recommendations. District's motion to continue did not present good cause for continuance, as the IEP team meeting to discuss Dr. Perlman's report was not an issue in this hearing. However, since Dr. Perlman did not assess Student until after the relevant events in Student's complaint, his testimony was strictly limited to the issue of potential remedies, and his independent assessment was not admitted into evidence.

ISSUES¹

1. Student presented the following issues:
 - a) Whether District denied Student a free appropriate public education for the 2013-2014 school year by:
 - b) failing to timely and appropriately assess Student in all areas of suspected disability, specifically in the areas of mental health, occupational therapy (OT), assistive technology (AT), and speech and language, for the June 3, 2013 IEP team meeting;
 - c) failing to appropriately and timely consider AT devices, specifically an iPad, in the June 3, 2013 IEP team meeting;

¹ 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.)

- d) unilaterally discontinuing Student's OT and behavioral intervention services contained in the June 3, 2013 IEP;
- e) failing to materially and appropriately provide Student with meaningful educational benefit;
- f) failing to appropriately consider Student's educational placement in the least restrictive environment with appropriate supports and services in Student's June 3, 2013 IEP;
- g) failing to implement or timely revise, with parental consent, an appropriate IEP or positive behavior intervention plan contained in the June 3, 2013 IEP;
- h) using restraints and seclusion on Student between August and October 2013;
- i) failing to timely provide Parents with a copy of Student's revised preschool behavior intervention plan before implementing it; and failing to obtain parental consent to the revision;
- j) failing to meaningfully calculate the frequency and duration of Student's accommodations as noted in his June 3, 2013 IEP;
- k) failing to timely complete the mental health and functional behavior analysis (FBA) assessments and to evaluate assessment findings within 60 days from initial parental consent, and
- l) failing to timely respond to Parent's request for production of Student's educational and behavioral records between August and October 2013.

District presented the following issues:

1. Whether Student's October 24, 2013 IEP offered Student a FAPE in the least restrictive environment, and
2. Whether District is entitled to conduct an educationally related mental health services (ERMHS) assessment pursuant to the assessment plan provided to Parents on October 23 and November 1, 2013.

SUMMARY OF DECISION

Student contends that since enrolling in District in April 2013, his educational rights as a preschooler and transitional kindergartener "have been egregiously addressed and/or materially ignored by District resulting in substantial contravention of the Individuals with Disabilities Education Act (IDEA), relevant case law, and Student's June 3, 2013 IEP and amendments." Student's 12 issues primarily relate to his behavior problems, which resulted

in District's use of physical restraints on Student. Student also contends that while Student's June 3, 2013 IEP may have initially represented a FAPE, it soon proved inadequate to meet Student's unique needs, and the District failed to take appropriate steps to modify the IEP or timely provide Student with appropriate services. District contends its behavior interventions were appropriate and the other services it offered were reasonably calculated to provide Student with an appropriate education, and therefore Student was not denied a FAPE.

In District's consolidated case, District contends its October 24, 2013 IEP is appropriate for Student, and it should be allowed to implement the IEP, and complete Student's ERMHS assessment. Student contends the October 24, 2013 IEP is incomplete and does not constitute a FAPE. Student further contends that District failed to offer and provide the ERMHS assessment in a timely fashion.

This Decision holds that while District's October 24, 2013 IEP was a move in the right direction, it did not contain sufficient goals to meet Student's unique needs, and failed to meet the clarity standard required to allow Parents to fully participate in the IEP process. Parents, however, have unjustifiably refused to consent to a District ERMHS assessment, which District will be allowed to conduct.

FACTUAL FINDINGS

Background

1. Student is a four year old boy living with his parents within District. He is smart, witty, and articulate beyond his years. He is outgoing and extremely energetic. At the time he entered District, he had not yet been assessed for special education eligibility.

2. In March 2012, Student developed behavioral difficulties when his Mother was hospitalized and very ill for approximately three months. Thereafter, Student's maladaptive behaviors increased; he began growling and "eloping" (walking or running away). At age 3-1/2, Student was required to leave the daycare center he had attended since he was three months old. Student then enrolled in another preschool but his maladaptive behaviors continued, and Student was ejected within his first week of attendance. Two months later, Student enrolled at Kindercare, another day care center, which he attended for six months. Student continued to exhibit the maladaptive behaviors of kicking, hitting, and spitting. He became occasionally incontinent.

3. By March 2013, Student left Kindercare. Student was diagnosed with attention deficit hyperactivity disorder (ADHD) and anxiety disorder. Student was prescribed anti-anxiety medications, and Parents obtained private cognitive behavior therapy, OT, and bio-medical intervention therapies for Student.

4. On April 11, 2013, Parents enrolled Student in District. Mother told District staff that Student's behaviors were interfering with his learning and social development and

provided relevant records including Student's medical records, OT reports, and all information from Student's preschools. District did not explain special education to Mother, provide notice of special education parental safeguards, or provide an assessment plan at that time.

5. On April 29, 2013, District provided, and Parents signed, an assessment plan to determine Student's eligibility for special education. As Student was only four years old, he was placed in a preschool special education class at Jackson Elementary School as a diagnostic placement for purposes of observation and assessment.² Student attended the Jackson special day class from May 2013 through the extended school year which ended on July 18, 2013.

Student's Initial Assessments

6. Janelle Peters,³ the preschool school psychologist for District, assessed Student during his attendance at Jackson and prepared District's Initial Preschool Assessment Report. The assessment team included a District speech and language therapist, a District behavior analyst, Student's preschool special day class teacher, a District nurse, and Parents. Ms. Peter's assessment report is multidisciplinary and reflects the primary parental concerns regarding Student's behaviors, specifically his aggression and defiance. In preparing to assess Student, Ms. Peters reviewed Student's private assessment from MCR Behavioral Services, which diagnosed Student's ADHD (combined type) and mood disorder NOS; Student's OT evaluation from Temecula Valley Therapy Services, which diagnosed Student's moderate sensory processing delays and excess sensory seeking; and Student's developmental-behavior report from La Jolla Developmental Pediatrics, which diagnosed Student's anxiety disorder with components similar to post-traumatic syndrome disorder, oppositional defiance disorder, self regulation difficulties; and sensory processing concerns. She also reviewed Student's medical records, weekly therapy records, as well as records from his three prior preschools.

7. Ms. Peters administered tests and diagnostic procedures including parental interviews, observations, vision and hearing screenings, the Developmental Profile 3, Developmental Profile 3 Parent Checklist, Bracken School Readiness Assessment-Third Edition (Bracken Third Ed.), Beery-Buktenia Developmental Test of Visual-Motor Integration-5 (Beery-Buktenia), and the Behavior Assessment System for Children-Second Edition (Behavior Assessment).

² District does not maintain a general education preschool program, only the Jackson special day class.

³ Ms. Peters holds a B.S. degree in Psychology and Human Development, a M.S. degree in Education, and a Certificate of Advanced Graduate Study in School Psychology. She has been a school psychologist since 1996.

8. The Developmental Profile 3 measured child development in five key developmental areas: physical, adaptive behavior, social-emotional, cognitive, and communication. The Developmental Profile 3 provided information from ratings scales provided to parents and Student's teacher, along with direct observations from the assessor. Student scored in the average range in all five developmental areas. Student demonstrated average social-emotional skills in his abilities to express needs, interact with others, and adhere to societal norms. Student used communication effectively and used logic including cause and effect when arguing a point.

9. The Bracken Third Ed. assessed Student's conceptual knowledge and measured his comprehension and acquisition of basic concepts and receptive language skills. Student scored within the average range for his age.

10. The Beery-Buktenia assessed Student's ability to integrate visual acuity, visual perceptual skills and fine motor abilities. Student's abilities were in the average range compared to same aged peers.

11. The Behavior Assessment was the most informative assessment regarding Student's behaviors. The Behavior Assessment, a behavior rating scale, was given to Mother and Student's teacher to measure Student's behaviors both at home and at school. The Behavior Assessment assesses a broad range of behaviors.⁴ In all areas, Student's behaviors at school were of higher or equal concern to those behaviors at home. Both Mother and teacher rated Student's hyperactivity in the significant range, finding that Student (1) interrupted others when speaking; (2) was overly active and unable to slow down; (3) threw tantrums and screamed; (4) acted out of control; (5) acted without thinking; (6) had poor self control; (7) would not wait to take his turn; (8) fiddled with things while at meals; (9) had trouble staying seated; (10) needed too much supervision; and (11) bothered other children when they were working. Student's teacher rated his aggression as significant, while Mother rated it at risk. Student's elevated scores were attributed to Student's (1) arguing when denied his own way; (2) annoying others on purpose; (3) threatening to hurt others; (4) losing his temper easily; (5) disrupting other children at play; (6) hitting other children; (7) seeking revenge on others; and (8) defying teachers and caregivers. Student's depression was reported as significant by Student's teacher and at risk by Mother. Student's elevated depression scores were attributable to Student's (1) being easily frustrated; (2) whining and crying; (3) changing moods quickly; (4) being easily upset; (5) expressing sadness and negativity; and (6) pouting.

⁴ Under the Behavior Assessment, a standard score within the "clinically significant" range suggests a high level of maladjustment compared with same aged peers. Scores in the "at risk" range may identify a significant problem that may not be severe enough to require formal treatment or may identify the potential of developing a problem that needs careful monitoring.

12. While the Behavior Assessment indicated at risk behaviors in other areas, it found Student's primary difficulties were in the areas of emotional control and emotionality. Student had a tendency to become irritable quickly and disruptive, intrusive and/or threatening towards other students. Student had difficulty controlling and maintaining his behavior and mood, with more of these behaviors exhibited at school than at home.

13. Ongoing observations of Student at Jackson during May 2013, found Student compliant in his first week of school. In the second week, Student was exposed to a less structured class which included a large group "circle time." In this second week Student's behavior deteriorated. He began refusing to comply with adult requests or follow routines. Student began running away from teachers and situations, and also began hitting and kicking staff and peers. He cried daily for his mother after being at school for only an hour. Beginning the third week, however, Student attended the special day class for the full day (8:30a.m. to 12:30p.m.), and the frequency of his problem behaviors began to decrease.

14. At times Student's behaviors could be extreme. Student could be very pleasant, but also very argumentative and volatile. Student demonstrated a need to be in control of situations and would be upset by perceived lack of control. Student displayed difficulty using words to communicate his wants and needs, and demonstrated impulsivity. On the other hand, Student responded well to being given choices and responsibilities. Student benefited from taking breaks and learned to appropriately request them. By the end of May 2013, Student's behavior improved from the prior four weeks. Student understood classroom routines, which he would follow approximately 75 percent of the time. Student transitioned well overall. His eloping had ceased. Student was verbalizing his wants and needs instead of just acting on them, and Student had become more social.

15. The Behavior Assessment determined that Student demonstrated aggressive behaviors towards adults and peers, including spitting, hitting and kicking. He demonstrated anxiety-related behaviors, including chewing on his shirt, difficulty separating from his mother, somatic complaints, worrying, and verbalizing fears. Further, Student exhibited oppositional behaviors, including refusing to comply with adult requests, refusing to complete tasks, and running away from adults and situations. As a result, Ms. Peters recommended that Student be considered for special education eligibility under the category of Other Health Impairment due to his ADHD and anxiety disorder, which prevented Student from participating in several preschool programs.

16. Ms. Peters suggested in her report that Student's behavior, progress and academic functioning be monitored closely. She noted that it remained unclear what impact situational factors did or did not have on Student's behaviors. If Student's behaviors remained chronic and severe, continued to affect Student's ability to maintain relationships, and became evident across settings, degrading Student's ability to learn, the IEP team might need to consider eligibility under Emotional Disturbance as well.

17. Ms. Peters recommended that Student would benefit from a structured educational environment, with exposure to same aged peers, and from specialized academic

instruction. Both proactive and reactive behavioral supports were necessary for Student. Additionally, she recommended that the IEP team consider conducting an OT assessment.

18. District did not administer a formal speech and language assessment to Student while he attended Jackson. Instead, Erin Johnson, District speech and language therapist, administered the Preschool Language Scale-5, Screening Test for Age Four, and observed Student during play and conversation to determine if speech and language was an area of suspected disability. If so, Student would subsequently be given a full speech and language assessment. Student passed all areas of the screening test, including language, articulation, connected speech, social/interpersonal skills, fluency and voice. There were no areas of communication which were lacking or in need of further assessment. Additionally, Parents noted no areas of concern with Student's ability to understand or use language or speech in age-level activities or at home. Mother, however, believed Student needed to be fully assessed in speech and language due to Student's lack of social skills.

19. As will be discussed later, District's copy of the Preschool Initial Assessment Report contained a four page addendum of "Suggested Activities" generated from the Developmental Profile 3. The copies of the assessment report provided to Parents, as well as the copy provided in Student's request for production of documents, did not contain this addendum.

June 3, 2013 IEP

20. Student's initial IEP team meeting to determine his eligibility for special education took place on June 3, 2013. Parents emphasized they were complete neophytes regarding special education, and were overwhelmed by the complex world of IEP team meetings. Parents were provided a copy of the assessment reports one day prior to the IEP team meeting, along with a draft IEP to review. Although no one from mental health services attended the IEP team meeting, all legally required participants attended. Expecting only a small and intimate discussion, however, Parents were taken aback by the sheer number of people who attended the IEP team meeting.

21. The IEP team discussed Student's psychoeducational assessments, and Ms. Peter's recommendations. While acknowledging Ms. Peter's concern regarding emotional disturbance, the IEP team agreed that, at that time, eligibility for special education and related services was most appropriate for Student under Other Health Impairment, due to his ADHD.

22. The IEP team discussed Student's strengths and weaknesses and determined Student's present levels of performance. Student showed average or age appropriate abilities in areas of academics, communication, and motor skill development. The IEP team focused on Student's behaviors as his area of need. Student thrived on being the center of attention; however, he was inconsistent in his behaviors. As example, in the classroom, Student would behave well for two days, and on the third day, he would exhibit aggressive, physical behaviors towards adults and students. Student often had a short attention span when

working in small group activities, and displayed inappropriate behaviors when the attention was directed away from him. He also had difficulty sitting and participating in large group activities for more than five minutes without misbehaving or eloping. Student needed to be in control of all situations, whether it was in conversation, instruction or play. When not in control, Student became frustrated and angry. He had difficulty managing his anger and frustration on his own, and often became violent (biting, hitting, and kicking) with other students and adults. These behaviors could last up to five minutes at a time.

23. The IEP team created four behavior goals. Goal One addressed Student's difficulties sitting and participating in large group activities. Goal Two addressed Student's short attention span in small groups and his inappropriate behaviors when attention was directed away from him. Goal Three addressed improving Student's self-control and sought to eliminate his aggressive behaviors. Goal Four sought to have Student improve his management of anger and frustration by utilizing appropriate means of communication to request a break. Although Ms. Peters had noted Student's task avoidance, no specific goal was created to address it. Further, when confirming Student's unique needs in the area of social interaction, Ms. Peters acknowledged a social interaction goal could have been appropriate, yet no goal was created in this area either. Wendy Thyfault, the transitional kindergarten special day class teacher at Pauba Valley Elementary School, attended the IEP team meeting. She thought the goals created for Student were appropriate, and could be measured, and progress appropriately reported.

24. The June 3, 2013 IEP team crafted accommodations in the forms of a token economy for positive behavior reinforcement, the use of visual aids and manipulatives, and additional adult support in the classroom.

25. District did not perform an AT assessment before the June 3, 2013 meeting, and no information was presented at the IEP team meeting to suggest AT was an area of need for Student. Writing was not a preferred task for Student, but he could write in an age appropriate manner. Student liked to use an iPad; however this device was utilized as a positive behavior reinforcement, not a full-time support.

26. Parents contributed to the IEP discussions. They raised concerns about Student's possible regression during the summer. Parents described Student's habit of throwing things, a behavior that had not been an area of concern at school. In response, the IEP team developed an ESY program for Student. Most importantly, a Tier-2 Positive Behavioral Intervention Plan (Tier-2 Plan) was reviewed, revised, and adopted at the IEP team meeting.⁵

⁵ Students can move through different tiers of positive behavioral interventions as their needs are identified, addressed and remedied. A Tier-1 Plan involves positive behavioral interventions which are typically established by school-wide practices that are implemented in the classrooms and on the campus that include teaching behavioral expectations to all students. A Tier-2 Plan involves targeted, systematic, positive behavioral interventions, strategies and supports to students displaying at-risk behaviors. A Tier-3 Plan

27. It is unusual for a preschooler to have a Tier-2 Plan in his initial IEP. The Tier-2 Plan was developed in response to Student's physically aggressive behaviors towards others, such as scratching, pinching, kicking and biting, which interrupted the instruction time for Student and other students. The IEP team sought to adopt evidence-based behavior strategies, including implementation of a token system, removing him from the group, using a social behavioral intervention group, and giving him activity breaks, "helper jobs," and "first-then" strategies with choices of reinforcement, all of which had previously been effective in reducing Student's behaviors.

28. The IEP team discussed placing in a general education classroom, a general education classroom with supports, and a special day class. Parents inquired about a general education classroom placement, but the District members of the IEP team determined a special day class was appropriate for Student until his behaviors further improved.

29. The June 3, 2013 IEP team made two distinct offers of placement and services. For the remainder of the 2012-2013 school year, Student would remain in the preschool special day class at Jackson, and receive 60 minutes of daily behavior intervention services.⁶ Student would also remain in the Jackson special day class during the ESY, and receive 30 minutes of daily behavior intervention services. Student's behavior intervention services would terminate at the end of the ESY session on July 18, 2013.

30. For the 2013-2014 school year, the IEP team offered Student placement and services in a transitional kindergarten special day class at Pauba. Student would also receive "extra classroom support" for the first 45 days of the school year. The IEP document states that 100 percent of Student's school day would be spent in the special day class.

31. Lastly, the IEP team recommended an occupational therapy assessment. An assessment plan was prepared, and Mother signed it on June 3, 2013. The IEP notes indicate that the OT assessment would be administered at the beginning of the 2013-2014 school year, which was scheduled for August 13, 2013. Parents consented to the IEP in its entirety, including the Tier-2 Plan.

ESY and Summer 2013

32. After absorbing the meaning of the June 3, 2013 IEP, Parents began having questions about Student's placement. Mother was concerned that the special day class was too restrictive for Student; there were no academic goals in the IEP; and there was no mainstreaming to the general education classroom.

is a positive behavioral support plan which is based upon a FBA. A Tier-3 Plan may be created when a student displays serious behavior problems that interfere with achievement of IEP goals or physical violence, which requires a systematic behavior intervention.

⁶ The behavior intervention services provided to Student are also known as applied behavior analysis or ABA.

33. On June 26, 2013, District held an informal meeting with Parents, their advocate, and Jodi Curtis, Student's case manager from Jackson, to discuss the IEP and answer questions. Parents requested an ERMHS assessment. They also requested Student be placed in a regular transitional kindergarten, rather than the special day class, as Parents thought the special day class was academically inadequate. Parents previously had asked for an FBA, and once again asked for one. Ms. Curtis denied these requests, explaining there was no need for a FBA as the District had enough information regarding Student's behaviors from their earlier observations. Student was improving, and his behaviors were calming down.

34. On June 27, 2013, Parents' advocate emailed Ms. Curtis documenting Parents' continuing requests. Parents asked for several things: (1) an IEP team meeting a week prior to school starting on August 13, 2013; (2) consideration of counseling and mental health services to address Student's anxiety; (3) an assessment plan for an FBA to address behavior concerns; (4) reinstatement of behavior intervention services; (5) consideration of more mainstreaming opportunities; (6) a copy of the District's Release of Information form so that District could exchange information with their outside service providers; and (7) information on the curriculum in the special day class transition kindergarten.

35. On July 12, 2013, Ms. Curtis responded to Parents' June 27, 2012 email. She stated first that, as school was closed until the beginning of August, District was unable to immediately set an IEP team meeting. Ms. Curtis, however, contacted Student's teacher and the Pauba principal, requesting that an IEP team meeting be set. Second, although not agreeing to an ERMHS assessment, District provided Parents with an assessment plan for a "formal observation for consideration of counseling/mental health services." Third, District provided notice of its reasons for declining to provide an FBA or behavioral intervention services after the ESY, but indicated it would obtain additional information for IEP team consideration. The District believed that an FBA assessment was not appropriate as Student's needs were being appropriately addressed through his Tier-2 Plan, and District was seeking additional information from Student's doctors and outside providers for consideration by the IEP team. Consideration of a less restrictive environment would await the start of his transitional kindergarten special day class program, based upon his new levels of performance. District provided a copy of the special day class transitional kindergarten program information packet to Parents, along with a copy of Procedural Safeguards.

36. The mental health and counseling "formal observation" was to be conducted by a member of District mental health staff. The assessment plan stated additional information would be obtained by an observation in Student's classroom, documented by a behavioral staff member. On August 28, 2013, Mother signed and returned the assessment plan to District.

37. Student attended the 2013 ESY program in the Jackson special day class. The Tier-2 Plan contained in the June 3, 2013 IEP was successful during that period. Student's ESY teacher told Parents that Student was responding to the interventions. His eloping had stopped. Mother acknowledged at hearing that the Tier-2 Plan was appropriate at Jackson.

2013-20014 School Year

38. District did not schedule an IEP team meeting for Student prior to the commencement of the 2013-2014 school year. Student and Parents, however, were able to tour Pauba and Student's special day class prior to the commencement of the school year. Mother's uneasiness regarding the new school year increased. She felt the rug was being yanked out from underneath Student in the move from Jackson to Pauba. The OT assessment had not been completed over the summer, and Student's energy and sensory issues had not yet been addressed. Jackson had a strong OT presence in the classroom's motor lab which Student used to burn off energy and focus on tasks; Pauba did not. Mother was also concerned about the termination of Student's behavior support services at the end of the ESY. In essence, Mother felt that the supports which helped improve Student's behaviors at Jackson were the very supports being taken away at Pauba.

39. Student was placed in Ms. Thyfault's transitional kindergarten special day class at Pauba consisted of Student and nine other Students, two of whom also had severe behavior problems. Ms. Thyfault was assisted by three adult aides. Ms. Thyfault was also Student's case manager.

40. Ms. Thyfault has worked for District since 1995, as a substitute teacher, general education elementary school teacher and special education teacher. While Student was in her class, Ms. Thyfault was a special education teaching intern and did not receive her special education teaching credential until November 2013.⁷ As part of her education, Ms. Thyfault had training in ABA, positive behavior strategies, replacement strategies and ProAct strategies.⁸

41. In anticipation of Student's attendance in her class, Ms. Thyfault observed Student for 30 to 40 minutes at Jackson. Student was disruptive and tried to attract attention; he wandered off; and he became upset when removed from the group. He threw a shoe when angry. After speaking with Student's teacher, Ms. Thyfault knew Student needed lots of reinforcement throughout the day. She did not share this information with the IEP team.

42. The school year started out well. Mother completed a Teacher Questionnaire about Student in which she explained Student's need for OT and motor breaks before asking him to attend to task. Ms. Thyfault developed a communication log with Mother, in which

⁷ While Ms. Thyfault's testimony was honest and authentic, her novice status in special education and due process hearings was apparent. Her demeanor did not instill confidence.

⁸ ProAct is a system of behavior control. Its strategies, as explained by Steven Israel, District program specialist and District ProAct trainer, are based upon the level of danger presented. Crisis communication, both verbal and non-verbal, is first used to calm the child and interrupt the crisis cycle. Evasion is used to get out of the way of the danger. Finally, restraint is used if the child's behavior is approaching the level of an assault.

Ms. Thyfault and Mother would engage in a daily dialogue regarding Student. Often Mother would provide lengthy responses or helpful suggestions regarding Student's behaviors. Other times, they spoke by telephone. Ms. Thyfault created daily behavior logs for students, collected data, and made anecdotal reports. However, because she had ten students, each with an IEP, Ms. Thyfault did not record everything Student did on a daily basis, nor was she required to do so.

43. After the first week of school Student's behaviors became inconsistent. His moods were "moment to moment", sometimes good, sometimes, bad. Not all positive interventions worked for Student. Commencing the second week of school, on August 21, 2013, Student's behaviors began to escalate. On August 26, 2013, she filed the first of 14 Behavior Emergency Reports (BER) concerning Student's maladaptive behaviors.

44. A BER is an emergency report which must be completed when an emergency intervention is used, i.e. any kind of restraint; when a serious injury occurs; and when serious property damage occurs. An emergency intervention may only be used to control unpredictable, spontaneous behavior which poses a clear and present danger of serious physical harm to the individual or others and which cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior.⁹

45. On August 26, 2013, Student did not respond to positive behavior interventions, and he began hitting, kicking, and spitting on other students and an adult aide. Student threw things in the classroom and punched Ms. Thyfault in the stomach. He yelled "bring it on." Staff removed Student from the classroom and placed him in seclusion in the Pauba front office. Ms. Thyfault defined "seclusion" as removing Student from the situation. This differed from a "timeout," as the special day class was equipped with a timeout area. Further, although Student's outbursts may have lasted longer, Student never remained in seclusion for more than 45 minutes.

46. Trude Warren, an attendance clerk for District, works at the reception desk in the front office at Pauba. The location of her desk is near the seclusion room and she provided the most accurate and unbiased description of it. The seclusion room is located next to the principal's office and is used for many purposes such as eating lunch, referrals, and timeouts, or any time someone needed to be removed from class for whatever the reason. The room itself has a wall of windows, and a door which is never locked. There is a light switch in the room, which Student would sometimes flicker the lights on and off.

47. Ms. Warren knows Student well, and has heard, if not observed, Student on each of his trips to the front office. Sometimes, Student walked to the room without assistance; sometimes his hand was being held; on other occasions, he was rolled in a chair into the room. He was never dragged into the room. Student was usually not alone in the

⁹ C.C.R. § 3301.(c)

room. He could easily open the door, which is one reason an adult remained in the room or just outside the door. Otherwise, Student would leave and run around the hallways. Ms. Warren would block the front door to prevent Student from taking off for the parking lot. Student was upset and disruptive in the seclusion room, where he would yell and scream, and kick the door. On several occasions Student hit, kicked or spit on Ms. Warren. Student was never hurt in the seclusion room and always calmly returned to class. Student also had good days and often came to the front office when he was behaving well. Ms. Warren spoke with Student almost daily, as he was sent on errands to the office, and would help her with her work.

48. Steve Israel also explained that “seclusion,” as part of ProAct, can be a misleading term. Seclusion does not involve putting a child in a lockdown setting. More accurately, it is a behavior intervention in which the child is removed from the classroom. An adult remains present to coach and calm the child enough to allow a return to the classroom. The lights in the seclusion room were sometimes turned off. This did not make the room dark, but was done to reduce any sensory overload, and allow the child to calm down.

49. On August 27, 2013, Student again exploded and the second BER was filed. This time, Student’s behaviors included hitting and scratching staff, climbing on counters, tearing papers, throwing objects, spitting at staff, and licking and spitting on windows. Student was again taken to seclusion in the front office, this time seated in a chair with wheels.

50. On August 28, 2013, Student had his third outburst requiring a BER. This time, Student did not want to put away a preferred activity (Legos). He began yelling threats, “Stupid teacher! What are you going to do when I fall? I will let you die. I am going to cut your legs and toes off. I’m going to rip your pants off. Student shouted and threw a walkie talkie at an adult aide. He was again taken to seclusion in the front office, where he took off all of his clothing and climbed up on a counter. He hit Kelli . Sutherland, the school principal, several times, bit and spit at her. Student continued to spit on walls and on the intervention team. After about 45 minutes, Student calmed down and stated he was ready to return to class. Upon his return to class, he refused to comply with instructions and eloped to the second grade wing of the school. At that point, Student was escorted back to the front office, where he continually tried to climb on top of the counters and spit at staff. He head-butted Ms. Thyfault. After about an hour, Student calmed down and returned to the special day class where he resumed his class schedule.

51. Although Student was not assigned a one-to-one aide, Heather Wildey, a District instructional aide, worked primarily with Student in the special day class. Ms. Wildey was hired shortly before school started to provide extra support in Ms. Thyfault’s classroom. Ms. Wildey worked with Student for the first three weeks of school. She described Student as very smart. Student’s language had an adult sophistication, which was unsettling to Ms. Wildey. She established that e could relate satisfactorily with his peers, but he was mean to some of the students in the special day class, and struggled with social skills.

Although Ms. Wildey was seasoned instructional aide who had appropriate training in behavior intervention, including ABA and ProAct, she did not present as a particularly effective aide or witness. Ms. Wildey knew Student had an IEP (as did all children in the special day class); however she did not recall the contents of Student's IEP. Ms. Wildey did not recall utilizing Student's Tier-2 Plan, however she did apparently implement the Tier-2 Plan by attempting to redirect Student's negative behaviors and have him make better choices. She gave Student break cards if he needed to take a break. She attempted to enforce a token economy. Some days positive interventions worked, however, most days they did not.

52. Ms. Wildey removed Student to the front office more than three times, and was involved with several of Student's BER's. She did everything she knew to modify Student's behaviors. She went to Ms. Thyfault and Leslie Archer, the school psychologist, to get more direction. Everyone was doing everything right, but it just wasn't working with Student. Ms. Wildey became professionally frustrated with Student, and after the first month of school, she resigned. Subsequently, Student had a series of at least four additional classroom aides before he was removed from school in October 2013.

53. Parents thought Student had a one-to-one aide, as part of the June 3, 2013 IEP. When Mother found out this was not so, she requested that a one-to-one aide be assigned to Student but was told this could not be done without an IEP team meeting.

54. Ms. Thyfault notified Ms. Archer a change would probably be needed in Student Tier-2 Plan. She established at hearing that Student's behaviors had changed since preschool and the June 3, 2013 IEP. Ms. Thyfault was professionally skilled to handle Student, but she was overextended with nine other children in her special day class. In hindsight, from her Jackson observation, Ms. Thyfault knew Student calculated his behaviors to get what he wanted, i.e., to have Mother take him home. She suggested that an FBA be conducted. On August 28, 2013, District notified Mother of an IEP team meeting set for September 4, 2013. Also on August 28, 2013, District provided Mother an assessment plan for an FBA, which she signed.

55. District school psychologist Ms. Archer was assigned Student's FBA. Ms. Archer is well qualified as a school psychologist. Ms. Archer has a M.A. degree in educational psychology, an M.A. degree in school counseling, and a B.A. degree in psychology. She holds a Pupil Personnel Services credential which qualifies her to work in school counseling, school psychology, and school child welfare and attendance. Ms. Archer performs cognitive behavior therapy involving short term interventions. She performs mental health therapy designed to change behavior. Ms. Archer is trained in ABA. As part of her employment with the District, Ms. Archer conducts psychoeducational assessments and FBAs. She is a Board Certified Behavior Analyst. As school psychologist, Ms. Archer is also a member of the crisis response team at Pauba.

56. District held an IEP team meeting on September 4, 2013, to discuss Student's maladaptive behaviors. The three BER's were discussed. The behavior strategies in the

Tier-2 Plan were reviewed. Father, disliked the use of seclusion with his child, and questioned District methods being used on a child with known anxiety issues. He believed an emergency IEP team meeting should have been called after the first BER. He told the IEP team that Student did not demonstrate such serious behaviors in any environment other than school. Mother stated that Student acted very different at home after seclusion; she described him as emotionally destroyed, very depressed, and silent. His shirt would be ruined from his chewing of it. Student did not want to return to school. Student would tell Mother, "I can't sit there that long." Ms. Archer indicated the Tier-2 Plan was not revised after the first BER as District needed time to look at Student's program to determine why it was not working. At the meeting, the IEP team did not revise Student's goals as he had only been working on them for a few weeks.

57. The IEP team compared the curriculum in a general education transitional kindergarten with that of the special day class transitional kindergarten, as well as mainstreaming possibilities. Other than the FBA and the OT assessments, which were approved, no changes were made to Student's IEP. Parents consented to the IEP.

58. District records also include a Tier-2 Plan dated September 4, 2013. The role of this new plan was not clear. The September 4, 2013 plan had been significantly updated from the June 3, 2013 version and contained new information regarding predictors or target behaviors, interventions and reinforcement procedures. The reactive strategies had been changed to address escalation in behaviors which were seen in the BER's. While Mother disagrees, the IEP notes indicate that the school psychologist reviewed Student's escalating behaviors and behavioral strategies, "as noted in the behavior plan" at the September 4, 2013 IEP team meeting. Ms. Archer recalled the Tier-2 Plan was discussed and revised, however she did not know if Parents had been given a copy of it. It was Ms. Archer's further understanding that Parents had consented to the Tier-2 Plan revisions. Ms. Thyfault also recalled the Tier-2 Plan had been discussed. Mother, however, steadfastly claimed there was no discussion of a revised Tier-2 Plan. Further, she stated that Parents did not know the September 4, 2013 Tier-2 Plan physically existed until they obtained a copy at the October 4, 2013 IEP team meeting.

59. Student's OT assessment was conducted by Jill Cellona, a licensed occupational therapist working for District. Her written report is dated September 12, 2013. Ms. Cellona conducted a records review, classroom observation of Student, parent and teacher interviews, specific task completion testing using the Wide Range Assessment of Visual Motor Abilities, and testing using the Sensory Processing Measure for Preschool.

60. Student was uncooperative and resistant to the OT assessment and had several outbursts prior to testing. In order to get Student to complete the assessment, Ms. Cellona had to negotiate with Student and provide rewards. Test results indicated Student's area of weakness was sensory processing, i.e., hearing, body awareness, balance and motion, which could affect his ability to participate in classroom activities as well as interfere with the learning of peers. Student, however, displayed inappropriate behavioral outbursts and task avoidance during the assessment that may not necessarily be attributed solely to sensory

processing issues. As a result of this assessment, Ms. Cellona recommended school-based OT services for Student. However, she concluded that Student's existing behavior goals were adequate for OT purposes; he did not need specific OT goals, as sensory issues were expressed in behavior. Student was already receiving OT which was embedded in the special day class program, and, in her opinion, Student did not require direct OT services.

61. On September 12, 2013, Student's behavior resulted in his fourth BER. Student's behavior "came out of nowhere." He kicked down another student's project, growled, clenched his fist and hit the student in the back. Student then began throwing things around the room, and was taken to the break area. When calmed, Student again attempted to hit the student, and grabbed a book from another student. Student ran around the room and charged a group of students. He swung at another student, and scratched her face before the staff could intervene.

62. After lesser behavior interventions failed, Ms. Thyfault restrained Student in a sitting position and used crisis communication in a calm voice to calm him. Student cried, and at one point, pushed his feet into the floor and forcibly arched his back and pushed Ms. Thyfault to the floor. She released Student in order to avoid hitting her head. Student immediately ran to the student he had initially hit, and punched him again with a closed fist. Ms. Thyfault and Ms. Wildey escorted Student to the front office seclusion room. Ms. Archer, the school psychologist, and Ms. Riley, the program specialist, were called to assist. When they arrived, Student, who was lying on the floor, told them he had hurt himself on the cupboard, and needed to go to the hospital. Student then got up, and bolted out of the room to another wing of the school, where he hit another child. Student then ran into a staff room, where the adults cleared scissors, pens, etc. off the tables to prevent Student from using them as weapons. Student hit his hip on the corner of a table, began crying, grabbed a wooden pointer, and began swinging it. At this time, Ms. Archer grabbed the pointer from Student and restrained him in a prone position on the floor, following ProAct procedures. When Student calmed down and was released, he stated he was ready to return to class. When he got to the door, he began running again. He was stopped by staff and returned to the office. Student yelled, spit at staff, and took off his shirt. He yelled derogatory remarks at the staff, and was pleased that he had injured Ms. Thyfault. Student subsequently calmed down, and was escorted back to class to eat his lunch.

63. In proning Student, Ms. Wildey used ProAct strategies based upon Student's severe behavior, his strong defiance and taunting of the adults present, and the fear that Student was getting ready to break the glass tables in the room. As a result, Student was "taken to the ground" where he remained for a few minutes. While on the ground, Ms. Archer stroked Student's back and calmed him down.

64. On September 17, 2013, the fifth BER was filed. This time Student grabbed scissors and began cutting up classroom materials and room dividers. He ran into the boys' restroom in the second grade wing, lay on the floor and yelled, "I am not going to the office." While Ms. Wildey escorted him to the office, Student yelled, "Let me see your butt," to a parent volunteer. In the office, Student spit and attempted to climb on furniture and into

cupboards. He chewed on his shirt. At one point, Student bit Ms. Widely on the arm and threatened to throw up on her. When Ms. Thyfault arrived in the office, Student then returned to class.

65. On September 19, 2013, the sixth BER incident occurred when Student began screaming and throwing objects in the classroom. Student was escorted to the office where he spit and attempted to jump on the cabinets. When Ms. Wildey tried to get him down, Student intentionally scratched his arm and repeatedly screamed, "You scratched me and made me bleed. If you try to hold my hand my mom said I can bite you." He ran out of the office and down the hall. When staff caught up with him, he ran into the library, where he began throwing books off the shelf. Student rolled on the floor and then ran up the stairs. He then ran into the teacher's lounge, where he asked for money for the vending machine. He played with the coffee machine, threw a chair, and opened the refrigerator. Staff removed glass objects from the table. Student, however, got a salt shaker, and poured salt on the tables. He then picked up a telephone receiver, spoke into the receiver, and then threw it at the wall. He pushed a glass table, looked at Ms. Wildey, and said, "You will get hurt." He then pointed at the staff, grabbed a tack out of the wall, and said, "Who wants to go next to get hurt. Stand back, shit, I'm really going to cut you." The staff ignored Student and attempted to use crisis communication with Student. When the librarian walked into the lounge, Student yelled, "stupid teacher, and pushed a glass table towards another glass table, which posed a danger of breaking glass. Student walked from the back of the table toward Ms. Archer, where he slapped her in the face. Ms. Thyfault arrived, and firmly told Student his behavior was not acceptable. Student began to cry, and then kicked Ms. Thyfault in the shin.

66. Student began the process of de-escalation. Student engaged in conversation as he calmed down, and finally said he was ready to return to the classroom but shortly after he got back to class, Student began throwing things. He was given a break but continued to throw things. He threw a mirror at Ms. Sutherland picked up a pointer and ran around the classroom swinging it at other students. He threw the pointer with force at Ms. Archer, who blocked it from hitting her face. Student tore things off the wall, pulled the window blind cords, .and tipped over room dividers.

67. Student's seventh BER incident on September 23, 2013, began when he bolted from the classroom. He came back to his classroom, but continued to run around, and picked up a box of Magnetix, which he threw at a group of students. Student was taken to the office, where his behaviors were similar to those reported in previous BER's. When he was calm, he went back to class, but again bolted to Ms. Riley's classroom. After lunch, Student bolted to another room. Later he ran to the classroom, grabbed his backpack, and lined up for the bus.

68. Student's eighth BER incident occurred on September 27, 2013. This time Student ran from the classroom into a restroom. When he came out, Student began hitting, kicking and scratching the new aide, Dennis Brooks. Student threw himself on the ground and began thrashing wildly. He hit his head on the water fountain. Student continued

kicking and spitting at staff. Ms. Archer was able to calm Student, who returned to class without further incident. After this incident, District set another IEP team meeting to be held on October 4, 2013.

69. The October 4, 2013 IEP team meeting was attended by Ms. Sutherland; Mr. Israel; Ms. Archer; Kyle Whittal, a school psychologist intern; Ms. Thyfault; Kim Szwest, a general education teacher and Parents and their advocates. Again, no one from mental health attended the meeting.

70. The IEP team discussed Student's recent BER's, District's failure to have an IEP team meeting prior to the beginning of the school year and the possibility of mainstreaming. Father objected to District's intervention methods, especially the prone restraint of his son.

71. The IEP team discussed Student's break cards, which were intended to improve Student's self-regulation. It was evident this behavior intervention was not working, as it was not being properly implemented. The purpose of the break card was for Student to use it when *he* decided he needed a break or to move around. Instead, Ms. Thyfault and Ms. Wildey used the break cards to *tell* Student to take a break.

72. The IEP team discussed Student's revised September 4, 2013 Tier-2 Plan, which, according to Mother, District had been utilizing without parental consent. The October 4, 2013 IEP team finally recommended a one-to-one aide for Student. It also recommended intervention by the District's behavioral team. Parents wanted Student to receive mental health counseling. Instead, the IEP team offered to provide Student 30-minutes per week of school counseling beginning October 7, 2013, and continuing until the review date of the still-uncompleted FBA. This counseling would be provided by Mr. Israel. Mr. Israel has an educational administration services credential and education specialist credential for mild/moderate disabilities but no credential or degrees in psychology or counseling. Parents insist that when they agreed to counseling, they were agreeing to counseling by a mental health provider.¹⁰ In any event, no counseling ever took place.

73. At the October 4, 2013 IEP team meeting, Parents also made a formal request for a copy of all educational records with Student's name on them, as well as copies of all records of the behaviors and responses in regard to Student's behaviors. Parents requested production of these documents within five days, on or before October 11, 2013. Parents did not sign the IEP document.

74. Mr. Israel did not recall if Parents were given a copy of Student's revised Tier-2 Plan or whether they had provided consent to the revised Tier-2 Plan prior to its implementation. While it is his custom to provide parents with a copy of the IEP at the end

¹⁰ It is unlikely Parents agreed to Mr. Israel providing counseling services to Student. Mother has a M.A. degree in psychology herself. Further, as with Ms. Thyfault, Mr. Israel's demeanor at hearing did not instill much confidence in parts of his testimony.

of the IEP team meeting, it was noted that a second copy of the IEP was printed as the IEP pages were numbered after the IEP team meeting. Mr. Israel did not personally give a copy of the IEP to Parents. He gave a copy of the IEP to Ms. Thyfault to send home to Parents.

75. On October 7, 2013, Ms. Thyfault reported two more BERs, which had occurred on October 3 and 4, 2013, prior to the IEP team meeting. On October 3, 2013, Student was compliant for his three morning rotations and story time. At the end of story time, Student growled and rolled around on the floor. When told to take a break, Student ran out of the room. He ran several laps around lunch tables and the playground. He laughed and spit at the adult aide. This went on for 40 minutes until lunch. After lunch Student resumed his maladaptive behaviors by swinging his lunch box at other students, and picking up a pointer to try and hit the aide. Student again ran from the class and tried to climb the fence. When the aide helped Student down from the fence, he spit on her and ran back to the classroom to get his backpack and wait for the bus.

76. On the morning of October 4, 2013, as class started, Student began squealing loudly and poking the child next to him. When told to stop, he bit Ms. Thyfault. When told to stop, he ran to the back of the classroom and began throwing things at Ms. Thyfault, and ran out of the classroom. The instructional aide ran after Student to the field, where Student began throwing rocks at birds. He then ran through the lunch area and halls to some portable buildings. Another special day class teacher saw Student and had him sit on the floor with her. Student talked calmly with her, but when Ms. Archer approached, Student tried to bite her, and ran. He was taken to the office, but ran away again, this time going to another classroom, spitting, and trying to bite a psychologist intern. He kicked the program specialist and said, "I can't wait to go home." He cried, "Mama, I want to go home."

77. On October 9, 2013, District finally sent Parents an assessment plan for an ERMHS assessment.

78. On October 10, 2013, District held an IEP team meeting to discuss Student's OT assessment. The IEP team determined Student qualified for school-based OT services, and proposed that Student receive nine 15-minute OT consultation sessions per year. However no OT goal was offered. Parents did not consent to this IEP amendment. Another IEP team meeting was set for October 24, 2013.

79. On October 11, 2013, Ms. Thyfault filed two more BERs for October 7, and 9, 2013. A total of 14 BER's were filed in the first 45 days Student attended school in the Pauba special day class. These subsequent BER's reported behaviors like those described above, which were now becoming routine

80. Parents decided "enough was enough." Parents felt Student was regressing. His personality was changing. District was still placing Student in seclusion. Services were not being provided, and the IEP team meetings were becoming oppositional at Student's expense. On October 15, 2013, Parents removed Student from Pauba, and he has not attended school since then.

October 24, 2013 IEP

81. In preparation for the October 24, 2013 IEP team meeting, District obtained authorization to discuss Student with his outside providers. Connie Miller, the school nurse, spoke with Dr. Mary Jane Pionk, Student's developmental pediatrician, regarding Student's diagnoses of anxiety and ADHD. Dr. Pionk prescribed medication for Student, and met with him monthly. She stated that Student's anxiety was almost at the level of a post-traumatic syndrome disorder. Student exhibits an underlying explosive disorder, and is worried and anxious on the inside. Dr. Pionk suggested District "look outside the box" for interventions to help Student, use positive reinforcements, and supply a one-to-one aide to assist student with assignments.

82. On October 24, 2013, District held an IEP team meeting. In addition to Student's usual IEP team meeting attendees, this meeting was also attended by Angelina Warner, District behavioral health therapist, and Amil Alzubaidi, District's behavioral health coordinator. Parents attended the IEP team meeting with their advocate. This IEP team meeting had initially been set to discuss the results of Student's FBA, but now also addressed Student's removal from school.

83. Parent's advocate inquired about Student's educational records and FBA data sheets which had not been provided to Parents as requested on October 10, 2013. Ms. Archer responded she had not been able to complete data collection at the level needed as Student had been removed from school on October 15, 2013. The FBA information which was available for this meeting, presented nothing new to Parents, and did not contain the depth of information needed to determine non-preferred activities and transition points. District provided Parents with an ERMHS assessment plan. Parents provided the behavioral health IEP team members with Student's history and behavioral information. The behavioral team explained the difference between the ERMHS assessment and the "observation" assessment to which Parents had previously consented. The behavioral team also recommended adding more counseling to Student's services, and discussed how counseling could be added in a collaborative manner.

84. The IEP team meeting also focused on returning Student to school. Student was afraid to return to school at Pauba. The IEP team discussed the possibility of another school site that might have a transitional kindergarten program.

85. The IEP team proposed a daily schedule for Student to address his identified unique needs. The behavioral health therapist discussed particular components of the schedule. The team discussed the use of a daily visual schedule that is broken down into smaller components. Sensory activities and strategies were also discussed and were embedded into Student's daily schedule. OT consultations would take place on specific activities and duration of specific activities. Parental concerns regarding strategic structure during transition points were discussed. Break cards were to be utilized to assist Student identify his feelings when a break was needed. The IEP team also discussed use of a

“jiggles” card for times when Student felt he had too much energy. A positive reinforcement system was also discussed.

86. There is no doubt a trust issue had arisen between Parents and District. Parents were understandably concerned about Student’s safety, and District’s continual use of seclusion and prone restraints. Parents were leery of District proposals and felt the offer of additional assessments was a plot to relieve District of failing assessment timelines. Parents also questioned District’s methods and the amount of data collected for assessments. The behavioral health coordinator tried to address parental concerns. District emphasized it was attempting to create a proactive plan to address Student’s behaviors so he would not engage in those very behaviors which had required seclusion or prone restraint as an intervention.

87. Given Student’s existing fear of school, Ms. Warner, offered to meet with Parents and Student in advance of Student’s transition back to school. Parents inquired regarding Ms. Warner’s qualifications, and Ms. Warner provided a summary of her qualifications and credentials. She told Parents the behavioral health staff would also provide classroom staff training.

88. At the end of the IEP team meeting, District agreed to provide a list of possible alternate school sites to Parents within 24 hours. Behavioral staff stated they would collaborate with the school psychologist to develop the behavior support plan. This behavior support plan would be provided to Parents for input before finalizing. Parents requested an independent psychoeducational and behavioral evaluations (IEE’s). The IEP team meeting adjourned without a formal offer from District containing ALL terms of the proposed IEP. Further, Parents did not consent to the IEP document as presented.

89. Oddly, although Ms. Archer considered the FBA incomplete, a FBA document, dated October 24, 2013, was prepared and discussed at the IEP team meeting. The targeted areas were (1) physical aggression; (2) eloping; and (3) verbal escalation. The frequency of each of these behaviors was more than once an hour, and the report concluded that these behaviors presented a significant disruption to Student’s learning and the learning of others.

90. District’s FBA confirmed the details of Student’s behavioral problems. Student required full adult supervision during problem behaviors because of safety issues. He is very strong and fast. When running inside the school there is a great potential for his running into others (particularly children) which could result in physical injury. Student’s behavior has been reinforced because staff goes after him. He gains the attention he wants, and it becomes a game for him. When staff catches up with him, the chase is over, and Student wants to escape the situation. At that point, Student may become frustrated, anxious, or have difficulty regulating himself. It is not until he is given a choice or opportunity to do something meaningful to him that he will go back into class.

91. The FBA recommended that Student would benefit from having consistent one-to-one aide support with a person trained in behavior. He would benefit from access to a

motor lab and frequent sensory breaks and a structured environment, with frequent and immediate positive reinforcement. The FBA further recommended that (1) replacement behaviors be taught and reinforced; (2) IEP goals be developed or revised in the area of behavior; (3) a positive behavior support plan be revised; (4) a Tier-2 Plan with related counseling services to be considered; and (5) an ERMHS assessment be conducted. Finally, the FBA called for a Tier-3 Positive Behavior Support Plan to be developed. No projected date for completion of the Tier-3 Plan was given. Ms. Archer could not complete the FBA until Student returned to school.

92. At hearing Ms. Archer testified that positive behavior interventions did not always work because Student had full control of his behaviors. Student's behaviors were not due to a behavioral disorder; they were intentional. Antecedents were difficult to determine because Student was not in crisis. He did not experience meltdowns. During his outbursts, he was able to calmly speak to adults. Student did not emotionally escalate; he remained absolutely calm. As Ms. Archer stated, Student knows the game. He is compliant when things go his way. If not, he "ups the ante" by escalating his behavior. Ms. Archer opined that District needed more time to extinguish Student's maladaptive behaviors. She saw a clear connection between Student's behaviors and his desire to go home to be with his Mother. Student needed to learn that he could not go home by acting out. Ms. Warner concurred and testified that District's interventions were not necessarily inappropriate; it just would take time and consistency to change his behavior.

93. Ms. Archer wanted Student to return to the special day class at Pauba. Although she agreed Student needed a one-to-one aide, she did not believe Student required a certified behavioral aide because all District aides have some behavioral training. Student's aide needed to be trained in ProAct and needed to understand crisis communication for safety purposes.

94. During the hearing, when asked about the provisions of the October 24, 2013 IEP, Ms. Thyfault responded she could not say with confidence that the contents of the IEP would work. Student was that unpredictable.

95. On October 30, 2013, District notified Parents that it agreed to Student's request for a psychoeducational IEE and FBA at public expense.

96. On November 1, 2013, District sent Parents a letter intended to confirm the discussions at the October 24, 2013 IEP team meeting, and provided explanations of several issues. First, District offered to provide Student counseling a minimum of 10 times per year, for 15 minutes per sessions. Second, District behavioral health staff would meet with Parents and Student to assist with the transition back to the school setting. Third, District denied Student's requests that, (1) District establish a trust as compensation for the additional anxiety Parents believed District had caused; and (2) that District provides Student a certified behavior specialist.

97. In its letter, District proposed an additional sensory-motor goal, which would be implemented in the OT services in Student's IEP. District also proposed to create a sensory diet, as well as a goal in that area, for parental review at the next IEP team meeting.

98. With regard to placement, Parents were informed that Temecula Elementary School had programs that could meet Student's needs. Rather than simply make an offer of placement, the letter stated: "Should *you* desire to request a transfer, you may do so through the Child Welfare and Attendance office at the district....Should you request a transfer and the transfer be approved, transportation will continue to be provided..."

99. Also included with the November 1, 2013 letter, was another copy of the ERMHS assessment plan requesting parental consent.

100. On November 7, 2013, Father responded to District's November 1, 2013 letter. Father consented to the implementation of the 15-minute counseling sessions, however he felt 30-minute sessions twice a week would be better until District could successfully manage Student's behaviors. Father also consented to the transitional meeting with the behavioral support staff to help with Student's transition back to school.

101. Father agreed that Student should receive a one-to-one aide throughout the school day. Father, however, was concerned that nothing more was said in District's letter regarding the aide's qualifications.

102. Father also notified District that Parents were declining the ERMHS assessment. Parents decided to privately obtain a mental health assessment. Parents agreed to implementation of a sensory diet but requested that District document its details in the IEP.

103. Lastly, Father declined District's offer to apply for a transfer to Temecula Elementary, as Parents believed Temecula Elementary academic ranking to be inferior. Therefore, Student would be returning to Pauba.

104. Between November 13, 2013 and December 2, 2013, Parents and District staff exchanged a series of emails in an attempt to get Student back in school. On more than one occasion, Ms. Warner attempted to set up the transitional meeting with Parents and Student. Difficulties ensued. In essence, Parents would not move forward with returning Student to school until District put "all of its ducks in a row," with concrete personnel and plans in place. Parents requested clarification of the details of the transition meeting. They requested to know specifically who was going to be working to transition Student back into class and the timelines for doing such. They also wanted the aide to attend the transition meeting with Ms. Warner.

105. District responded by reporting to Parents that a trained and experienced intensive behavioral interventionist (IBI) had been assigned as Student's aide when he returned to school. The IBI would be supervised by, and work under the direction of, the

classroom teacher and behavioral health staff, including Ms. Warner. Record keeping and data collection would be done under the supervision of the classroom teacher. The teacher/case manager would be responsible for the implementation goal and reporting the progress of the goals. The IBI would not be available for the transition meeting, nor would her educational background and transcripts be provided to Parents. The transition meeting was never held, and Student has not yet returned to school.

Production of Documents

106. Parents made their initial records request to obtain all of the documents and data collected by District. Parents wanted to “see what the District saw” in order to come to their own conclusions regarding Student’s IEP. As Mother stated, she wanted “anything and everything” on which District had based its IEP opinions. District did not provide all data connected to Student. As an example, Mother wanted the data collected in the FBA. Ms. Archer refused to give up her data until the FBA was completed.

107. On October 14, 2013, Ms. Sester, Parent’s advocate, wrote to Mr. Israel to address Student’s concern regarding District’s non-compliance in producing records pursuant to Mother’s written request. In Ms. Sester’s opinion, only partial records were provided to Parents. Ms. Sester specifically noted that Parents had been informed that formal records as well as informal observations had been prepared by several District staff members as part of Student’s FBA, which was then in process. Parents wanted the FBA data, as they felt they were being excluded from observing Student at school, and had no information with which to be meaningful participants in Student’s IEP’s. Ms. Archer, who was conducting the FBA, had refused to provide the FBA notes and would not do so until the FBA had been completed. Ms. Sester specified that Parents were requesting the raw data collected and observations and reports from the FBA.

108. On October 30, 2013, Ms. Sester again wrote District on behalf of Parents. The letter, entitled, “second request,” make a request for all of Student’s educational records under applicable federal law. The records request included a list of every type of note or record kept by District, including by any staff member who had provided services or were involved in providing Student a FAPE.

109. On January 8, 2014, Ms. Sester again wrote District on behalf of Parents and requested Student’s records for the period of October 13, 2013 through January 8, 2014. In response to the January 2014 request, District provided Parents a significant number of documents. Among the documents were copies of assessments, and IEP documents which were not the same as the documents previously provided to Parents.

110. Of greater importance, Parents have complained of not receiving complete copies of Student’s educational records, including the psychoeducational assessment, the Tier-2 Plans, and IEP documents. The evidence showed that District provided Parents with an incomplete file. At the end of the October 24, 2013 IEP team meeting, Parents only received the meeting notes, and signature page of the IEP document. Only after the third

request for records, after District had filed its own due process request, were all of Student's educational records produced, with the exception of the complete October 24, 2013 IEP. Pages one and two of the IEP were not produced in Student's requests, and were only discovered in District's Evidence Binder as part of Exhibit 65.

Additional Testimony

111. Father testified at hearing and expressed the modest philosophy that "If it's broke, fix it or try something else." He made several persuasive points. When Parents made the decision to remove Student from school, they could see nothing being done for Student. The ideas thrown about by District simply were not coming together. There was no follow-through from District; no sense of emergency. Ms. Thyfault was out of options. A series of adult aides had assisted her, but the staff did not display the skills set needed to handle Student. Further, Student's IEP was being poorly implemented. An example was, Student was promised counseling. This service, however, was delayed, and when finally implemented, it was administered by Mr. Israel, not a member of the mental health staff. Father presented simple logic. How can Student receive a FAPE if he spends extensive time in seclusion, where academically, he learns nothing? Student received a FAPE at Jackson because *things worked there*. If things *were not working* at Pauba, how could Student be receiving a FAPE?

112. Parents also wanted Student placed in another classroom, and preferred a general education kindergarten. Student is the only transition kindergartener in his special day class at Pauba. Parents are concerned that Student will begin mimicking his special day classmates. Further, Student is big for his age. It is noted that Jackson has a kindergarten class, with access to the motor lab. District rigidly did not place Student in this kindergarten class because Student was *one day short* of the birthday cut off for kindergarten class at Jackson. Parents had also inquired about placement at Abby Reinke Elementary School, as it has a transitional kindergarten, motor lab, special day class, as well as general education classes. Parents would prefer placement in the Abby Reinke general education kindergarten with a trained behavioral aide for Student. If the general education placement did not work, then Student could fall back into the special day class.

113. Dr. Pionk testified on behalf of Student. Her April 19, 2013, assessment of Student was previously provided to District. District did not dispute her diagnosis of Student's ADHD and anxiety. Dr. Pionk, however, disagrees with District's behavioral methodology as it pertains to Student. Dr. Pionk opined that Student is sensory seeking. He needs movement, the feeling of motion, as is illustrated by Student's bumping into people and putting objects in his mouth. Dr. Pionk's plan for Student included behavior therapy and medication (Prozac). By the time of Student's initial IEP team meeting, Student's anxiety and behaviors had improved with the Prozac. Student could handle more stress.

114. Dr. Pionk saw Student again on August 9, 2013, and reviewed Student's June 3, 2013 IEP and Tier-2 Plan. Student appeared to be doing well. He verbalized better, and his behaviors were stable or improved. Student's medication was changed as well. Dr.

Pionk knew Student was enrolled in the special day class; however, she was concerned about more anxiety in larger groups. She expressed surprise that an FBA had not been obtained, because a new school setting could increase Student's anxiety. Dr. Pionk looked at the FBA as a proactive strategy. On August 9, 2013, Dr. Pionk wrote a letter to District suggesting Student be allowed to take water breaks to reduce his anxiety. Dr. Pionk saw Student again on September 20, 2013. This time, Student's behaviors had escalated. He was having tantrums and difficulties coping. Student was also having more difficulties writing and was more resistant to writing tasks. Dr. Pionk increased Student's medication.

115. Dr. Pionk opined that seclusion was not appropriate for any child. During seclusion, Student's behaviors were so escalated, he could not learn from the experience. According to Dr. Pionk, seclusion can cause psychological damage, because a child can become fearful of those he trusted. She further noted a difference between a time out and seclusion. A time out may be appropriate where a child is removed from an immediate area for a very short time. Seclusion, however, is a more lengthy removal to a dark contained space. While it is reasonable to remove a child from the classroom when there is a high degree of maladaptive behavior, it also represents a danger that the child sees it as punishment. It also confirms that other interventions have not worked. On October 14, 2013, Dr. Pionk wrote District requesting that the seclusion of Student be terminated. Dr. Pionk has not visited Pauba, nor viewed the front office used for Student's seclusion.

116. Dr. Pionk also opined that restraining a child in a prone position was likewise inappropriate, except in an extreme situation, such as if a child runs into the street. Further, although an emergency restraint might be required *once*, it would be imperative to have an immediate meeting to revise the student's behavior plan, provide more intensive behavior interventions, and/or provide a trained one-to-one behavioral aide.

Testimony about Remedies

117. Dr. Pionk recommended Student receive OT to address his sensory processing. Student does not have any learning or academic deficits, nor has he exhibited any loss of academic abilities. Dr. Pionk concluded that Student does not need special education teachers for academics, he need a teacher trained in positive behavior interventions.

118. Shatoiya Cook operates the Cook Family Childcare Center, which provides Student's daycare before and after school. Ms. Cook has a background in early childhood education, and presented as an articulate and knowledgeable witness. Notably, Ms. Cook can simultaneously express the patience of her Job, while giving "the look" one can only fear from their mother. Ms. Cook's program is structured. Children cannot do as they want in her program. They are provided limited choices for activities. Limited choices avoid chaos. Student did not exhibit many maladaptive behaviors toward Ms. Cook, although he did exhibit some behaviors towards other children. Student has been known to push limits with the staff. Ms. Cook admits she is stern and dramatic with Student. She doesn't "play games," means what she says, and uses a dramatic tone of voice to make her point with the children.

119. While Student can be anxious at daycare, Ms. Cook uses positive reinforcements with Student. She acknowledged Student has thrown tantrums with her. She, however, remains firm, and does not debate the situation with him. “Student needs to know you mean business.” For example, if Student throws a tantrum, Ms. Cook will say in a stern tone, “That’s not working,” and then go on about her business.

120. Ms. Cook finds that Student is very intelligent, opinionated, and has an extensive vocabulary. His writing is age appropriate; he can write his name; and he can perform basic addition. Student is behind in social skills. He has difficulties with boundaries and personal space. He has to learn to take turns, and not be the center of attention all the time.

121. Dr. Mitchel Perlman maintains a private psychological practice and provides comprehensive assessments of specialized needs children for special education. He also specializes in the diagnosis of and consultation for children who are involved in chaotic, traumatic, critical, or intense situations. His previous treatment groups have included social skills and peer interaction groups.¹¹ Dr. Perlman was an exceptionally persuasive witness. He was candid, exacting in his answers, and informative about a very unusual child.

122. Dr. Perlman’s review of medical and psychological documents led him to conclude that the diagnoses of Student’s doctors are consistent with those of District. Student suffers from mood disorders and ADHD. Cognitively, Student is normal and shows no areas of deficit. There is nothing to suggest a learning disability. Student’s academic readiness skills are solidly average, as are his math and pre-reading skills. Student exhibits some difficulty with writing numbers and copying letters, which could represent a fine motor deficit. It could also be due to a lack of experience or exposure; Student simply has not learned these skills yet. In any event, Student does not have a processing deficit.

123. Dr. Perlman opined that, from a social-emotional standpoint, Student presented with three areas of concern: (1) coping; (2) ideation; and (3) sense of self. Student’s coping skills indicated a low tolerance for frustration, but Dr. Perlman noted there was a volitional aspect. Student is not overwhelmed when acting out. Student can think logically and abstractly. He can handle problem solving, but he has a penchant to want things his way. Student is capable of cooperating with others, if it is in his best interests. As a result, rewards and reinforcements will not work with him. One must challenge Student to act in an appropriate manner to reach his goal. Dr. Perlman opined that rather than using ABA to address Student’s behavior in class, it would be better to use a cognitive behavioral approach.

¹¹ For purposes of this hearing, Dr. Perlman’s testimony was limited to his review of educational records, interview of Ms. Cook, and observation of Student.

124. Dr. Perlman believes that Student's sense of self, or self-valuation, is on a dangerous course, and it is necessary to interrupt Student's current path toward self-destruction. Student presents as excessively egocentric. He acts out of feelings of entitlement. Given that Student only displays these noxious behaviors at school, it is apparent that these behaviors are volitional. Simply put, Student must learn to interact appropriately. Student needs a social component in his program to make him want to behave to enjoy peer interaction. He needs to be around children with average IQ's, or special education children who are primarily "diploma bound".

125. Student also needs a general education curriculum, according to Dr. Perlman, especially if he remains in the special day class. He needs a classroom with more controls. He is headstrong; he is not a follower. Student requires a school program staffed with strong personalities who will hold Student accountable for his actions. Dr. Perlman applauds Ms. Cook's daycare as a good example for controlling Student's behavior. While Ms. Cook uses no specific strategy or methodology to be successful, her demeanor and firmness with Student pays off. He is not allowed to manipulate his way out of tasks. He is held accountable. He still may be noncompliant and manipulative, but not in an aggressive or noxious way.

126. Student only attended Ms. Thyfault's special day class for one-half of the first semester of school. Ms. Thyfault acknowledged Student did not receive all of his academic hours due to the behavior reported in the BER's, but he was still getting behavioral instruction during those periods. Although Student would escalate his behaviors as task avoidance, once he calmed down, Student was still required to complete his work. Student did make academic progress, and when he left school, he was not behind academically.

LEGAL CONCLUSIONS

*Legal Framework under the IDEA*¹²

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) 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 a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and

¹² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In California, related services are also called designated instruction and services. In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

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 definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and school districts 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); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

Student's Issue One: Whether District denied Student a FAPE for the 2013-2014 school year by:

a): Whether District failed to timely and appropriately assess Student in all areas of suspected disability, specifically in the areas of mental health, OT, AT, and speech and language;

5. Student contends District failed to timely assess Student in all areas of suspected disability, specifically, in the areas of mental health and behavior, OT, and AT. Student further contends District failed to appropriately assess Student in the areas of speech and language and OT.

6. Before any action is taken with respect to an initial placement for special education, the school district must assess the student in all areas of suspected disability. (20 U.S.C § 1414 (b)(3)(B); 34 C.F.R. § 300.3004 (c)(4); Ed. Code, § 56320.) The threshold for suspecting a child has a disability is relatively low. (*Dept. of Ed. V. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Hawaii 2001).) A school district's inquiry should be whether the child should be referred for an evaluation, not whether the child actually qualifies for services. A school district, however, is not required to perform every possible assessment in every possible area, and is only required to assess in those areas related to the suspected disability. (*M.M. v. Government of District of Columbia* (DD.C. 2009) 607 F. Supp. 168.)

7. California Education Code section 56320, subdivision (g), requires that assessments be conducted by persons knowledgeable of the suspected disability. The assessment materials must assess specific areas of education need and not merely provide a single general intelligence quotient. (Ed. Code, § 56320, subd.(c).) Moreover, psychological assessments, including individually administered tests of intellectual or emotional functioning must be administered by a credentialed school psychologist. (Ed. Code, §§ 56320, subd.(b)(3) and 56324.) Assessments must be conducted by persons competent to perform assessments, as determined by the school district, county office, or special education local plan area. (Ed. Code, § 56322.)

8. On April 11, 2013, Student enrolled in District, bringing "two big binders" of significant information regarding his suspected disabilities, compiled by Mother and Student's private doctors and service providers. District was informed Student had been diagnosed with ADHD and anxiety. Student had developed maladaptive behaviors in his previous daycare centers, and Mother was concerned that these behaviors were interfering with Student's learning and social development. As a result of the information presented, District placed Student in its preschool special day class at Jackson in order to assess him, and observe him in a school setting over a period of time. No evidence presented suggests that Student had any learning disabilities. To the contrary, all agree, Student is academically capable. Parents were primarily concerned about Student's behaviors and social-emotional skills.

9. District conducted a psychoeducational assessment of Student. The assessment team included a preschool school psychologist, a speech and language therapist, a behavior analyst, Student's preschool teacher, a District nurse, and Parents. Student does not challenge the professional qualifications of District's assessors. The assessment was multidisciplinary and included parental interviews and review of the documents presented by Parents, observations in the school setting, vision and hearing screenings, standardized tests, and rating scales. The Developmental Profile 3 measured Student in key developmental areas, including adaptive behavior, social-emotional, cognition, and communication, and Student scored in the average range in all areas tested. Student scored within the average range for his age on the Bracken Third Ed., which assessed his conceptual knowledge, comprehension, and receptive language skill. Student exhibited average abilities on the Beery-Buktenia, which assessed Student's visual perceptual skills, and fine motor skills.

10. District utilized the Behavior Assessment rating scales with Mother and Student's teacher, to determine Student's level of ADHD and maladaptive behaviors. Student's behavior areas in the significant range were similar between Mother and Student's teacher, and were instrumental in qualifying Student for special education under the category of other health impaired. Given Student's significantly high ratings on the Behavior Assessment, the assessment report recommended the IEP team consider an additional assessment in OT to explore potential sensory issues related to Student's ADHD and anxiety. Student's psychoeducational assessment adequately assessed Student in all areas of suspected disability presented as of April 2013, when Student was enrolled in District. Further, Student's assessment results identified an additional area of suspected need, in OT.

SPEECH AND LANGUAGE

11. District did not perform a formal speech and language assessment. Instead, a speech and language pathologist administered the Preschool Language Scale-5, Screening Test for Age Four, and also observed Student at play and in conversation. The purpose of the screening was to determine if Student even had a suspected speech and language deficit. The screening results indicated Student presented no areas of communication which were lacking or in need of further assessment. Although Mother wanted a full assessment to explore Student's social interactions, Parents had reported Student was able to use appropriate speech and language in age appropriate activities. Taken as a whole, with the other assessment results presented at the June 3, 2013 IEP team meeting, Student showed no speech and language deficits which would require further assessment. As a result, District was not required to perform a full speech and language assessment. District did not fail to appropriately assess Student in the area of speech and language.

ASSISTIVE TECHNOLOGY

12. Similarly, Student contends District failed to timely assess Student in the area of assisted technology.

13. In developing an IEP, the IEP team must consider whether a student requires AT services and devices. (Ed. Code, § 56341.1, subd. (b)(5).) An AT device is defined as “any item, piece of equipment or product system...that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs.” (20 U.S.C. § 1401(1); Ed. Code, §56020.5.)

14. No AT assessment has been offered or performed by District. Although Dr. Pionk indicated in Student’s medical records, that Student exhibited anxieties with letter writing that triggered Student’s behaviors, she did so from a medical standpoint. Student’s functional capabilities were not hindered by an inability to write. Student had average and age appropriate fine motor skills, which was confirmed by the Beery-Buktenia . Further, Student presented no verbal or nonverbal communication difficulties, which would even remotely suggest a need for AT. Student liked to use an iPad, and Student found writing to be a non-preferred task. While the iPad might qualify as a positive behavior reinforcement utilized in a behavioral context, there was no evidence to suspect AT was required for Student to access his education. District did not fail to assess Student in the area of AT.

OCCUPATIONAL THERAPY

15. Student contends District failed to timely assess Student in the area of OT.

16. Assessments and reassessments require parental consent. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code, § 56321, subd. (f)(1).) A parent shall have at least 15 calendar days to consent to the proposed assessment plan. (Ed. Code, § 56043, subd. (b).) The assessment may commence immediately upon obtaining parental consent, and it must be completed and an IEP team meeting must be held within 60 days of receiving consent. (Ed. Code, §§ 56321, subd. (a); 56043, subd. (f)(1); 56344, subd. (a).) The IEP required as a result of an assessment of a student shall be developed within a total time not to exceed 60 days, not counting days between student’s regular school sessions, terms or days of vacation in excess of five school days, from the date of receipt of the parent’s written consent for the assessment. (Ed. Code § 56344, subd. (a).)

17. Student’s initial April 29, 2013 assessment plan did not contain an OT assessment even though District knew Student had been diagnosed with ADHD and anxiety. Parents provided District with reports and data from Student’s private OT provider. Simply knowing Student was currently receiving OT services met the low threshold for a suspected area of need. Since District did not timely act on that information, it committed a procedural violation of the IDEA.

18. A school district’s failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) However, in the event of a procedural violation, a denial of FAPE may only be found if that procedural violation 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, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

19. Student's contentions regarding assessment timeliness merely confounds the issue. In fact, District argues that it still offered an OT assessment a mere 35-days after the initial assessment plan, and that the OT assessment itself was procured within statutory timelines. Such focus ignores the question whether District's failure to offer an OT assessment on April 29, 2013 impeded Student's right to a FAPE. This question remained unanswered, although Ms. Cellona's OT assessment found Student had a weakness in sensory processing, which ultimately qualified him for OT services.

20. What is clear is that District's delay significantly impeded Parents' participatory rights. Parents asserted Student had OT deficits when enrolling Student in District. They raised questions about Student's sensory needs at the June 3, 2013 IEP team meeting, and without the OT assessment, District could not fully address Student's OT needs. Student's ADHD energy and sensory issues could not be addressed. Student's placement at Jackson included a strong OT presence in the classroom; Jackson had a sensory lab which Student used in order to focus on tasks and burn off energy; Student's offer of placement at Pauba did not provide the same sensory supports. As a result, District was unable to adequately answer questions or support its IEP decisions involving the impact of sensory issues on Student's behavior. Further, while the time period without OT assessment data was short, Student's behaviors escalated in an equally short time. The failure to initially assess Student in the area of OT therefore constituted a denial of FAPE.

MENTAL HEALTH

21. Student contends Parents requested an ERMHS assessment as part of Student's initial assessment, and District's failure to conduct it amounts to a failure to assess Student in all area of suspected disability.

22. A behavior intervention plan is a set of positive behavioral interventions and supports, along with other strategies, designed to assist a student whose behavior impeded his own learning or the learning of others. Under such circumstances a school district must implement a behavior intervention plan. (34 C.F.R. § 300.324(a)(2)(i).) The IDEA, however, does not dictate the format or content of a behavior intervention plan. Therefore, school districts have broad discretion in developing behavior intervention plans for students with disabilities. Conversely, a school district's failure to develop a behavior intervention plan can result in a denial of FAPE. (*Rialto Unified School District*, 48 IDELR 296 (SEA CA 2007).) Special education decisions also show that the failure to properly or consistently implement a student's behavior intervention plan can also amount to a denial of FAPE. (*Guntersville City Board of Education*, 47 IDELR 84 (SEA AL 2006); *Stroudsburg Area School District*, 27 IDELR 975 (SEA PA 1997).)

23. Certainly an abundance of information was provided to District regarding Student's medical and behavioral history. Parents and Dr. Pionk believed an ERMHS

assessment was needed based upon Student's diagnoses of ADHD and anxiety. However, a psychiatric diagnosis does not necessarily identify a disability or area of educational need under the IDEA. Mental health is not a category of eligibility. The components of Student's ADHD/anxiety must present in a manner which impacts Student's ability to access his education. District knew Student's diagnosis and knew Student had a history of maladaptive behaviors. Student's behaviors were serious enough to qualify him for special education under other health impairment. Educationally, his behaviors prevented him from participating in several preschool programs. Student's aggressive behaviors, however, did not necessarily indicate mental illness, but rather required District to craft a behavior intervention plan for Student.

24. During his diagnostic period at Jackson, Student was exposed to positive behavior interventions, which proved effective. It was undisputed that Student's behaviors dramatically improved by June 3, 2013, while he attended Jackson, and continued to improve through the ESY and summer vacation. While Student contends District took a "wait and see" stance that was not necessarily inappropriate, Student had only been with the District a little over a month. District created a Tier-2 Plan to address Student's maladaptive behaviors. It was reasonable for District to use the interventions that were working at the time, rather than immediately create more intensive interventions. Even Mother admitted the Tier-2 Plan was working during Student's time at Jackson.

25. On June 26, 2013, Parents again requested an ERMHS assessment. As of that date, Student's behaviors remained stable, and there were no apparent regressions in it. District's "wait and see" philosophy continued to be appropriate. While District did not agree to the ERMHS assessment at that time, it did provide Parent with an assessment plan for a mental health observation to be completed by District mental health staff. The purpose of this observation was to provide mental health information for the IEP team regarding Student's potential need for mental health services. Mother consented to the assessment plan on August 28, 2013.

26. District finally provided Parents with an ERMHS assessment plan on October 9, 2013. Parents have steadfastly refused to consent to a District ERMHS assessment since that time. Additionally, Student was removed from Pauba on October 14, 2013, and has not attended school since then. As a result, District, although willing to conduct the ERMHS assessment, cannot do so without parental consent. Without a completed ERMHS assessment, no factual basis can be determined and no legal conclusions can be drawn to determine whether the ERMHS assessment was timely or appropriate. Student therefore did not prove that District failed to assess him in the area of mental health.

(b): Whether District denied Student a FAPE by failing to consider AT devices, specifically an iPad, in the June 3, 2013 IEP;

27. In essence, Student contends District should have provided or at least considered providing Student with an iPad as an accommodation rather than as an aspect of behavioral control. Legal Conclusions 6, 7, 18 and 19 are incorporated herein.

28. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child, and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) The IEP team also must consider special factors, such as whether the child needs AT devices and services in order to receive a FAPE. (Ed. Code, §56341.1, subd. (b)(5).) An AT device is required only if it is necessary for the child to receive an educational benefit. (*J.C. v. New Fairfield Bd. of Educ.*, 56 IDELR 207 (D. Conn. 2011).)

29. No evidence was presented to suggest Student could not functionally or communicatively access his education. The fact that Student liked the iPad does not mean he needed it. While the iPad could be helpful to Student, there was no evidence presented to indicate he required it to make educational progress.

30. While the use of an iPad might have been discussed as a potential positive behavior reinforcement, District is not required to select or determine specific reinforcements in an IEP. What constitutes a positive reinforcement for Student may change on a daily basis. In fact, for Student, the effectiveness of positive behavior reinforcements did change, depending on Student's mood. District did not deny Student a FAPE by failing to provide him with an iPad. To the contrary, providing Student with an iPad or any other such device, would have been dangerous, given Student's aggressive behaviors and penchant for throwing walkie-talkies and pulling telephones from the wall.

(c): Whether District denied Student a FAPE by unilaterally discontinuing Student's OT and behavioral interventions services contained in the June 3 2013 IEP;

31. Student's reading of the IEP is factually incorrect. Student's June 3, 2013 IEP indicates "for the remaining days of the 2012-2013 school year," Student shall receive 60 minutes of ABA services, five times a week; during the ESY, behavior intervention services for 30-minutes, four times a week, for the period of June 17, 2013, to July 18, 2013. For the 2013-2014 school year, no behavior interventions services were offered. Parents consented to this portion of the June 3, 2013 IEP. Therefore, District was not "unilaterally discontinuing" Student's services. District was implementing the provisions of an operative IEP. Further, the June 3, 2013 IEP contained no OT goals or services for Student, for any period of time. As District had never offered or implemented OT services for Student, there was nothing for District to discontinue, unilaterally or otherwise.

(d): Whether the June 3, 2013 IEP denied Student a FAPE by failing to provide Student with meaningful educational benefit;

32. Student contends the June 3, 2013 IEP failed to provide Student with meaningful educational benefit.

33. An IEP must include a statement of the child's present levels of educational performance; a statement of measurable annual goals which are designed to enable the student to be involved in and make progress in the general curriculum; a statement of the special education and related services and supplementary aids and services to be provided; and a statement of how the child's progress toward the goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i), (ii)(iii) and (vii)(I); 34 C.F.R. § 300.347(a)(1), (2), (3) and (7)(i); Ed. Code, § 56345, subd. (a)(1), (2), (3) and (9).) While the required elements of the IEP further important policies, "rigid adherence to the laundry list of items [required in the IEP] is not paramount." (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F. 2d 1186, 1190-1191.) Further, an IEP is evaluated in light of information available at the time it as developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is a snapshot, not a retrospective. (*Ibid.*) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

34. An IEP must be upheld if the school district's offer was reasonably calculated to provide the child with educational benefit. (*Gregory K v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) As the Ninth Circuit held in *Mercer Island, supra*, the phrases "educational benefit," "some educational benefit," or "meaningful educational benefit," all refer to the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Mercer Island, supra*, 592 F.3d at p. 950, fn. 10.)

35. The June 3, 2013 IEP team discussed the assessment results, and found Student eligible for special education and related services. There was no disagreement in the determination of Student's present levels of performance, nor were they disputed at hearing. Student showed average abilities in areas of academics communication, and motor skill development. The IEP team determined Student's area of need centered on his behaviors. As a result, the IEP team created four goals which appropriately addressed Student's behavioral and ADHD needs, including Student's difficulties sitting, attending in group activities, short attention span, self-regulation, frustration and anger management. In order to support these goals, appropriate accommodations were created, and additional adult support was added to Students classroom to assist Student's transition to Pauba. The IEP team prepared a Tier-2 Plan, rarely seen with a preschooler's initial IEP, to address Student's aggressive behaviors. This Tier-2 Plan used evidence-based behavior strategies and had proven effective while Student had attended Jackson. Parents consented to both the IEP and the Tier-2 Plan.

36. It is unfortunate that the behavioral controls in the June 3, 2013 IEP did not work. Nevertheless, the IDEA was not established to guarantee substantive outcomes (*Rowley, supra*, at p. 192), nor can the IEP be judged in hindsight. District complied with the procedural requirements set forth in the IDEA when crafting Student's June 3, 2013 IEP. The IEP goals and services comported to Student's behavioral needs. As such, the

June 3, 2013 IEP provided Student an educational program that allowed him to obtain some educational benefit. The District was required to do no more.

(e): Whether the June 3, 2013 IEP denied Student a FAPE by failing to consider Student's educational placement in the least restrictive environment with appropriate supports;

37. Student contends District failed to place Student in the least restrictive environment when it placed Student in the preschool special day class at Jackson.

38. In addition to providing a FAPE, a child with a disability must be educated with children who are not disabled to the maximum extent appropriate. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2) (2006); Ed. Code, § 56342.) In determining the program placement of the student, a school district must ensure that the placement decisions and the placement are made in accordance with federal requirements regarding placing the child in the least restrictive environment (Ed. Code, § 56342, subd (b).)

39. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: the educational benefits of full-time placement in a regular classroom; the non-academic benefits of full-time placement in a regular classroom; the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and the cost of placing the child with a disability full-time in a regular classroom. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

40. Student initially attended the Jackson special day class as a diagnostic placement to determine Student's eligibility for special education. Given that Student's primary area of concern was his behavior and its impact on his learning, it is understandable that Student's assessment and observations took place in a diagnostic preschool setting. This allowed District to assess Student's behavior, emotionality and social interactions in a more natural setting over a period of time. As Student had not yet been determined eligible for special education, placement in the least restrictive environment was not yet required. Further, District did not operate a general education preschool, nor was it required to do so.

41. Student's placement in the Jackson special day class for the remainder of the 2012-2013 school year was simply a matter of common sense. The regular school year had approximately two weeks remaining. Student was making educational progress, and his behaviors were improving in the Jackson special day class. It would have been pointless, even if possible, to successfully transition Student into any other educational setting for the two weeks before school ended given his potential behavioral problems. Additionally, Student was offered academic instruction and behavioral services for ESY. District does not have ESY for general education students. Therefore, if Student attended ESY, it had to be in the Jackson special day class.

42. There is no dispute that, without his maladaptive and aggressive behaviors, Student is academically capable of accessing age appropriate curriculum in a general education setting. Based upon Student's assessment results and observations, Ms. Peters, Student's assessor, determined that Student would benefit from a structured educational environment. The IEP team discussed options of placement in general education, placement in general education with aide support and placement in a special day class. While Parents preferred placement in a general education classroom with aide support, the IEP team determined Student would be placed in a special day class.

43. Student's contention regarding Student's least restrictive environment for the 2013-2014 school year, requires analysis pursuant to *Rachel H* factors set forth above. Student is of average intelligence and displays no academic deficits which would prevent him benefiting from placement in a general education classroom. It follows that Student would also derive non-academic benefits from placement in a general education classroom with his age appropriate peers. At the time of the June 3, 2013 IEP, Student's behaviors, though improving, were still disruptive and aggressive enough to require a Tier-2 Plan. It was determined that Student's behaviors would be more contained in a smaller educational setting, with less students, and where Student could demand more attention and time from the teacher. Because of his ADHD, Student needed more structure than what was offered in a general education classroom. Finally, in weighing the benefits of placement in a general education classroom, versus the negative impact of Student's disruptive and aggressive behaviors on the teacher and other students, it was reasonable for the June 3, 2013 IEP team to conclude that Student was still far too disruptive to succeed in a general education classroom, even with an aide. The descriptions in the Factual Findings of Student's behaviors in the special day class amply confirm that view. As a result, as of June 3, 2013, Student's least restrictive environment was the special day class.

44. It became apparent, at Student's subsequent IEP team meetings, including the October 24, 2014 IEP team meeting, that Student could not receive sufficient educational benefit in a general education classroom because he could not restrain his behaviors. Student required so much of the teacher's time and attention that he would have substantially interfered with the learning of the other students. Student's aggressive behaviors threatened the safety of others and he could pose a danger to himself. Further, even Student's lesser behaviors were significantly disruptive and would interfere with normal classroom functioning. At no relevant time could Student have been satisfactorily educated in a general education classroom.

(f): Whether District denied Student a FAPE by failing to implement, or revise with parental consent, an appropriate IEP or the positive behavior intervention plan contained in Student's June 3, 2013 IEP,¹³

¹³ Student's contentions regarding the revision of Student's behavior intervention plan are addressed in Issue Seven.

45. A school district must insure that (1) an IEP is in effect before special education and related services are provided to an eligible student and is implemented as soon as possible following the IEP team meeting; (2) the student's IEP is accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation; and (3) each teacher and provider is informed of his/her specific responsibilities related to implementing the student's IEP as well as the specific accommodations, modifications, and supports that must be provided for the student in accordance with the IEP.(34 C.F.R. § 300.342(b)(2003); Ed Code, § 56347.) In *Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 481 F.3d 770, the Ninth Circuit held that failure to deliver services promised in an IEP is a denial of FAPE if the failure is "material"; meaning that "the services a school provides to a disabled child fall significantly short of the services required by the child's IEP." (*Id.* at p. 780.)

46. Student contends that District failed to properly implement Goal Four, which was designed to teach Student to effectively use a break card as an appropriate means of self-regulation. This contention has merit. Ms. Wildey did not recall the contents of Student's IEP, and did not recall utilizing Student's Tier-2 Plan. Her actions showed little concern for the implementation of Student's goals, and she apparently paid little attention to the contents of Student's IEP. Both Ms. Thyfault and Ms. Wildey stated they often gave Student his break card when *they* felt he needed a break. This was contrary to the self-regulation purpose of the goal. It was inappropriate to have the adults tell Student when he needed to take a break, if the purpose of the goal was to teach Student when to ask for one. Further, Ms. Thyfault's testimony suggests that giving Student the break card was also used as a positive behavior support, which also taught Student nothing about self-regulation. This constituted a material failure to properly implement Student's IEP with respect to Goal Four.

47. Student contends that District failed to implement the October 4, 2013 IEP amendments to which Parents provided consent. The October 4, 2013 IEP amendment offered Student one-to-one aide support and 30 minutes of weekly counseling beginning October 7, 2013 until the next review date of the IEP. Parents consented to these additions to the IEP. Student's counseling sessions were never implemented. Student was not provided any counseling in the ten days prior to his removal from school on October 14, 2014. Additionally, while District sought to employ a one-to-one aide who could handle Student's behaviors, Student was only provided with a series of substitute aides who could not. Therefore, District failed to appropriately implement Student's aide support. Both of these provisions were added to Student's IEP in order to provide Student a FAPE, and in both cases District's failure to implement them was material and resulted in a denial of FAPE.

(g): Whether District denied Student a FAPE by using restraints and seclusion on Student between August and October 2013;

48. Student contends District failed to appropriately revise Student's Tier-2 Plan with parental consent. Student contends District failed to revise the June 3, 2013 Tier-2 Plan when it became clear its behavior interventions and replacement strategies were not working. School started on August 14, 2013. Student began accumulating BER's on August 26, 2013.

District held an IEP team meeting on September 4, 2013, and discussed and revised the June 3, 2013 Tier-2 Plan at that time. District believed Parents consented to its implementation. Parents were not provided a copy of the revised Tier-2 Plan on September 4, 2013, and Mother insists she did not consent to its implementation, as she did not know the revised plan even existed until it was referenced at the October 4, 2013 IEP team meeting. While Parents were not provided a copy of the revised Tier-2 Plan, the evidence indicates the Tier-2 Plan was discussed and revised at the September 4, 2013 IEP meeting, a mere nine days after the first BER. Further, it was not unreasonable for District to wait nine days before revising the Tier-2 Plan, as the initial Tier-2 Plan had only been in effect at Pauba for three weeks. Data needed to be collected and collated in order to appropriately revise the Tier-2 Plan. This revised Tier-2 Plan remained in effect until Student left school, for a period of approximately two months. During this time District was conducting a FBA, and upon its completion District would again address modification of Student's behavior plan. District did not fail to timely revise Student's Tier-2 Plan.

49. Student's contentions regarding District's failure to obtain consent prior to implementing the September 4, 2013 Tier-2 Plan and failure to timely provide Parents with a copy of the revised plan are allegations of procedural violations which make little sense in light of Student's contention that District failed to timely revise the June 3, 2013 Tier-2 Plan. Parents may not have given consent to implementation of the new plan, and were not given a copy of it until October 4, 2013. Nonetheless, Parents wanted the initial Tier-2 Plan modified and did not indicate they would have withheld their consent if asked and/or presented with a copy of the revised Tier-2 Plan at the September 3, 2013 IEP team meeting. Moreover, there was no evidence that implementation of the new plan, though unsuccessful, was any less successful than implementation of the old one. These procedural violations therefore do not rise to the level of a denial of a FAPE.

(h): Whether District denied Student a FAPE by failing to timely provide Parents with a copy of Student's revised Tier-2 Plan before implementing it, and failing to obtain parental consent to do so;

50. Student contends District's use of restraints and seclusion denied Student a FAPE.

51. The IDEA does not directly address the use of restraint and seclusion in school. Instead, the IDEA requires IEP teams to consider the use of positive behavioral interventions and supports, and other strategies to address behaviors that impedes a student's learning or that of others. (20 U.S.C. § 1414 (d)(3)(B); 34 C.F.R. 300.324 (a)(2)(i).) However if such methods are permitted by state law, and necessary for a particular child to receive a FAPE or to enable the child to participate in extracurricular and non-academic activities, they should be incorporated into the child's IEP or behavior intervention plan. (*Letter to Anonymous*, 57 IDELR 49 (OSERS 2010).) While restraint and seclusion are not prohibited, "This does not mean, however, that school districts are free to implement aversive behavioral interventions with abandon." (*Letter to Trader*, 48 IDELR 47 (OSEP 2006).)

52. The U.S. Department of Education defines physical restraint as a personal restriction that immobilizes or reduces the ability of a student to move his/her torso, arms, legs, or head freely. The term does not include a physical escort. A physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purposes of inducing a student who is acting out to walk to a safe location. (*U.S. Dept. of Education Restraint and Seclusion: Resource Document*, p. 10.)

53. The U.S. Department of Education defines seclusion as the involuntary confinement of a student alone in a room or area from which the student is physically prevented from learning. It does not include a timeout, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming. (*Ibid.*)

54. Further, restraint does not include behavioral interventions used to calm and comfort an upset student, and seclusion does not include classroom timeouts, supervised in-school detentions, or out-of-school suspensions. (*Ibid.*)

55. District provided Student with a Tier-2 Plan which had been developed in response to Student's aggressive behaviors as known in June 2013. District utilized evidence-based behavior strategies and other methodologies, all of which had previously been effective in reducing Student's behaviors. Some days the positive behavior interventions worked, other days they did not. It was difficult to determine antecedent behavior as Student's maladaptive behaviors were volitional and would develop unexpectedly. While it is disturbing that on 14 separate occasions, Student's behaviors required a BER, the fact remains that on all of the other school days, Student's behaviors were manageable under the Tier-2 Plan. The District used restraint and seclusion only as a last resort.

56. Based on the BER notes, District's use of ProAct techniques were used only when Student's behaviors escalated to the point that he had become a danger to himself or others. When Student was removed from the classroom, he was taken to an unlocked windowed room where he was supervised by adults. Witness descriptions of the seclusion room and restraints used on Student do not even qualify District actions as seclusion and restraint as defined by the Department of Education. Given that Student's behavior was generally volitional, the length of the seclusion depended on when Student wanted to calm down and return to class. Every time Student was secluded or restrained, he calmed down and eventually returned to class on his own terms.

57. Student's restraints and seclusion, and even the need to restrain him in a prone position, were based upon well-documented events in which Student's physical safety or the safety of others was threatened. While parents may be outraged at District's emergency strategies Student has presented no evidence to suggest parental consent to restrain or seclude a student in a dangerous or emergency situation. District's use of restraints and seclusions per se did not deny Student a FAPE.

58. Student also argues that the BER incidents themselves caused a denial of FAPE due to the cumulative time Student spent in his behavioral outbursts and removal to the front office. Student calculated he missed 20 hours of specialized academic instruction during this time. However, Student has not shown that Student lost any actual educational benefit. He was required to make up his missed work. Further, Ms. Thyfault and Dr. Perlman established Student had not academically regressed and continued to make progress in class.

(i): Whether District denied Student a FAPE by failing to meaningfully calculate the frequency and duration of Student's accommodations as noted in his June 3, 2013 IEP;

59. Student contends the District failed to properly implement Student's goals and Tier-2 Plan when the teaching staff and aides failed to appropriately collect measurable data regarding the implementation and tracking of progress on Student's four behavior goals and behavior plan.

60. There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denial of a FAPE. When a school district does not perform exactly as called for by an IEP, the school 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 the services provided to a disabled child fall significantly short of those required by the IEP. The material standard does not require that the child suffer demonstrable educational harm in order to prevail. (*James Van Duyn v. Baker School District 5J, supra*, 481 F.3d at p. 780.)

61. A student's IEP is required to include a description of how the child's progress will be measured and when periodic reports on the child's progress towards meeting the annual goals will be reported, such as through the use of periodic reports, concurrent with the issuance of report cards. (34 C.F.R. 300.320 (a)(3).)

62. Each of Student's four goals creates an annual goal which is measured over the course of the school year to determine Student's progress in successfully attaining the goal. Each goal indicated it would be measured by teacher data and observation. While Student argues that data was either lacking, scanty, or inconsistently collected, the evidence shows that data was indeed collected, although perhaps not to the extent desired by Parents. In addition to collecting data on goals, Ms. Thyfault maintained a daily communication log with Mother, created behavior logs for Student, and provided anecdotal reports. Student relies on Ms. Thyfault's admission that she was overextended with 10 students and 10 IEP's and would not maintain the level of daily data collection desired by Student. Nor was she required to do so. Further, data collection was only one means of measuring progress. Observation of Student was the second component of measurement, and Ms. Thyfault saw Student on a daily basis.

63. Student presented no evidence that Student's progress on his goals could not be measured from the data collected. Student points out that he made no progress on his goals, as was reflected in his progress report. It does not automatically follow, however, that

the reason he failed to make progress was that District failed to sufficiently measure his lack of progress. The level of data collection on Student's goals does not reflect a failure to implement Student's IEP or a failure to adequately measure Student's progress on those goals.

(j): *Whether District denied Student a FAPE by failing to complete the ERMHS assessment and the FBA, and timely evaluate assessment findings within 60 days from parental consent;*

64. Student contends District failed to complete an ERMHS assessment and the FBA, within statutory timelines.

65. Parents who do not permit a school district to perform its duties in relation to the preparation of an IEP cannot claim relief from the consequences of the obstruction. (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 69 (*Cape Henlopen*); *C.G. v. Five Town Community School* (1st Cir. 2008) 513 F.3d 281, 286-288; *MM v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 535-536; *S.M. v. Hawaii, supra*, 808 F.Supp.2d at p. 1275.)

66. Parents requested an ERMHS assessment of Student since his enrollment in District. While Student considers the assessment plan for the mental health observation an assessment plan for an ERMHS assessment, it was not. The assessment plan for the observation, which Mother signed on August 28, 2013, was District's offer of an observation in lieu of the ERMHS assessment, which District had declined to provide on July 12, 2013. Mother also initially acknowledged the observation assessment might provide enough information to ultimately obtain the ERMHS assessment. When District finally provided Student with an assessment plan for the ERMHS assessment, on October 9, 2013, Parents refused to provide consent to the assessment. As Student has refused consent to the ERMHS assessment, he cannot successfully argue that District failed to complete it.

67. Mother did provide consent to the mental health observation on August 28, 2013. Accordingly, the assessment results should have been presented at an IEP team meeting within 60 days of parental consent, on or before October 27, 2013. Further, Parents consented to the FBA on October 9, 2013, and therefore was not required to hold an IEP team meeting to discuss those results until early December 2013. At some point it appears the mental health observation morphed into the FBA. The FBA, which was presented at the October 24, 2013 IEP team meeting, indicates the date of consent for the assessment as August 28, 2013, rather than October 9, 2013. As the express purpose of the mental health observation was to gather information to determine whether an ERMHS assessment was merited, and the ERMHS assessment was offered on October 9, 2013, it is likely that District saw no further need to discuss the mental health observations, and those findings were presented as part of the FBA. Nonetheless, although District did not hold an IEP team meeting to discuss the mental health observation assessment, no damage to Student's education or Parents' participatory rights resulted from the violation. District correctly contends that upon Student's removal from school, District no longer had access to

Student, and therefore could not complete the observation assessment or the FBA due to Parents' action in withdrawing Student from school.

(k): Whether District denied Student a FAPE by failing to timely respond to Parents' request for production of Student's educational and behavioral records between August and October 2013;

68. Parents have a right to review and inspect their child's education records in relation to their child's special education identification, assessment, educational placement and receipt of a FAPE. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, § 56504.) The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611 (b).) In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3 & 300.611(b); Ed. Code, § 56504.) The United States Supreme Court defined the word "maintained" in this context by its ordinary meaning of "preserve" or "retain." Records are maintained when the agency keeps the records in one place with a single record of access. (*Owasso Indep. Sch. Dist., No. I-011 v. Falvo*, (2002) 534 U.S. 426, 433-34 [122 S.Ct. 934, 151 L.Ed.2d 896].) Under California law, the parent shall have the right and opportunity to examine all school records of his or her child and to receive copies within five business days after the request is made by the parent, either orally or in writing. (Ed. Code, §§ 56501, subd. (b)(3), 56504.)

69. Parents made a series of document requests between August 2013 and January 2014. They made written requests for Student's educational records on October 4 and 14, 2013, in which Parent's advocate generically indicated what documents were missing and what documents she wanted. Another document request was made on October 30, 2013, and included a list of every type of note or record kept by District, including records of any staff member who had provided services or was involved in providing Student a FAPE. On January 8, 2014, another request for documents was made. However, some of the documents produced by District do not comport with the same documents previously given directly to Parents. Specifically, the psychoeducational assessment, the Tier-2 Plans, and IEP documents are not the same documents. Some have additional pages, which were revised after given to Parents, or were not given to Parents at all.

70. Of significant concern is the existence of the October 24, 2013 IEP. At the end of the October 24, 2013 IEP team meeting, Parents only received the meeting notes and signature page of the IEP document. It was only after Student's third written request for records, and after District had filed its own due process request, that all of Student's educational records were produced, with the exception of the complete October 24, 2013 IEP. Pages one and two of the IEP were not produced in Student's requests, and were only discovered in District's Evidence Binder as part of Exhibit 65.

71. District therefore violated Parent's procedural rights to review and inspect their child's education records. With the exception of the District's failure to provide Parents with a copy of the October 24, 2013 IEP, these procedural violations did not result in any substantive harm to Student. District's failure to provide Parents with its entire October 24, 2013 IEP offer, however, reinforces the findings contained in this decision regarding District's October 24, 2013 offer of FAPE, and is further discussed below.

District's Issue One: Whether Student's October 24, 2013 IEP offered Student a FAPE in the least restrictive environment;

72. District contends the IEP drafted on October 24, 2013, offered Student a FAPE in the least restrictive environment. District further contends that Student's removal from school on October 14, 2013, prevented District from completing its mental health observation of Student and prevented the completion of the FBA.

73. An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it. (*Union School Dist. v. Smith*, (9th Cir. 1993) 15 F.3d 1519, 1526.) In *Union*, the Ninth Circuit observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Id.* at p. 1526). The requirement of a formal, written offer alerts the parents to the need to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services. (*Ibid.*; *Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107 (citing *Union*, *supra*, 15 F.3d at p. 1526).)

74. District contends the October 24, 2013 IEP offer included an accumulation of services which District had not been allowed to previously implement. In that offer District proposed to amend the June 3, 2013 IEP by (1) providing Student with one-to-one aide support, full-time on a daily basis for the remainder of the school year; (2) providing OT consultation for 15-minute sessions, nine times per year, until the end of the school year; and (3) providing Student with counseling/guidance services to support his behavior goals for 10 sessions until the end of the school year, in 15-minute increments.

75. No other changes to the June 3, 2013 IEP were made. No behavior goals were added or amended to support a modified behavior intervention. Although Student's OT needs did not require direct OT services, the evidence showed he needed some OT services. However, no sensory accommodations were added, such as use of fidgets, time outs, or breaks. The IEP did not indicate what type of one-to-one aide Student would receive, i.e., whether it would be a trained behavioral aide, an educational aide or a full-time classroom aide. The counseling service was generic. There was no indication whether this was a

service to be provided by the mental health staff, a school psychologist. The counseling offer appeared to be nothing more than an extension of District's earlier stop-gap measure to provide some form of counseling to be provided by Mr. Israel until the ERMHS assessment could be completed. There was no description of how or when Student would access the counseling. Given that Student had been referred for an ERMHS assessment and District was conducting an FBA, it is also disquieting that no counseling goal or behavior goal was created.

76. No changes were made in the October 24, 2013 offer in Student's placement in the special day class transitional kindergarten at Pauba. The IEP team discussed a change in school site for Student, yet no specific placement was contained in the IEP. The issue was simply left open for Mr. Israel to "get back" to Parents. When he did respond to Parents, he left the option of a placement change up to Parents, rather than make a specific offer on behalf of the IEP team. While identifying the school site does not always determine placement, it was a necessary component in Student's case. Student's sensory issues and the availability of a sensory lab were important consideration for Parents. Pauba's lack of a sensory lab had been an issue with Parent's from his arrival there. Jackson, Temecula Elementary, and other school sites had sensory labs. Student had expressed fear about returning to Pauba. A change in placement was being considered to address his fears. Determination of which school was being offered substantially affected the supports potentially available to Student. The District's failure to identify a school site therefore rendered its offer impermissibly vague.

77. Although Ms. Archer stated the FBA had not been completed, a written draft of the FBA was presented and discussed at the IEP team meeting. The FBA recommended that IEP team consider, among other things, (1) developing or revising IEP goals in behavior; (2) providing IEP related Tier-2 Plan related counseling services; and (3) creating a Tier-3 positive behavior support plan. Although the FBA is not part of the IEP, none of these recommendations was mentioned in the IEP. Given the importance of Student's behavioral regulation, it was imperative that District create an IEP which clearly set out what District intended to do about Student's behavior, so Parents could legitimately consider whether to consent to the IEP, and consent to the ERMHS assessment. The offer did not contain that essential element.

78. The series of events after October 24, 2013, indicate a good faith attempt by District to get Student back into school. These actions, however, taken outside of the IEP team meeting, do not change the fact that the IEP document was excessively vague and inadequately informative. Further, the evidence supports the finding that Parents were not even given a copy of the complete October 24, 2014 IEP for their consideration. District's failure to provide Parents with a copy of the IEP, let alone a copy which presented a clear offer of FAPE, was a denial of FAPE, which resulted in a denial of educational benefit to Student and a significant impediment to Parents' participatory rights.

79. As indicated above, a parent who does not permit a school district to perform its duties in relation to the preparation of an IEP cannot claim relief for causing the

obstruction. The October 24, 2013 IEP team meeting was held after Student was removed from school on October 14, 2013. District seems to argue that if the October 24, 2013 IEP failed to provide Student a FAPE, it was because District could not complete its assessments as Student is not in school. District's complaint, however, alleges the October 24, 2013 IEP is a FAPE. Therefore, for purposes of the validity of the October 24 2013 IEP in District's action, Student's removal from school is immaterial.

District's Issue Two: Whether District is entitled to conduct an ERMHS assessment.

80. District contends it is entitled to conduct an ERMHS assessment of Student.

81. Parents cannot withhold consent for an assessment by a school district and still claim their child's entitlement to special education and related services. "Every court to consider the IDEA reevaluation requirements has concluded that 'if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student'" (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160, quoting *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178-179.) The Ninth Circuit held in *Gregory K. v. Longview School Dist.* (*supra*, at p. 1315) that "if the parents want their child to receive special education services under the IDEA, they are obliged to permit testing."

82. If the parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (34 C.F.R. § 300.300(a)(3)(i), (c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

83. A parent is entitled to obtain an IEE of a child. (20 U.S.C § 415(b)(1).) An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the school district responsible for the child's education. (34 C.F.R. § 300.502 (a)(3)(i).)

84. Since enrolling Student in District in April 2013, Parents consistently requested an ERMHS assessment. On October 9, 2013, after Student's tenth BER, District finally sent Parents an assessment plan for an ERMHS assessment. Parents now refuse to provide consent for District's ERMHS assessment. Instead, Student intends to obtain a private mental health assessment.

85. Student's maladaptive and aggressive behaviors at school have escalated since his initial assessments and IEP in May and June 2013, culminating in 14 BER's between August 26, 2013 and October 14, 2014. This alone demonstrates a significant problem which necessitates Student's reassessments in order for District to appropriately modify Student's existing June 3, 2013 IEP and Tier-2 Plan, and provide Student a FAPE.

86. Student may pursue his private assessment, and he may present the findings of that private assessment to District for consideration in modifying Student's IEP. Student

must however, also consent to District's ERMHS assessment plan. District is entitled to obtain an ERMHS assessment, and Parents must cooperate and make Student available for the assessment. Should Student remain unavailable for assessment, he may not claim a denial of FAPE based upon his mental health status or needs.

REMEDIES

1. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489,1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

2. Parents who do not allow a school district to perform a triennial reassessment cannot claim that the district has denied their child a FAPE. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315 (*Gregory K.*); *M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160; *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178 (*Andress*)).

3. Student's request for referral of Student to a private behavioral specialist of Student's choice, at District expense, for a period of up to one year is denied. The purpose of this proposed remedy is to assist Student in the transition back into an appropriate District placement, primarily based upon Dr. Perlman's IEE recommendations.

4. Student's request for an award of 100 hours of compensatory educational tutoring is based upon the assumption that Student requires academic remediation for missed academic instruction. Student missed 20 hours of specialized academic instruction due to his removal from the classroom as described in the BERs. Student has no learning disabilities and exhibits age appropriate academic skills. Dr. Perlman, who assessed Student after his removal from Pauba, confirmed that Student presented with average cognitive skills and showed no need for academic support. Ms. Thyfault, reported that in spite of the 14 BER's, Student still made academic progress in her class. In addition, he was required to make up his work. Student does not require academic remediation.

5. Student is awarded up to 50 hours of private counseling or mental health services through a provider selected by Parents, based upon the District's hourly rate for such services, in an amount not to exceed \$15,000. Student displays extremely maladaptive behaviors which are dangerous to himself and to others. Further, those behaviors have not been eased or extinguished by using evidenced-based positive behavior interventions. Student's behaviors are voluntary and calculated, therefore traditional ABA strategies have not been effective. District shall directly contract with Student's selected provider for payment, if under District contract or otherwise feasible. If District is unable to directly fund Student's provider, District shall reimburse Parents for such services within 60 days of presentation of proof of payment. District's obligation to provide the private counseling awarded herein, shall terminate upon Student's completion of 50 hours of private services, District's payment of a maximum of \$15,000 to Student's selected providers, or December 31, 2015, whichever first occurs.

6. In order to compensate Student for District's failure to assess Student in the area of OT, District shall provide Student with an independent OT assessment with an assessor of Parents choice, in an amount not to exceed \$1000. This award is based upon a finding that District failed to initially assess Student's sensory needs which were an area of suspected disability due to his ADHD and anxiety. Further, District's offer of limited OT consultation does not adequately address Student's sensory needs, especially in a placement without a sensory lab.

7. As remedy in its consolidated complaint , District requested:

(a) Student's October 24, 2013 IEP be deemed a FAPE in the least restrictive environment; and

(b) District be allowed to conduct an ERMHS assessment of Student without parental consent.

8. District did not prevail on its Issue One, and the October 24, 2013 IEP does not constitute a FAPE in the least restrictive environment.

9. District prevailed on its Issue Two, and shall be allowed to conduct an ERMHS assessment of Student without parental consent. Parents have consistently requested since April 2013, that District conduct an ERMHS assessment of Student. Student's maladaptive behaviors have continued to escalate without clear reason for doing so, and positive behavior interventions have not been successful. Parent's refusal to consent to the ERMHS assessment prevents District from obtaining necessary information with which to offer Student a FAPE.

ORDER

1. Student is awarded up to 50 hours of private counseling or mental health services through a provider selected by Parents, calculated a reasonable hourly rate for such services, in an amount not to exceed \$15,000. If District is unable to directly fund Student's provider, District shall reimburse Parents for such services within 60 days of presentation of proof of payment. District's obligation to provide the private counseling awarded herein, shall terminate upon Student's completion of 50 hours of private services, District's payment of a maximum of \$15,000 to Student's selected providers, or December 31, 2015, whichever first occurs.
2. Within 45-days of this Order, District shall provide Student with an independent Occupational therapy assessment with an assessor of Parents choice, in an amount not to exceed \$1000. In the event Student fails to select an independent assessment within 90 days of this Order, then, District is relieved of any duty to fund such occupational therapy assessment.
3. District may conduct an EMRHS assessment without parental consent.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Student's Issues 1(a) and (f), and District's Issue One. District prevailed on Student's Issue (b through e) and (g through k), and District's Issue Two.

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: April 18, 2014

/s/
JUDITH L. PASEWARK
Administrative Law Judge
Office of Administrative Hearings