

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2014110046

v.

MILL VALLEY ELEMENTARY
SCHOOL DISTRICT.

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on October 27, 2014, naming the Mill Valley Elementary School District. The matter was continued for good cause on December 10, 2014.

Administrative Law Judge Darrell Lepkowsky heard this matter in San Rafael, California, on May 5, 6, 7, 11, 12, 13, 14, and June 3, 2015.

Mandy G. Leigh, Attorney at Law, represented Student. She was assisted most days by Elizabeth Pacheco, Attorney at Law, and Tiffany Miller. Student's Parents attended the hearing. Student was not present during the hearing.

Lenore Silverman, Attorney at Law, represented Mill Valley. She was assisted on various days by attorneys Emily Sugrue, Alejandra Leon, and Shawn Olson-Brown. Andee Abramson, Mill Valley's Director of Student Services, attended the hearing.

On June 3, 2015, the last day of hearing, the parties requested a continuance to file written closing argument. The parties timely filed their briefs on June 22, 2015. On June 29, 2015, in response to Mill Valley's motion to strike appendices to Student's brief, the parties were granted a continuance to file reply briefs, which they filed timely. The record closed on July 13, 2015, upon receipt of closing briefs from the parties.¹

¹ Student filed an opposition to Mill Valley's motion to strike; in which he moved for sanctions against Mill Valley, contending that Mill Valley's motion was meritless. Student's motion for sanctions is denied.

ISSUES²

1. Whether Mill Valley denied Student a free appropriate public education during the spring of 2013, and/or 2013 extended school year, by:

- a. Failing to administer an assessment to Student in preparation for his transition from preschool to Kindergarten;³
- b. Failing to consider input from Student's parents before placing him in a Kindergarten class; and
- c. Placing Student in a regular Kindergarten class rather than in a transitional Kindergarten class?

2. Whether Mill Valley denied Student a FAPE during the 2013-2014 school year by failing to:

- a. Provide measurable, appropriate goals and objectives in Student's individualized educational programs dated December 5, 2012, May 15, 2013, and December 5, 2013, including all IEP amendments, to address Student's deficits in the areas of academics, cognitive skills, social/emotional functioning, behavior, language and communication, orientation and mobility, and self-help;
- b. Provide Student with placement in the least restrictive environment;
- c. Provide appropriate services to Student to support his needs in the areas of behavior, speech and language, occupational therapy, one-to-one instruction, and extended school year;
- d. Timely conduct a functional behavior assessment;
- e. Timely develop a behavior support plan;

² The issues have been rephrased 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.)

³ Pursuant to discussion with counsel for Student, this issue was re-phrased at the start of the hearing in accord with the issue as stated in Student's due process hearing request.

- f. Appropriately implement Student's IEP's and behavior support plan; and
- g. Provide appropriate accommodations and modifications to address Student's sensory, behavioral, and academic needs.

3. Whether Mill Valley denied Student a FAPE during the 2013-2014 school year, by misrepresenting or omitting facts about Student's education to his parents?

4. Whether Mill Valley denied Student a FAPE by failing to provide a prior written notice after Student's parents provided notice in June 2014 that they were unilaterally placing Student?

SUMMARY OF DECISION

This case is about a young boy with Down's syndrome whose IEP team agreed should be placed in a general education classroom with supports for Kindergarten. The parties dispute whether Student should have been placed in a transitional Kindergarten class rather than in a regular Kindergarten class. The parties also dispute whether Mill Valley adequately responded to Student's behavioral challenges, whether Student's IEP's during Kindergarten were appropriate, whether all of the provisions of the IEP's were implemented, and whether Student's parents were accorded all of their procedural rights to participate in Student's IEP process.

This Decision finds that Student's IEP's were appropriate, that Mill Valley did not fail to accord Student's parents their procedural rights, and that Mill Valley did not materially fail to implement any portions of Student's IEP's. However, this Decision also finds that Mill Valley's functional behavior assessment was flawed, resulting in a flawed behavior support plan, and that it failed to therefore provide appropriate behavior goals and services to Student. This Decision further finds that Mill Valley failed to amend Student's behavior support plan even after Student continued to exhibit the same behaviors, which often resulted in his removal from his classroom. Finally, this Decision finds that Mill Valley failed to materially implement the behavior intervention services required by Student's IEP. These failures resulted in Student failing to progress behaviorally during the 2013-2014 school year, thereby denying Student a FAPE.

FACTUAL FINDINGS

Jurisdiction and Background Information

1. Student was six years old and in the first grade during the course of this hearing. He has Down's syndrome and is eligible for special education under the qualifying category of intellectual disability. Student is generally a happy child, who loves to learn, and

loves dancing and music, particularly opera. Student lived with his parents within Mill Valley's boundaries at all times relevant to this proceeding. For the 2014-2015 school year, Student's parents enrolled him in an independent study charter school program, which was chartered by another local educational agency.

2. Student initially received Early Start intervention services from his local regional center, which referred Student to the public school system just before he turned three in preparation for his transition from Early Start to public school. Mill Valley did not have its own preschool programs. Therefore, Student's initial assessment for special education was administered by the Marin County Special Education Local Plan Area. School Psychologist Christina Fass administered the initial psycho-educational portion of the assessment in December 2010. A speech and language pathologist from the Special Education Local Plan Area administered the speech and language assessment.

3. Based upon the results of the assessments, Student's IEP team, composed of Student's parents and staff from the Special Education Local Plan Area, determined that he required special education and related services to address his unique needs in the areas of intellectual development, speech and language, social/play, attention skills, self-help, and classroom readiness. Student's IEP team placed him in a moderate to severe preschool special day class offered through the Marin County Office of Education at Marindale Elementary School. The class was taught by special education preschool teacher Jay Sampson, who was assisted by one to two classroom aides. The class had anywhere from five to 10 students in it during the approximately two and a half years Student attended. Occupational therapy services were integrated in the classroom daily by an occupational therapist. Student also received group speech and language therapy twice a week, for 20 minutes a session, provided by a speech and language pathologist.

Transition from Preschool to Kindergarten

DECEMBER 5, 2012 IEP TEAM MEETING

4. Marindale convened an annual IEP team meeting for Student on December 5, 2012. Since the IEP developed at this meeting would carry Student through approximately the first semester of Kindergarten, Andee Abramson, Mill Valley's Director of Student Services, attended the meeting on behalf of Mill Valley. In addition to Student's parents and other school staff, Student's preschool special education teacher, Mr. Sampson, attended the meeting and provided much of the input on Student's progress to date.

5. At the time of the meeting, Student had demonstrated progress in pre-academic areas, and in pre-math skills. Student had also shown slow but steady improvement in his ability to attend and follow directions. He had not met his attention goal, but his attention span had increased somewhat. Student had progressed in the area of speech.

His IEP team considered Student's highest priority for the coming year to be increasing the length and frequency of his utterances and his ability to express himself verbally in a variety of pragmatic situations at school. Student's receptive language skills had been an area of strength for him. Additionally, his articulation skills had improved overall.

6. Student's gross motor skills had also shown considerable improvement as to his ability to balance and agility on playground equipment. However, Student's progress with his fine motor skills had been slower, although he did demonstrate improvement from the prior year. In the area of social and emotional behavior, Student appeared to enjoy school, and willingly participated in most school activities. He enjoyed the company of his classmates but was shy, and often chose to play by himself. In the area of self-help, Student still needed adult assistance with toileting and washing his hands.

7. Student's IEP team developed nine annual goals to address Student's unique needs during the remainder of preschool and the first part of Kindergarten. The team developed language goals to address Student's deficits in speech intelligibility, expressive language, and receptive language. The team developed three pre-academic goals for Student that focused on increasing his ability to identify colors, match colors, shapes and objects, and match, name, count, and identify numbers. The team also developed a goal to address Student's deficits in fine motor skills and another to address his visual motor needs. The last goal was in the area of independence, whose object was to teach Student to use a visual schedule to complete his activities. One of the visual schedules mentioned as a possibility in Student's independence goal was a "first/then" board. This visual aide had two columns. The left column indicated the first activity Student would be doing. The right column indicated the activity that would follow the first. The goal addressed Student's need for learning class expectations and knowing what his tasks would be during the course of each school day.

8. Dr. Cheri Worcester and Julie Maier, Student's two experts who testified at hearing, and whose credentials will be discussed in detail below, criticized the goals. However, Dr. Worcester is not a teacher, psychologist, speech therapist, or occupational therapist, and her criticisms were not persuasive. Ms. Maier, who has been both a general education and special education teacher, also criticized the goals. However, her criticisms were based on assumptions about Student's preschool program that were not supported by her observations of Student either in preschool or in Kindergarten or by any discussions with Student's teachers. For these reasons, Ms. Maier's criticisms were also not persuasive.

9. All of the goals were based upon prior assessments of Student, his present levels of performance, input from his parents, and input from his teacher, who, by that time, had worked with Student for about two years. Each goal described Student's progress toward his prior goals, determined Student's present levels of performance, and his need for the goal. Each goal was measurable. Each goal addressed Student's known unique needs at the time his IEP team developed them. Baselines for some of Student's goals were not as

developed as they could have been, but there is no requirement that baselines be detailed or even stated. Student contends that he required goals in the area of cognition and orientation and mobility. However, Student provided no evidence in support of those contentions. None of his witnesses addressed the issue or provided guidance on how goals in those areas should be worded, what needs should be addressed, or what the objectives of the goals should be, for this or Student's subsequent IEP's.

10. The December 5, 2012 IEP annual team meeting was not directed at determining a Kindergarten placement for Student for the following school year. However, the goals developed by Student's IEP team were designed to cover the first semester of Kindergarten, and appropriately addressed all of Student's unique needs known to his IEP team at the time of this IEP team meeting.

11. The Marindale IEP team offered Student continued placement in his special day preschool class for the remainder of the 2012-2013 school year, with the same level of speech and language services. The team also offered extended year services to Student in a special day preschool class, including the same level of speech and language services. Student's parents consented to the IEP.

LACK OF TRANSITION ASSESSMENT

12. At the December 5, 2012 IEP team meeting, Student's IEP team agreed to meet in the spring of 2013 to discuss Student's transition to Kindergarten and determine his needs and placement for the following school year. The Marindale IEP team members also proposed doing an early triennial assessment of Student in the spring of 2013 in preparation for Student's transition to Kindergarten. Student's triennial assessment was not due until the fall of 2013. Marindale staff explained to Student's parents that it would be helpful to assess Student early in light of his transitioning to a new school.

13. Marin County school psychologist Christina Fass prepared an assessment plan in mid-April 2013. The plan proposed assessing Student in the areas of pre-academic achievement, cognitive development and learning ability, social/emotional/behavioral development, and self-help and adaptive skills.

14. Ms. Fass believed she had sent the assessment plan to Student's parents but Student's parents never received the actual copy of the plan. However, Student's parents were aware that the Marin County Office of Education proposed assessing Student in preparation for his transition to Kindergarten. Student's parents both came to the conclusion that an assessment before Student started Kindergarten was not in his best interests. They believed that standardized testing was too restrictive because of the protocols and rules that were part of the assessment process. They believed that standardized tests would not give a full and positive picture of Student. By spring 2013, Student had developed alopecia, a

condition that caused him to lose his hair, and Student was very conscious of this and was affected by it. Student's parents thought that his condition and reaction to it might affect the testing process and compromise the results. They believed that Student would be "pigeon-holed" by the test results, and that his ability to make progress in a general education program would be questioned by the school districts. They were afraid that if Student did not score well on the assessments, Mill Valley would not agree to a general education placement.

15. Ms. Fass and Student's mother had several discussions about the assessment process and the reasons why Student's parents would not consent to the early administration of Student's triennial assessment. Student's mother made her concerns clear to Ms. Fass, who communicated those concerns to Janelle Campbell, the Director of Special Education for the Marin County Office of Education. Ms. Campbell then informed Ms. Abramson, the Mill Valley Director of Student Services, that Student's parents were declining to give consent for the assessment.

16. Student's parents were aware that Marindale staff and Mill Valley staff wanted to do the assessment, but they declined to consent at the time due to their concerns about the possible results of the test. In hindsight, Parents believed that district staff should have been more forceful in explaining how important it was to assess Student before he started Kindergarten. Student's expert, Ms. Maier, who is an inclusion expert, agreed that normally an assessment should be done for a special education child who is transitioning from preschool to Kindergarten. Her opinion, however, assumed that a child's parents were consenting to the assessment. She did not address a situation where, as in this case, Student's parents rejected the transition assessment when it was offered. Mill Valley was not under an obligation to convince Student's parents to permit them to assess, and were under no obligation to file for due process to override the lack of consent.

MAY 15, 2013 IEP; OFFER OF DEVELOPMENTAL KINDERGARTEN; LACK OF BEHAVIOR ASSESSMENT AND BEHAVIOR SUPPORT PLAN

17. Mill Valley convened an IEP team meeting on May 15, 2013, to address Student's transition to Kindergarten. Staff from Marindale as well as staff from Mill Valley participated in the meeting as district IEP team members.

18. Mr. Sampson, Student's preschool teacher, prepared an assessment checklist for the meeting. As of the date of the meeting, Student used verbal expression as his primary method of communication. Student was capable of following one-step directions at school and could repeat familiar two and three-syllable phrases. Student's skill at attending in class had improved as had his ability to verbalize longer phrases and sentences, and his receptive language skills. Student was often able to match identical objects, match objects to pictures, and count from 1 to 10. He was working on identifying colors by their names. Student still

had not mastered identifying written numbers. He had progressed in his fine and gross motor skills. Student had made significant or partial progress on most of his goals. The only exception was his goal for completing one and two-step directions. As of the May 15, 2013 IEP team meeting, Student had not made any progress on the goal, and still required consistent verbal and mild physical prompting to complete the instructions. Student's goals were still in progress and therefore were continued from his December 2012 IEP.

19. Student contends that the goals did not address his needs. Dr. Worcester and Ms. Maier criticized the goals because they believed that Marindale and Mill Valley staff should have modified them so that they were more in line with Kindergarten standards. However, Student was not at a cognitive level to be able to access a Kindergarten curriculum. The goals contained in his December 5, 2012 IEP addressed his present levels of performance at the time and addressed all of his unique needs. The goals were designed to address Student's progress on his pre-academic skills, and were appropriate for his abilities at the time they were developed. There was no persuasive evidence that the goals were inappropriate for Student or should have been modified as he transitioned to Kindergarten.

20. Student, however, had begun to engage in some behaviors not previously noted at school. He began to have frequent daily incidents of screaming on the school bus, in the hallways at school, and in the school bathroom. He did not scream much in class. Ms. Fass and Mr. Sampson believed that the screaming might have been the result of Student liking the way it sounded, particularly in the bathroom where the acoustics made the sound different. Student also had begun acting aggressively with his classmates, by grabbing at them, in contrast to his previous shy and quiet disposition at school. Student's behaviors were most notable during transitions from preferred to non-preferred activities.

21. Ms. Fass discussed Student's behaviors with Mr. Sampson, who thought that Student's behaviors were improving rather than worsening. Student's behaviors were not impeding his progress at school. Mr. Sampson made several suggestions on how Student could be supported in Kindergarten, either in a special day class or in a general education class. He recommended that school staff assist Student in making transitions between activities, including the use of visual supports and partial physical prompting; assist Student with toileting and dressing; that directions be simplified, with the use of physical demonstrations and verbal modeling; that Student be given more time to process directions; that he be given multiple opportunities to practice directions; that he be given assistance with tasks above his ability level; and that Student be given assistance completing activities and directions that contained multiple steps.

22. Mr. Sampson did not believe that Student's behaviors impeded him in preschool or would impede his learning in Kindergarten, as long as Student was provided accommodations and support in class. Most of his suggestions were added as accommodations for Student in the May 15, 2013 amendment to Student's December 5, 2012 IEP so that his behavior needs would be addressed in Kindergarten.

23. Student's parents continued to advocate for a general education placement for Kindergarten. They provided the IEP team with a list of their long-term goals for Student and their hope that his general education teacher would hold Student to the same high expectations she or he had for Student's non-disabled peers. They provided the IEP team with a list of internet links with videos of people with Down's syndrome who had experienced great successes in life, particularly after having been educated in inclusive classrooms. Based upon their research, which indicated that inclusive models, where students with Down's syndrome are educated to the greatest extent possible in general education settings, Student's parents believed that Student would ultimately have the most success in life by being fully included in general education.

24. However, Student's parents believed that Student should first attend a transitional Kindergarten class before going into a regular Kindergarten class. They requested that placement during the IEP team meeting. Student did not qualify for the class. Transitional Kindergarten was designed for children who would be younger than five years old when Kindergarten started. Student had turned five in January 2013 and therefore did not qualify. The children in the transitional Kindergarten would all be considerably younger than Student. Mill Valley did not believe that it was appropriate to place a child so much older than his peers in the classroom.

25. Mill Valley's position was supported somewhat by the testimony of Student's expert witness, Ms. Maier. Ms. Maier is an inclusion specialist with a master's degree in special education. The majority of her studies were concentrated on the concept of including special needs children in general education classes. Ms. Maier teaches special education classes at San Francisco State University. She also has consulted for many years with various school districts to ensure that the IEP's of fully included children are properly implemented and that the child's IEP team is knowledgeable and prepared to implement an inclusion program. Although Ms. Maier thought Student might have benefited from a transitional Kindergarten class, she acknowledged that one of the criteria for an effective inclusion program was that the special needs child be assigned to a chronologically age appropriate classroom. It would therefore not have been appropriate to place Student in a class with children a year younger than he.

26. Additionally, the transitional Kindergarten class at Mill Valley was heavily impacted and had more students in it than the regular Kindergarten classes, which were scheduled to have 20 to 25 children enrolled, which would have resulted in less time for the teacher to devote to Student.

27. Mill Valley had two types of regular general education Kindergarten programs. One type of class was academically based, with the emphasis on teaching the students pre-academic and academic skills such as reading books and writing in journals. The other type of classroom was called a developmental Kindergarten, where instruction was more play based, and emphasized music, dancing, and the development of social skills readiness.

28. Mr. Sampson had some reservations about Student's ability to progress in a full-time general education classroom, mostly because of Student's shyness with other children and tendency to play alone. However, Mill Valley had a strong commitment to inclusive practices. After consideration of all the information presented by Student's parents, and their strong preference for inclusion, the Mill Valley IEP team agreed with the request of Student's parents for a general education placement. Mill Valley offered Student placement at Tamalpais Valley Elementary School (known as Tam Valley) in Mary Dale's developmental Kindergarten class.

29. Ms. Dale's classroom was recommended for several reasons. Foremost was the fact that Tam Valley was a full inclusion school. There were no special day class placements on the campus. All special education students enrolled at the school attended general education classes to the extent possible, with specialized academic instruction provided to them either in their general education classrooms or in a Learning Center, according to each child's individual needs.

30. Additionally, Ms. Dale had had a prior student with Down's syndrome in class and the placement had been successful. She also had experience with children with other disabilities, such as autism. Although Ms. Dale taught to the state Kindergarten standards, she presented the curriculum in a way that was more appropriate for the developmental stage of the students in her class. She used a kinesthetic approach to learning, emphasizing the use of physical things rather than paper and pencil to teach lessons. Since Student was at a lower cognitive level than his same-aged peers, Ms. Dale's developmental classroom would be easier for Student to access than an academic based Kindergarten class.

31. Mill Valley's offer of placement and services for Student for Kindergarten was full-time placement in a general education developmental Kindergarten class, with 40 minutes a day of specialized academic instruction in his classroom, provided by a special education teacher from Tam Valley's Learning Center, along with a curriculum modified to Student's developmental level, as needed. Mill Valley also offered Student one, 30-minute speech and language therapy session a week in a group setting. To support Student's general education placement, Mill Valley offered to provide additional aide support throughout Student's school day, as needed. Mill Valley continued to offer Student extended school year programming at his preschool, along with continued speech and language services. All of Student's IEP's have contained a provision for extended school year placement and services.

32. Student put on no evidence about the composition of the transitional Kindergarten class, the curriculum that would have been in place, or any factors indicating that a developmental Kindergarten class would not offer him a FAPE or that he could only receive a FAPE in a transitional Kindergarten classroom. There was no persuasive evidence that Mill Valley should have been aware in May 2013 that Student required a transitional Kindergarten class to receive a FAPE or that a developmental Kindergarten class was not an appropriate placement for him.

33. Subsequent to the May 15, 2013 IEP team meeting, Ms. Dale went to observe Student at his preschool placement. She was accompanied by Tam Valley school psychologist Sheri Heise and Tam Valley special education teacher Teri Hagen, both of whom would be working with Student when he began Kindergarten. None of the three observed Student engage in any behavior that indicated that he would not be successful in Kindergarten. Student did not engage in any aggression or screaming during their observation.

34. Ms. Hagen was the special education teacher in charge of the Learning Center at Tam Valley. She had a master's degree in special education and held both general education and special education teaching credentials. Ms. Hagen had worked approximately 10 years with Mill Valley. She served as the case manager for children receiving instruction from the Learning Center as well as provided the direct specialized academic instruction to them. Part of her training and duties was to support inclusion of students with special needs in general education classrooms no matter how severe their disabilities.

35. Ms. Hagen first learned about Student in spring of 2013 when she was asked to participate in his IEP process as the special education teacher IEP team member. Based upon the information in Student's records, the evaluations done of him, her observation of Student at his preschool class, and discussion with Student's IEP team, Ms. Hagen agreed with the other IEP team members that Student could be successful in a full-inclusion general education class. There was nothing about Student's behaviors in preschool that was so intense that it might prevent his successful transition to a general education classroom.

36. Student also visited Ms. Dale's classroom twice prior to starting Kindergarten in August 2013. One visit was during the spring. The second visit was the day before Kindergarten started when Ms. Dale's entire class was invited to spend time in her classroom to familiarize them with her, the classroom, and school site. Student had an opportunity to play and interact with other Kindergarten children, to hear a story and participate in a discussion of it, do a drawing activity, and try to write his name. Student did very well with both the drawing activity and writing his name. Although he needed support during the activities, he easily transitioned between them and was a ready and willing participant. Student did not engage in any screaming or aggression, and did not give any indication that he was uncomfortable or unhappy in the class.

37. Student presented the expert testimony of Dr. Worcester at the hearing. Dr. Worcester is a Board Certified Behavior Analyst with a doctorate degree in Educational Psychology which she obtained in 2010. She has been a Board Certified Behavior Analyst since 2002, and has 18 years of experience working with special needs children, including many years on the staff at various school districts or working with school districts as a consultant, either as a behavior analyst or as an inclusion specialist.

38. Dr. Worcester believed that Mill Valley should have conducted a functional behavior analysis of Student, and developed a behavior support plan for him prior to his beginning Kindergarten. She opined that Mr. Sampson's transition report provided Mill Valley with sufficient information about Student's behavior needs to require a behavior assessment and to have a plan ready to implement the day Student began school.

39. Dr. Worcester has excellent credentials as a behaviorist. However, her opinion was not supported by any other professional who testified. All of Mill Valley's witnesses who addressed the issue, including Ms. Heise, Ms. Hagen, Ms. Fass, and Mill Valley's expert witness Dr. Diane Ashton, whose credentials will be discussed below, concurred that a behavior assessment was unnecessary and would have been unproductive at the time. Student's behavior in preschool was not impeding his learning. He never had to be removed from the classroom and was always easily redirected. None of the Mill Valley staff noted any screaming or aggression in the classroom when they observed Student at school during the spring of 2013. Student had two visits to Kindergarten prior to the start of the school year that were successful. He did not demonstrate any of the behaviors during the visits and gave no indication that he was unhappy or uncomfortable in the classroom.

40. Further, Dr. Ashton, Ms. Heise, Ms. Hagen, and Ms. Fass all persuasively testified that it would not have been productive to conduct a behavior assessment of Student prior to him starting Kindergarten. Student would be attending a new school, with a new classroom, new classmates, and a new teacher. His reactions and behaviors in his preschool classroom were therefore not relevant to how he might react and behave in a totally different environment. It would be very difficult to determine the antecedents or bases of Student's behavior in the new environment, and difficult to determine appropriate responses, without observing him there first and seeing whether his behaviors would continue, increase, or decrease once he started Kindergarten.

41. Additionally, Ms. Maier, Student's inclusion expert, reviewed Student's May 15, 2013 IEP. Although she believed that it was important for Mill Valley staff to have been aware of the behaviors discussed in Mr. Sampson's transition evaluation, she agreed that there were not enough indicators that Student required a behavior support plan prior to his starting Kindergarten.

42. Therefore, Dr. Worcester's opinion that Mill Valley should have assessed Student's behavior and developed a behavior support plan prior to him beginning Kindergarten was not as persuasive. The opinions of Mill Valley and Marin County Office of Education staff that Student's overall profile and behaviors to date did not necessitate the administration of a behavior assessment or development of a behavior support plan were supported by their observations of Student in his preschool class as well as during his visits to Ms. Dale's classroom. There was no persuasive evidence that assessing Student in his preschool environment, where his behaviors did not disrupt his class, would have provided insight to Student's later disruptive behaviors once he started Kindergarten.

Events between Preschool and the Start of Kindergarten

43. After reviewing the May 15, 2013 IEP, Student's parents had a number of concerns about the program being offered. Their primary concern was their belief that the description of one-on-one aide services offered "as needed" was too vague. They felt Student required the services of a full-time aide throughout his school day. Student's parents were also concerned that one, 30-minute session a week of speech and language therapy was insufficient to meet Student's needs. Parents further believed that Student required specific occupational therapy services, which previously had been imbedded in Student's preschool curriculum. They also requested clarification of the amount of time Student would spend in specialized academic instruction as that would impact his overall time in the general education classroom.

44. Mill Valley and Marin County Office of Education, the latter of which was still involved in Student's IEP process, agreed to amend Student's IEP in response to his parents' concerns. They agreed to provide Student with aide support during the entire school day, which lasted five hours. They clarified that 40 minutes of specialized academic instruction would be pushed into Student's general education classroom rather than having Student pulled out to go to the Learning Center. They also agreed to administer an occupational therapy assessment to Student during the summer before the start of the new school year.

45. The occupational therapy assessment was done by Erin Hurley, the occupational therapist who had provided occupational therapy services to Student's preschool class. She did not administer any standardized tests to Student; rather, she based her assessment on prior observations of Student in preschool. Based upon her prior observations of Student, Ms. Hurley concluded that maintaining postural control, visual attention, bilateral coordination, and organization of fine motor tasks were challenging for him. She recommended that Student be provided with uncluttered work surfaces so that he was not overwhelmed by too much information or materials at one time. She concluded that Student needed to have his body supported while working at a table and that he required support while sitting on the floor as well. Ms. Hurley found that Student needed to be regulated to access instruction. She recommended that his actions and positioning be varied to address this need. For example, Student could march to music after having been seated for a period of time. Ms. Hurley also made recommendations for addressing Student's need to increase his hand strength and his writing abilities.

46. Mill Valley convened an amendment IEP team meeting for Student on July 17, 2013, to review Ms. Hurley's report. Based upon her recommendations, Student's IEP team developed a goal to address Student's fine motor deficits, which Ms. Hurley had found to be a significant area of need for Student. The IEP team also added 30 minutes a week of group occupational therapy services to address the goal. The occupational therapy goal and occupational therapy services met all of Student's known occupational therapy needs at the time.

2013-2014 School Year

FIRST WEEKS OF SCHOOL AND INITIAL BEHAVIOR SUPPORT PLAN

47. The 2013-2014 school year at Mill Valley began at the end of August 2013. Special education teacher Teri Hagen and Kindergarten teacher Mary Dale were aware Student would be attending Tam Valley and assigned to Ms. Dale's classroom. Both had observed Student in his preschool placement. Student had appeared to understand the preschool routines and actively participated in class. Neither Ms. Dale nor Ms. Hagen had reason to believe Student would not have equal success in Mill Valley's developmental Kindergarten program. In addition to being more focused on play activities and activities incorporating Kindergarten standards in ways that used objects rather than pencil and paper, the program began with a short three-hour day, extending to five hours a few months after the start of the school year. This helped the students to become accustomed to being in school.

48. Ms. Hagen met with Ms. Dale prior to the start of the school year to review Student's IEP and plan for Student's first day of school. Ms. Hagen also began preparing a modified curriculum for Student. During the course of the year, she was actively engaged in continually modifying curriculum, sometimes based on the lessons Ms. Dale planned for her class and sometimes based on an alternative curriculum from a program called Unique, as well as a curriculum called Rethink.

49. Ms. Hagen also discussed Student's IEP with his speech language therapist and occupational therapist. She wanted Student's service providers to be aware of his unique needs in each of their specialties. Ms. Hagen also discussed with the service providers how she would be consulting with them throughout the school year and how they could integrate their services into the curriculum in Student's Kindergarten classroom.

50. Ms. Hagen selected an aide for Student in conjunction with Tam Valley Principal Gail Van Adelsberg. The aide, Molly Delaney, had extensive experience working with special education students. She was also familiar with the Kindergarten curriculum. Ms. Hagen had previously trained Ms. Delaney on implementing IEP's, implementing accommodations for students with special needs, adapting lessons, and on which behavior strategies to use, if necessary. School psychologist Sheri Heise had also provided behavior training to Ms. Delaney. Part of the training had been on how to offer movement and music breaks to students, if needed. Ms. Hagen spent time with Ms. Delaney prior to the start of the school year reviewing Student's IEP and how he would be included in the general education classroom.

51. There are a wide range of abilities, academic levels, and maturity among Kindergarten students. Ms. Dale had many years of experience teaching Kindergarten. She was therefore aware of, and was prepared for, separation anxiety demonstrated by some of

her students on the first day of school. For that reason, the first day of school was focused on play activities and circle time activities. Because Ms. Dale had anticipated that many of the children would be anxious or crying the first day, there were extra adults in the classroom to support the children, including a school counselor. Ms. Dale began the first day by greeting all the children and then reading a story to them while their parents were still present. She planned to move to a new activity after the story so the children would be distracted as their parents left the room, with the counselor standing by if any of the children became upset.

52. Student's aide was in the classroom on Student's first day, as well, waiting for him to arrive. Student's parents left along with the other children's parents after Ms. Dale read the story. Student began screaming loudly right after his parents left. Ms. Delaney tried to calm Student down, but he was not responsive. Ms. Dale continued with the activities she had planned for the class, but Student continued screaming. Ms. Hagen came in shortly afterward and also tried to calm Student, but he continued screaming for most of the time class was in session.

53. Ms. Dale, Ms. Hagen, Ms. Heise, and Student's aide met that same day to discuss Student's behavior and how to respond to it the next day. They were aware of Student's love for music, so they discussed incorporating more music into the class activities, giving him more breaks and extra time to transition between activities, and providing Student with break time on the playground if he did not respond positively to other interventions.

54. The second day of school was similar to the first. Student screamed the entire class time. The other children had difficulty doing their activities because of his screaming. They could not hear Ms. Dale speak. Ms. Dale could not teach because the screaming interfered with her ability to communicate with her students. Student also would grab and throw objects in the classroom, such as papers and blocks.

55. Ms. Hagen, Ms. Dale, and Ms. Heise discussed other strategies to address Student's behaviors. They designated a specific place on the rug for Student to sit during circle time activities. They brought in cushions to the classroom for extra sensory stimulation. They brought in fidgets for Student to manipulate. They modified activities so that Student would not feel they were too challenging for him. They had Ms. Dale incorporate more movement and music during the first session of group activities in the day since Student enjoyed music so much. Ms. Dale knew that when Student was in preschool at Marindale he and the other children had special cube chairs to sit in. She retrieved Student's chair from Marindale and brought it to her classroom for Student to sit in, thinking it would be more comfortable for him than sitting on the floor.

56. None of the interventions were successful. Ms. Delaney was not able to cope with Student's behaviors and asked Ms. Hagen for additional help. Ms. Van Adelsberg and Ms. Hagen then selected two other aides to work with Student along with Ms. Delaney.

Ms. Delaney at first worked with Student for about the first hour of his school day, with Joan Garcia assigned to support Student for the remainder of the morning. Anna Mari Goy was assigned for the second half of the day. Ms. Garcia was selected because she had a calm demeanor and had previous experience with special needs children. Although Ms. Goy was newly employed by Mill Valley, Ms. Hagen and Ms. Van Adelsberg believed that she had the ability to implement behavior strategies. Eventually, Ms. Delaney stopped providing support to Student and Ms. Garcia took over responsibility for providing aide support for the first half of the school day.

57. Ms. Hagen trained both new aides. She reviewed Student's IEP goals with them, provided them with a summary of his IEP, and discussed different behavior strategies with them. When the aides first began working with Student, Ms. Hagen accompanied them so that she could model the strategies. During the course of the school year, she met with them on a weekly basis to discuss how Student's team would be addressing his academics, and to discuss Student's behavior issues and strategies used to address his behavior.

58. Ms. Hagen also created a weekly schedule of all of Student's activities each day for the aides to follow. Additionally, although Ms. Dale already had a daily schedule posted in her classroom for all the students, Ms. Hagen created an individual daily schedule for Student's aides to use with him. She created a "first then next" board for the aides to show Student exactly what he would be doing during the school day. She and the aides also took photographs of Student doing his activities to personalize the experience for him and get him excited about what he would be doing. The plan was to motivate Student by having him first do a less preferred activity followed by a preferred activity.

59. Student did not respond positively to the strategies Ms. Hagen and Ms. Dale attempted. He continued to scream in class. His screaming would start with a low growl. Sometimes, the growling would get louder, culminating in screaming or yelling.⁴ Some of Student's classmates were disrupted by the screaming. Ms. Dale could not teach the class. She had to interrupt lessons to respond to Student and the other children could not hear her when Student was screaming. She and Ms. Hagen instructed the aides to take Student out of the classroom when the screaming became too loud for other children to do their work.

60. Student also engaged in other behaviors that interfered with his learning. He would sometimes lie down on the floor, slump in his chair or slide off of it, and run away from adults or the activities he was supposed to be doing. Student acted aggressively with his classmates by grabbing their hair or arms. He also threw things in the classroom, such as blocks or worksheets. Ms. Hagen and Ms. Dale did not direct that Student be removed from the classroom except for when his screaming interfered with instruction.

⁴ The parties used the terms "screaming" and "yelling" interchangeably.

61. It was apparent within a week or two after the school year began that the informal strategies Ms. Hagen and Ms. Dale were using with Student were not effective. Ms. Hagen consulted with Ms. Heise. They concluded that Student required a behavior support plan to address his behaviors.

62. Ms. Heise composed a form to chart Student's behaviors throughout his school day. When the original forms proved too complicated for the aides, Ms. Heise revised it to make it more user-friendly. Ms. Heise trained the aides on when and how to use the prompts and on how to enter the information on the behavior data forms.

63. To prepare her proposed behavior support plan, Ms. Heise used the information from the behavior data forms, spoke with Student's teachers and the occupational therapist, and contacted Marindale staff to discuss Student's behaviors when he was in preschool. Her intent was to determine the antecedents for Student's behavior to determine why he was engaging in the behaviors and, therefore, how to address them. Ms. Heise did not conduct a formal functional behavior analysis before developing the behavior support plan. However, there is no requirement that a formal assessment be conducted before a behavior plan is developed. Ms. Heise had sufficient information from the behavior data collected by Student's aides on which to base her proposed behavior plan.

64. Student's disruptive behaviors consisted of screaming, throwing things, inappropriate touching of peers, lying on the ground, sliding off his chair, and running away from adults and activities. The behaviors occurred on a daily basis, at a rate of every 10 to 20 minutes. Although the behaviors impeded the ability of Student and his peers to access their education, the behaviors were only of moderate severity because they did not cause injury to Student or others.

65. Based on the data kept by the aides and input from Student's teachers and service providers, Ms. Heise concluded that Student was engaging in the disruptive behaviors during instruction that lasted a long time, during activities that Student did not like, during activities that he found too challenging, particularly if the challenging activity lasted for more than 10 to 15 minutes.

66. Ms. Heise determined that the factors in Student's school environment affecting Student's behaviors were his lack of effective communication skills and the fact that schedules, rules, expectations, and alternatives were not yet clear to Student. To address Student's behaviors, Ms. Heise recommended that Student be seated in his own chair during class circle time and that he have a separate area for times he needed to be away from the class or for breaks as needed. She recommended that Student have a visual schedule paired with verbal instructions, that his instructors institute a reward system for him, and that they provide him with the use of an iPad or computer.⁵

⁵ An iPad is a tablet computer.

67. Ms. Heise also proposed that the following interactions be used with Student at school: frequent praise of replacement behaviors; provision of clear, specific, and short directions; provision of consistency and structure; clear and exaggerated facial expressions and tone of voice in communicating with Student; provision of sensory breaks throughout the day; focus on gaining Student's attention prior to giving him an instruction; and provide a preferred activity after a non-preferred or challenging activity.

68. Student's IEP team, including his parents, agreed to Ms. Heise's behavior support plan in an IEP dated September 20, 2013. Student's IEP team also added a goal to address making Student less dependent on prompting to complete school activities.

69. However, Ms. Heise's behavior plan failed to address Student's behavior needs in several ways. None of these factors she determined were affecting Student's behavior adequately determined why Student screamed in class. Another problem with the behavior plan was that it failed to propose adequate replacement behaviors for Student's screaming, throwing things, and grabbing at his peers. It is unclear why Ms. Heise believed the use of technology would address Student's behaviors as she had not assessed his need to use it or how it would affectively redirect the behaviors. Additionally, while Ms. Heise recommended that a timer be used with Student during his assignments, she failed to detail when, how, and for what purpose the timer would be used.

FUNCTIONAL BEHAVIOR ASSESSMENT AND SECOND BEHAVIOR SUPPORT PLAN

70. Ms. Hagen and Ms. Heise instituted a graduated response to Student's behaviors. If the behaviors disrupted instruction, Student's aides first took him to the back of the classroom. If the behavior involved screaming and Student could not be redirected, his aides removed him from the classroom. At first, the aides took Student outside to a hallway. If he continued screaming, they took him to the playground. After the weather became colder, and the playground no longer was a possible place to take Student, Ms. Van Adelsberg and Ms. Hagen decided Student would first go the Learning Center as an alternative location. If his behaviors continued to be disruptive, they decided Student's aides would take him to the occupational therapy room, which was not close to other classrooms, and provided a quiet place where Student's aides could try to continue providing him with instruction.

71. Mill Valley began to implement Ms. Heise's behavior support plan immediately after Student's parents approved it. However, it did not have any positive affect on Student's behaviors. Rather, the behaviors increased in frequency and intensity to the point that Student at times was lying on the floor either growling or screaming. The behaviors were worse in the afternoon and did not cease even after Student had been given breaks from the classroom activities.

72. Within about 10 days of implementing the behavior plan, Ms. Heise realized that it was not working. She contacted Ms. Van Adelsberg and Ms. Abramson for assistance. Ms. Van Adelsberg and Ms. Abramson immediately responded to the situation by contracting with a non-public agency called Gateway Learning Group to provide behavior consultation and support to Student. Gateway assigned Erika Ertel⁶ to be the case manager for Student. Ms. Ertel was a master's level Board Certified Behavior Analyst, who had received her certification about a year and a half prior to being assigned to Student's case.

73. Student expert Dr. Worcester and Mill Valley expert Ms. Ertel both criticized Ms. Heise's behavior support plan because it was not based on analysis and data collection, and did not clearly define the function of Student's behaviors. However, although Ms. Heise's behavior support plan was flawed, Mill Valley responded to its ineffectiveness by immediately contracting with an agency to provide a higher level of behavior support to Student when Ms. Hagen and Ms. Heise realized the behavior support plan was not effectively addressing Student's behaviors. Student therefore did not suffer any loss of educational benefit nor was he denied a FAPE because of the flaws in his initial behavior support plan.

74. Pursuant to the May 15, 2013 IEP, Student was receiving specialized academic instruction from Ms. Hagen in his Kindergarten classroom. Student's behaviors were interfering with Ms. Hagen's ability to instruct him in the classroom because of the effect on the other children. On October 8, 2013, Student's IEP team met to discuss how best to provide the specialized instruction to Student. The team amended Student's IEP by having him receive instruction from Ms. Hagen at the Learning Center rather than in Ms. Dale's classroom. Student's parents consented to the amendment. Providing specialized academic instruction in the Learning Center resulted in Student's percentage of time in general education decreasing from about 90 percent to about 70 percent of his school day.

75. The IEP team also added the two hours a week of behavior consultation that Gateway was hired to provide for Student.

76. Through Gateway, Ms. Ertel began providing behavioral consultation services for Student in October 2013. Around this time, Ms. Delaney stopped providing aide support services to Student. Ms. Garcia thereafter supported Student in the morning with Ms. Goy taking over responsibility for aide support about halfway through Student's school day.

77. Ms. Ertel reviewed the behavior data Student's aides had compiled. She did not believe that the data was sufficient for her to develop a behavior support plan. She therefore determined that she would need to do a functional behavior assessment to address Student's behavior needs.

⁶ Ms. Ertel is also referred to at times in documents as Erika Ertel Nixon, her married name.

78. Ms. Ertel reviewed all of Student's IEP's; spoke with his teachers, aides, his mother, and Ms. Heise; and reviewed the behavior data that Student's aides were compiling. She observed Student at school and did a functional analysis of his behavior based on her observation of him. The purpose of Ms. Ertel's assessment was to determine the function of Student's behaviors so that his behaviors would not be reinforced accidentally. The assessment process consisted of taking data to determine the antecedents to the behaviors, what the behaviors consisted of, and the consequence of the behaviors. The antecedent focused on what was happening right before the behavior occurred. The consequence focused on what happened after Student engaged in a disruptive behavior.

79. However, Ms. Ertel did not analyze the data previously taken by Student's aides and did not incorporate it into the determinations she made on the behavior assessment. This resulted in her having an incomplete picture of the cause and effect of Student's behavior.

80. The three target behaviors Ms. Ertel analyzed were Student's yelling, aggression, and throwing objects. She defined yelling as any time Student growled or screamed at a volume greater than the other noise in his environment for longer than three seconds. Ms. Ertel excluded times when Student raised his voice appropriately, such as when showing excitement during an outdoor play activity.

81. Ms. Ertel defined Student's aggressive behavior as being any time he used a part of his body to make forceful contact with someone else. This included pushing, hitting, and kicking. It did not include hugs, or tapping or touching someone to get his or her attention, or physical contact during playground activities such as tag.

82. Ms. Ertel defined throwing as any occasion Student used his hands to throw an item while indoors.

83. Ms. Ertel collected three different types of data during her assessment. During her two classroom observations of Student, she collected frequency data and antecedent-behavior-consequence data. The purpose of the frequency data was to provide information about the rate at which the behaviors occurred and the degree of disruption. The antecedent-behavior-consequence data was to look at what was happening immediately before and after Student engaged in the targeted behaviors to better understand why he needed the behaviors or what was triggering them. During the functional analysis, Ms. Ertel took Student to a separate room at school and artificially arranged his environment to see what would cause Student to engage in disruptive behaviors.

84. During Ms. Ertel's observations of Student, his yelling behaviors occurred 2.8 times an hour. Student's yelling was sometimes preceded by a demand being placed on him. However, Ms. Ertel was not able to determine an antecedent for Student's yelling in

some of the cases as the yelling often occurred when no demands were made of him. The consequence of the yelling where Student yelled in response to a demand being made to him was that the person making the demand stopped making it. The person would then either attempt to redirect Student to something else or give him attention by telling him “no yelling.” In only a few cases did the adult continue demanding that Student to do what they had asked.

85. Student engaged in aggressive behaviors an average of two times an hour. The aggression generally consisted of Student grabbing at his peers’ arms or hair. Ms. Ertel was not able to determine an antecedent to the aggression. The consequences for Student’s aggressive behavior were either receipt of attention from the adult with him, such as the adult telling Student “no,” or, in a few cases, the adult removing Student to another area of the classroom.

86. Student threw things in class an average of 4.8 times an hour during Ms. Ertel’s observations. Ms. Ertel was unable to determine an antecedent for the throwing. Student threw things during transitions between activities, during free play time, and during one-on-one instruction. The consequence of Student throwing things was generally attention from the adult with him, such as the adult saying “no throwing, [Student].”

87. For her functional analysis, Ms. Ertel artificially created four conditions to see how Student would react and under what circumstance he was most likely to engage in the behavior. Three of the four conditions - getting attention, being allowed to escape a task, and being left alone - were the contingent conditions. Each condition lasted five minutes. For the attention condition, Ms. Ertel paid no attention to Student unless he engaged in one of the targeted behaviors. If he did, she would give him some attention. If Student’s behavior was highest during the attention condition, it would likely mean that the targeted behavior was maintained by receiving attention. For the escape condition, Ms. Ertel gave Student a task to complete. If Student engaged in a behavior, the task would have been removed and Student would be allowed to take a break. For the alone condition, Ms. Ertel put only a few items on a table and made no demands of Student and paid no attention to him. The play condition was used as the control condition where preferred activities and attention from Ms. Ertel was readily available.

88. Student engaged in his yelling behavior at a higher rate during the escape condition trial. He yelled at a lesser frequency during the play and attention conditions. Student did not yell at all during the alone condition.

89. Student did not engage in aggressive behavior during any of the trial conditions. This was likely because no classmates were present. Student’s aggression primarily occurred with his peers. This was a flaw in the assessment because the conditions imposed were not done in the same environment where Student’s disruptive behaviors generally occurred.

90. Student threw things during each of the trial conditions, although the behavior occurred mostly during the alone and attention conditions. Student threw things 29 times when the alone condition was implemented and 28 times during the attention condition. As with her observations of Student's behavior, Ms. Ertel was not able to conclude why Student's behaviors were occurring during each of the trial conditions. In spite of her inability to determine the causes of Student's behavior, Ms. Ertel did not conduct more observations of Student. This too was a flaw in her assessment process.

91. Based upon her behavior assessment, Ms. Ertel developed a proposed behavior plan. She included three long-term goals for Student. The first goal was for him to decrease his rate of yelling to less than one time per hour, for three consecutive school days. Student was to use a variety of words or phrases such as "No, thanks," and "I don't want to" instead of yelling when he wanted to express dislike. In response to Student's yelling, Ms. Ertel proposed having Student's aides carry a timer. When Student began yelling, they would start the timer and tell Student that if he used a "quiet voice" he would get a reward as a positive reinforcer. Student would determine the reward. The timer was implemented with Student, but did not prove helpful and later discontinued.

92. Ms. Ertel also recommended that Student be provided with a quiet work space that he could go to when his yelling was so loud that it disturbed his peers. Student would be removed from the classroom to a quiet place to do non-preferred activities if he continued yelling in the classroom. Once Student had completed the non-preferred activity in the alternative, Student would then be given a preferred activity. When Student finished the preferred activity, Student would return to the classroom. However, this goal did not recognize the reasons Student was yelling, did not suggest appropriate replacement behaviors, and did not focus on finding ways to retain Student in class with his peers. Ms. Ertel also recommended the continued use of a visual schedule with Student, and that his aides make him aware that a preferred activity would come once the non-preferred activity was completed. However, the use of the visual schedule and the "first/then" scenario had already been attempted with Student and had not been successful in decreasing his disruptive behaviors.

93. The second long-term goal Ms. Ertel proposed was for Student to use his words to communicate with others, rather than engaging in aggression. The objective was for Student to engage in no aggressive conduct over three consecutive school days. The plan was for Student's aides and teachers to model language for him when a classmate approached, with praise given to Student each time he interacted appropriately with a peer. Ms. Ertel suggested that adults position themselves between Student and his peers if they thought it appeared Student was going to make any aggressive movements. If Student did engage in aggression, he would be removed from the area with little eye contact and no verbal interaction. Once Student was calm for a minute, the adult with him would then remind Student to "keep your hands to yourself" or to "use gentle hands." Student would then be returned to his activity.

94. The third long-term goal Ms. Ertel proposed was for Student to engage in less than one instance of throwing per hour, for three consecutive days at school. The objective was for Student to request a break or ask to use a fidget toy, either by verbalizing or using his picture cards, in four out of five instances during three consecutive school days. Ms. Ertel also recommended that Student be taken outside to engage in physical activity such as throwing a ball. Although Ms. Ertel was not able to determine an actual antecedent for Student's throwing behavior, she hypothesized that Student would not feel a need to throw things if he was given frequent breaks to engage in physical activity. She also recommended that school staff make an effort to have fewer materials in Student's work space so that he would not have access to things to throw. Ms. Ertel recommended that if Student threw things that he be directed to pick them up and his breaks not be provided immediately after he engaged in the conduct.

95. Ms. Ertel's behavior plan also contained a provision for continued monitoring of Student's behaviors.

EXPERT TESTIMONY REGARDING BEHAVIOR SUPPORT PLAN

96. There was strong disagreement among the experts who testified regarding whether Ms. Ertel's behavior assessment and behavior plan were properly executed and addressed Student's needs. Dr. Worcester was highly critical of Ms. Ertel's functional behavior assessment and her resulting behavior support plan. Her first criticism was that it did not meet the guidelines for behavior plans indicated by an organization called Positive Environments, Network of Trainers, or PENT, which focuses on addressing behavior issues of school children. Many school districts, including the Marin County Office of Education, follow PENT guidelines in developing behavior support plans and behavior intervention plans. Dr. Worcester analyzed Ms. Ertel's behavior assessment under those guidelines and determined that it met only five of 24 criteria.

97. Dr. Diane Ashton testified on behalf of Mill Valley. Dr. Ashton has a doctorate in educational psychology and special education. She has worked in the field of special education for over 40 years. At the time of the hearing she was the Director of Special Education for another school district, a position she had also previously held in another location. Dr. Ashton has taught special education classes at the university level both in the United States and abroad. Her education and teaching experience has focused on different issues concerning the education of children with special needs, in particular inclusive teaching practices. Dr. Ashton was a compelling and persuasive witness.

98. Dr. Ashton pointed out that there is no statutory mandate that PENT guidelines be followed in developing behavior plans. A behavior plan that met PENT criteria did not mean it was adequate. Conversely, a behavior plan that did not meet PENT criteria could very well meet a child's needs. She did not find the fact that Ms. Ertel's assessment did not meet PENT criteria to be a decisive issue.

99. On this point, Dr. Ashton was more persuasive than was Dr. Worcester. Although PENT criteria may be a “gold standard,” there is no requirement under federal or state special education law that dictates what either a functional behavior analysis or a behavior support plan must contain or what format it should follow. Therefore, the failure to follow PENT criteria did not in itself invalidate Ms. Ertel’s assessment or resulting behavior support plan.

100. In contrast, the criticisms that Dr. Worcester found regarding the content and scope of the functional behavior analysis and behavior support plan, the behavior goals developed for the plan, and the behavior services provided to Student were persuasive. The behavior assessment only included two short observations by Ms. Ertel. The assessment did not identify the educational settings where the behavior was observed. Identification of where the behaviors occurred was important because the primary reason for the assessment was the fact Student had to be removed from his normal educational setting. It was essential that it be determined if his behaviors were occurring in all educational settings, while Student was on the playground, and/or just in the general education classroom. Additionally, Ms. Ertel did not consider the several months of behavior data that had been taken by Student’s aides. There were almost 100 pages of data that described situations where Student was yelling, acted aggressively with peers, and threw things. Yet, the functional behavior assessment ignored some two months of data in favor of two short observations. The failure to consider this data was one of the reasons Ms. Ertel was unable to determine antecedents for any of Student’s three disruptive behaviors.

101. Another valid criticism Dr. Worcester had of the behavior assessment was that it stated that frequency of behavior equated to the level of disruption of the behavior. However, all that the frequency data determined was how often the behavior occurred. There was no discussion of the level of the disruption of any of the behaviors or any discussion of environmental factors that might have caused or affected the behavior, or determined whether it was, in fact, disruptive to those around Student.

102. A further flaw in the assessment was the lack of a determination of what was the antecedent, or cause, of the behaviors. Dr. Worcester’s opinion that more assessment should have been done to determine antecedents was particularly compelling because the lack of antecedents made the resulting behavior plan questionable. Ms. Ertel developed a behavior plan that focused on removing Student from the classroom when he became too disruptive. Yet, there was no determination as to why Student was yelling so loudly, only supposition. If Student, in fact, was yelling because he did not want to remain in the classroom, removing him served only to get him what he wanted. And, the weight of the evidence supports a conclusion that Student did not want to be in the classroom. Student’s behaviors, particularly his yelling, were most pronounced when he was in the general education classroom or in the Learning Center. When Student was working one-on-one with his aides, he was more easily redirected and would do the assignments they gave him.

Student's success in the one-on-one independent study program at home the following school year, where he did not engage in the three behaviors, is further support that he probably did not want to be in the classroom. Dr. Worcester and Dr. Ashton both concluded that Student's behaviors, in particular his yelling or screaming, were because he did not want to be in the classroom.

103. The need to determine an antecedent to the behaviors was also emphasized by Dr. Ashton. Although she initially testified that Ms. Ertel's assessment and behavior plan were sufficient, she acknowledged several weaknesses in them. She was not able to determine either from the assessment or the behavior plan how often Student's behaviors were occurring and how often he was successful in remaining in the classroom. Although there were indications in the data and the assessment that Student was removed from the classroom when his disruptive behavior reached a level "five" on a scale of one to five, there was no data or discussion on how often, when, where, and under what circumstances Student had behaviors that only rose to a level of one to four. In those latter circumstances, it was important to know what worked and what did not work in containing Student's behavior. No data was taken, for example, on the fact that Student's growling may have been at level two, but then after he was redirected he returned to his task. All that Ms. Ertel's data indicated was that Student engaged in yelling, which decreased somewhat over time. It failed to provide Dr. Ashton with a complete picture of what was going on with Student's behaviors.

104. Finally, the behavior assessment and resulting behavior plan did not contain any concrete replacement behaviors for Student, particularly for his yelling, other than teaching him to say "all done" when he finished a task. The problem was that there was no indication that Student was yelling because he wanted to communicate he was done with something. Since Ms. Ertel never made that determination, there was no correlation between Student's yelling and teaching him to say "all done." Similarly to Dr. Worcester, Dr. Ashton opined that Ms. Ertel's conclusion that Student's yelling was for communication purposes was an assumption not supported by the data. Dr. Ashton acknowledged that she would have focused on making the general education classroom a reinforcer for Student because it was apparent from the data and records she reviewed that Student was not at ease in the classroom. It would have been important to have focused on getting Student to want to be there rather than removing him from someplace he did not want to be.

105. Dr. Ashton also acknowledged that even if Ms. Ertel's first behavior support plan of December 2013 were appropriate, by at least February of 2014 the IEP team should have revised it based on Student's continued yelling and other behaviors. It was apparent that Student was not happy in the classroom and wanted to escape. Therefore, the behavior plan should have included replacement behaviors and reinforcers that would have helped Student want to love to be in class rather than want to escape from it.

106. Dr. Worcester was also persuasive that the defects in the behavior assessment and behavior plan resulted in the development of inadequate behavior goals. For the yelling behavior, the goal ultimately had Student removed from class if he became disruptive. Yet,

removing Student from class did not teach him any replacement behaviors for the yelling. The fact that Ms. Ertel, although contracted to provide the behavior intervention called for in Student's IEP, provided no guidance to the aides or Ms. Dale and did not intercede when she noted Student engaging in behaviors and being removed from class, compounded the weaknesses in the behavior plan and emphasized the lack of behavior support Student received.

107. Dr. Worcester was also persuasive that the goals for aggression and throwing suffered from the same weakness as the yelling goal because there were no concrete replacement behaviors offered for the behaviors. Student continued to engage in the behaviors until he left Mill Valley near the end of the school year. The fact that Student's aggression and throwing resurged between March and June 2014 is evidence that the behavior plan and goals did not address the reasons Student engaged in the behaviors. Because no antecedents had been determined, no appropriate replacement behaviors were developed, and Student continued to engage in the behaviors. And, even with the resurgence in the behaviors, Mill Valley did not suggest modifying the behavior plan at the June 9, 2014 IEP team meeting.

108. Further, the behavior plan did not include any directives for staff, particularly Student's aides, who worked with him more directly than did his teachers, to reinforce positive behavior. Further, Ms. Ertel never trained Student's teacher on implementing the behavior plan. At hearing, Ms. Dale acknowledged that it was Student's aides who implemented the plan and it was the aides, not Ms. Dale, who made the decisions on when to remove Student from the classroom. Ms. Dale was not notified to where the aides were taking Student when they took him out of her class. Sometimes it was to the playground, sometimes out for a walk, at other times to the Learning Center, and other times to the occupational therapy room. Nor did anyone inform Ms. Dale of how well removing Student to these alternative areas was working.

109. Finally, the behavior supports Mill Valley provided failed to address Student's needs. The December 5, 2013 IEP contained behavior intervention services, provided by a non-public agency, as a related service for Student. However, although Ms. Ertel provided some training to Student's aides on implementing the goals of her behavior support plan, she gave them no specific guidance on when to return Student to the classroom. When asked during their testimony about the criteria for returning Student to class after he was removed for being disruptive, Ms. Goy and Ms. Garcia were only able to give vague answers as to how long they would retain Student outside the classroom when they removed him. It was at their discretion the amount of time Student would be outside class.

110. Further, Ms. Ertel never intervened during her observations to direct the aides in addressing Student's behavior. She acknowledged that all she did was observe Student and take behavior data when she came to his school. If she arrived while Student was in his classroom, and the aides felt that his behavior had become too disruptive and decided to

remove him either to the hallway or to the occupational therapy room, Ms. Ertel would not intervene to suggest strategies to defuse the situation. If Ms. Ertel arrived on campus and Student was already in an alternative location, such as the occupational therapy room, Ms. Ertel did not intervene and tell the aides when Student's behavior had calmed to an extent that he was ready to go back to class. Therefore, there were times when Ms. Ertel was present that the aides simply kept Student in the occupational therapy room and started doing lessons with him when his behavior was no longer disruptive. Ms. Ertel was not really providing the behavior intervention services called for in Student's IEP.

111. For these reasons, Dr. Worcester's opinion was persuasive that the functional behavior assessment and resulting behavior plan and goals, as well as the behavior support services provided to Student, were inadequate and failed to meet his behavior intervention needs, resulting in a denial of FAPE.

TRIENNIAL ASSESSMENT AND DECEMBER 5, 2013 IEP

112. Mill Valley conducted a triennial assessment of Student in the fall of 2013 in preparation for his triennial IEP team meeting. Mill Valley did a psycho-educational assessment and assessments in occupational therapy, and speech and language. The assessments covered the areas of cognitive functioning, receptive and expressive language, social and emotional functioning, self-help skills, academic performance, motor abilities, orientation and mobility skills, and health and development. The assessments covered all areas of Student's suspected disabilities and assisted in developing Student's present levels of performance. The assessment team consisted of Ms. Heise, Ms. Hagen, speech and language pathologist Kristin Novotny, occupational therapist Colleen Cavin.

113. Based upon the results of the triennial assessment, Student's assessment team recommended that a visual schedule continue to be used to enable him to understand his school day. Because Student was having difficulty verbalizing his wants and needs, his assessment team recommended that, in addition to verbal instruction, an additional communication method, such as the Picture Exchange Communication System, be used to supplement communication with Student and perhaps reduce his frustration level. The team also recommended adjusting Student's behavior support plan.

114. Student's IEP team met on December 5, 2013, to review his triennial assessment and Ms. Ertel's functional behavior assessment, and to develop his annual and triennial IEP.

115. The IEP team reviewed Student's progress on his present goals. In expressive language, although Student had made progress on the goal to increase his mean length of utterance (the mount of words used, such as in a sentence), Student still had not met the goal. Student had an expressive language goal to demonstrate the appropriate use of pragmatic language, such as for requesting assistance. While Student's preschool IEP team the

previous school year had found that Student was making progress on this goal, by the time of the December 5, 2013 IEP team meeting, Student's progress had slowed or regressed, and he did not meet the goal. Student had one articulation goal, which was to increase his speech intelligibility and increase his ability to say words with multiple syllables. Although Student had met the two benchmarks for the goal during preschool, Student had not made any further progress on it during Kindergarten and therefore did not meet the goal.

116. Student had two receptive language goals. The first goal was for Student to respond when asked to identify certain concepts. Student had made partial progress on the goal during preschool, but made minimal progress after starting Kindergarten and did not meet the goal by the annual IEP team meeting. Student had a second receptive language goal for him to complete one and two-step directions in response to verbal and gestural prompts. Student only made minimal progress on this goal during preschool and did not make any progress on it during Kindergarten. He did not meet the goal by the time of the December 5, 2013 IEP team meeting.

117. Student had three pre-academic goals. The first was to improve his receptive and expressive identification of colors. Student began making progress on this goal during preschool. By the end of preschool, he was successfully naming two colors and receptively identifying 4 of the 11 colors listed in the goal. However, he failed to make any progress on the goal during the first portion of Kindergarten. He no longer was able to name any of the colors when asked to do so.

118. Student's second pre-academic goal was for him to match three shapes, colors, or objects by size. Student met the benchmark of this goal by the end of preschool. However, he regressed during Kindergarten. By the time of the December 5, 2013 IEP team meeting, Student was no longer able to match any new materials, and did not meet the goal.

119. The third pre-academic goal was in the area of pre-math skills. The goal called for Student to demonstrate three of four pre-math skills of either matching numbers 1 to 10, naming the numbers, counting objects, or giving the teacher the number of objects requested. Student was only beginning to make progress on this goal when he finished preschool. By the time of the December 5, 2013 IEP team meeting, Student was only able to rote count to 10 with prompting; he was not able to do any other pre-math skill and therefore did not meet the goal.

120. Student had one fine motor goal that called for him to be presented with fine motor tasks that were challenging for him and for Student to make attempts to complete the task, seek assistance if needed, and cooperate with the instructor while getting assistance. During preschool, Student made significant progress toward this goal. He was more willing to attempt tasks, appeared more motivated to do the work, demonstrated more perseverance in a greater number of activities, and, although not yet able to ask for help, willingly accepted help from instructors. However, Student's progress slowed during Kindergarten.

Although his endurance for tasks had improved, Student would often push items away or throw them rather than accept help in completing the task. Student did not meet the goal.

121. Student's IEP team had developed a visual motor goal for him after he finished preschool. The goal required Student to copy shapes with appropriate spacing and orientation on the paper. Student made partial progress toward the goal but did not meet it.

122. Student's IEP team had also developed a goal after he began Kindergarten that addressed making him more independent. The object of the goal was for Student to use a visual schedule to complete activities with no more than two prompts, 70 percent of the time. Student had made progress on the goal, but did not meet it. He was able to complete tasks with two prompts or less only 50 percent of the time.

123. In sum, Student did not fully meet any of his annual goals by the time his IEP team met on December 5, 2013. Mill Valley was unsure why Student had regressed. It speculated that there was a possibility that Student's preschool instructors had overstated his abilities and present levels when they developed his December 2012 IEP and May 2013 transition IEP. However, Dr. Worcester opined that Student's lack of progress was most likely the result of the fact that his disruptive behaviors interfered with his learning, particularly when he was removed from class. Her opinion in this regard is persuasive. There is no evidence to support Mill Valley's hypothesis that Student's preschool instructors misrepresented Student's abilities. Furthermore, Student provided evidence of his academic progress during the 2014-2015 school year, when, as discussed below, he received his education in an independent program provided in his home. Therefore, Student had the ability to progress. He did not make the progress in Kindergarten that he made in preschool due to his behavioral challenges.

124. However, whatever the reason for Student's lack of progress on his goals, Mill Valley appropriately responded by developing 16 new goals that were commensurate with his present levels of performance. Mill Valley based the goals on input from Student's teachers, aides, and parents; the triennial assessment completed by Mill Valley; and the functional behavior assessment completed by Ms. Ertel. Most goals described Student's baselines in the respective areas. Although one of the speech and language goals did not state a baseline, it was because it was a new goal for Student. The baselines were not extensively discussed on the goal forms. However, all of Student's present levels were discussed in his assessments and in the progress notes for his previous goals. All this information was contained in the December 5, 2013 IEP document, and discussed by the IEP team, including Student's parents, at the IEP meeting. Therefore, all the goals were based on Student's present levels of performance and his present need for the goal. Each goal was measurable. Each goal addressed all of Student's known needs at the time.

125. Since Student had failed to meet any of his previous goals, his IEP team revised them and, in some cases, made them somewhat less challenging for him. In speech and language, the team revised one expressive language goal to require Student to increase

his mean length of utterance from his present 1.6 words per utterance to two words per utterance, and increased from two to three the number of words Student would strive to use appropriately each time he spoke. The team reduced the pragmatic functions Student would be asked to complete from four out of five functions to only asking him to one and two-step directions associated with classroom tasks.

126. The team added a goal for Student to use a communication book with picture icons. The goal did not specify the use of a specific communication system such as the Picture Exchange Communication System. Mill Valley had already begun using a picture system with Student and continued to do so for the remainder of the 2013-2014 school year. Ms. Hagen and Student's aides created a communication book for him that had picture icons that Student could select for actions, such as when he needed to go to the bathroom, when he needed help, or when he was hungry or thirsty. The book also included photographs of staff that worked with Student during his school day and of Student engaged in various activities or being behaving appropriately, such as keeping his hands together. Ms. Hagen and Student's aides used the pictures and photographs throughout the school year to supplement and support verbal communication with Student. Additionally, staff created picture icons that the aides could place on Velcro strips on the aprons they wore. The icons were therefore available for use in whatever location Student was receiving instruction. There was no persuasive evidence that this communication system was not used or that it was not initially helpful to Student.

127. The IEP team also developed four new pre-academic goals for Student, two in language arts and two in mathematics. The language arts goals were simpler than the previous goals. Since Student had regressed in his ability to identify basic shapes, instead of identifying specific letters of the alphabet, the goal required Student to learn to identify which of four uppercase letters was different than the other three. Instead of focusing on identifying colors, the second annual language arts goal sought to teach Student to recite at least half of the alphabet. The math goals also contained fewer parts to them than had the previous math goal. The two new math goals sought to have Student learn to rote count to 20 and to learn to give a specified quantity of one to five objects when requested.

128. The IEP team added a new goal to address Student's difficulties with attention and focus. The object of the goal was for Student to orient himself in the direction of an adult speaker when his name was called.

129. Based on the difficulties Student had responding to adults and peers when they greeted him by name, the team developed a social skills goal to have Student respond to greetings by saying looking at the speaker and saying "hello" when prompted.

130. Student required six to nine prompts to complete a three-minute familiar task. His IEP team developed a goal for him to decrease the amount of prompting, at least during one-on-one instruction using a visual schedule, to two or fewer prompts.

131. To address Student's fine motor deficits, his IEP team developed a goal for him to be able to copy lines, circle, and crosses, rather than requiring him to draw them on his own.

132. In response to Student's continued challenges with toileting, his IEP team developed a goal for him to pull his pants up and down by himself.

133. The team developed a new eye-hand coordination goal for Student based upon deficits Ms. Cavin's occupational therapy assessment had identified.

134. The IEP team also incorporated Ms. Ertel's three proposed behavior goals.

135. Based upon Student's present levels of performance and the goals developed from that information, Mill Valley offered Student continued placement in a general education Kindergarten class, with 30 minutes of group occupational therapy services, two, 20-minute sessions a week of speech and language therapy, continued full-time aide support, 720 minutes a month of behavior intervention services, and 370 minutes a week of specialized academic instruction to be provided on a pull-out basis. The IEP continued to state that Student would spend more than 70 percent of his time in general education.⁷

136. The December 5, 2013 IEP also provided Student with the following accommodations: frequent breaks; a visual schedule; increased positive reinforcement; reduced visual and auditory distractions; aide support embedded in the school day; consultation between IEP team members; and a modified curriculum. The IEP did not discuss how or where the modified curriculum would be provided to Student, other than the fact that it would occur in both the general education and special education classrooms, as would all of Student's accommodations. Student's parents consented to the IEP.

137. By June 2014, Student had made at least some progress on all of the new goals from his December 5, 2013 IEP. He made beginning, partial, or substantial progress on his goals of identifying letters; rote counting to 20; associating numbers to objects; orienting himself toward speakers; responding to his name; completing tasks; building with blocks for hand-eye coordination; increasing his mean lengths of utterance; and completing directions. As discussed more fully below, Student initially decreased his yelling, throwing, and aggressive behaviors. However, after March, the throwing and aggression again increased in frequency. By June 2014, Student had met the benchmarks or met the goal in the areas of reciting the alphabet; copying lines; and pulling his pants up and down to use the bathroom.

⁷ It is unclear why the percentage of general education instruction did not decrease given that Student's specialized academic instruction increased from 200 minutes a week (40 minutes a day, five times a week) to 370 minutes a week, an increase of more than three hours a week. Neither of the parties addressed this discrepancy.

138. By March 2014, Student made beginning progress on his goal to use his communication book. However, Student thereafter did not show any interest in using the book. He preferred to use words to communicate, to make choices, and to describe items. During speech therapy sessions, Student would respond to the use of picture icons to work on sentence structure. However, when not in speech therapy, Student preferred to use words to communicate, including asking for breaks. Based on Student's resistance to using the communication book, Mill Valley decided to discontinue its use.

139. With the exception of Student's behavior goals, all goals developed by Mill Valley were appropriate. The goals drafted by Ms. Hagen and Student's related service providers were based on Student's present levels of performance. Each goal contained a means for measuring progress toward the goal. Student's IEP team had sufficient information regarding Student's needs from his assessments and observations of his instructions to identify Student's areas of academic need, speech and language needs, occupational therapy needs, and self-help/adaptive living needs. Student did not offer any persuasive evidence, other than behavior, that he had unique needs that Mill Valley failed to address through Student's IEP.

MARCH 27, 2014 IEP TEAM MEETING

140. Ms. Ertel continued to observe Student's behavior between December 5, 2013, and late March, 2014. Her observations indicated Student's behaviors continued and that he was outside of general education and in an alternative setting on almost every one of the days she observed him.

141. At the end of March, Ms. Ertel updated her functional behavior assessment to include progress Student had made on his behavior goals. The objective of the first behavior goal was for Student to use five different words or phrases to express dislike or refusal of a task. As of March 26, 2014, Student had begun to use one phrase, "all done," to express dislike or refusal. According to Ms. Ertel's data, Student's yelling had decreased from 2.8 times an hour to 1.5 times an hour.

142. The objective of the second behavior goal was for Student to use words to communicate with others rather than engage in aggressive behavior. Student had initially been engaging in two aggressive acts an hour. By March 26, 2014, Student was saying "hi" or giving "high fives" to others when prompted. His aggressive acts had decreased to only .2 per hour.

143. The third behavior goal was for Student to decrease the times he threw objects from his rate of 4.8 times per hour, and to request a break or fidget toy instead. By March 26, 2014, Student had decreased his throwing of objects to 1.6 times per hour. However, he still was not able to use words or pictures to request a break or a fidget toy.

144. In spite of the decreases noted by Ms. Ertel, Student was still being removed from class about as frequently as he had been during Ms. Ertel's first observation period between October and December 2013.

145. Student's parents had become increasingly concerned about Student's continued removals from class. Both parents were fairly frequent visitors to Student's classroom, rotating every other week to act as parent assistants during center time activities. Often, they would go to Ms. Dale's classroom and not find Student there. Ms. Dale would direct them to the Learning Center. Sometimes Student was there; often, Student's mother or father would be directed to find Student in the occupational therapy room. When they would get to the occupational therapy room, they could see that Student was no longer yelling and wondered why he remained there instead of returning to his classroom.

146. Student's parents were particularly concerned because Student did not engage in any yelling, aggression, or throwing behaviors at home or in the community. Student participated in baseball, music, gymnastics, and private speech therapy without incident and with full enjoyment. Student's parents could not understand why he was so different at school. At times, when Student's mother was at school, she had seen him in a hallway or somewhere else outside of his classroom screaming, with no intervention by his aide except the aide trying to cajole Student to stop.

147. Principal Adelsberg had informed Student's mother that Student's yelling was affecting the whole school. Student's mother was upset because it did not appear that anything was being done to fully address Student's behaviors and determine why they were happening. Student's parents were also concerned that Student was not being included in class activities and was not considered a full member of the classroom. Accordingly, Student's parents asked for another IEP team meeting, which Mill Valley convened on March 27, 2014.

148. Student's mother was concerned about Student's removals from class and his lack of integration in classroom activities and curriculum. Ms. Dale and Ms. Heise acknowledged that Student was removed from class when his vocalizations became too disruptive for the other children to learn. Ms. Ertel acknowledged that she sometimes had Student leave the classroom *before* he started screaming to make certain he left the class on a good note. Principal Adelsberg, who was also at the IEP team meeting, acknowledged that Student's vocalizations had increased at times during the school year to a point where it was a concern.

149. The IEP team did not suggest making any changes to Student's behavior support plan to address his continued disruptive behaviors and his continued removal from class. However, in response to the request of Student's parents for more communication about how Student was doing at school, Mill Valley agreed to send home communication logs containing information about what Student did each day.

JUNE 9, 2014 IEP TEAM MEETING

150. Ms. Ertel continued observing and collecting data on Student's behaviors. By early June 2014, Student's yelling had decreased to 1.1 times per hour. Student still had not added any new replacement phrases to indicate his dislike or refusal of an activity. He still just used the phrase "all done" when he no longer wanted to do something. And, instead of increasing his use of the phrase, Student had decreased its use from 2.4 times an hour to 1.26 times an hour. Student therefore had not met the goal of substituting language for his yelling. In spite of the decrease in yelling, Student was still being removed to the occupational therapy room even when his behaviors were fairly minor.

151. Similarly, Student had not met his behavior goal of using words instead of aggression to communicate with his classmates. While Student's aggressive acts decreased between December 2013 and March 2014, they increased again between March and June 2014. The goal was for Student to decrease his aggressive acts to zero instances. In June, Student was still engaging in aggression 1.2 times per hour, 6 times the rate noted in March 2014.

152. The only steady decrease in Student's behavior was in throwing objects. By June 2014, Student had decreased instances of throwing from 4.8 to 1.2 times an hour. However, while Student had been able to say "all done" when he wanted a break an average of 2.4 times an hour in March 2014, his use of the phrase dropped to 1.26 times an hour by June, demonstrating another regression in his behavior between March and June 2014.

153. Mill Valley convened an amendment IEP team meeting on June 9, 2014, to discuss Student's transition to first grade and what services he would need. Student's parents were extremely concerned about Student's lack of progress at school, especially his disruptive behaviors. They continued to be concerned about Student's removal from class and his lack of integration in class activities and curriculum. The Mill Valley IEP team members acknowledged that Student was still being removed from class and receiving instruction in an alternate quiet place when his behaviors impeded the ability of his peers to learn. However, evidence at hearing from Student's aides and Ms. Dale indicated that Student was removed at times when he growled even though classmates had become accustomed to it.

154. Student's parents informed Mill Valley during the June 9, 2014 IEP team meeting that they were removing Student from the district. For the 2014-2015 school year, Student's parents enrolled him in an independent study charter school program. Student's mother was given training to lead or guide Student's instruction. Student also received special education support and related services. Student flourished in this one-on-one independent environment and made significant academic gains. However, Student's parents still prefer to have him attend a general education classroom in a public school because of the strong social contacts he would have with his peers.

MODIFICATION OF STUDENT'S CURRICULUM

155. As stated above, Ms. Hagen was Student's special education teacher and case manager. Because Tam Valley operated on an inclusion model, it had no special day classes where special education students spent most of their school day. Every special education child at Tam Valley was assigned to a general education classroom for some or all of the school day. Ms. Hagen's duties included working collaboratively with each child's IEP team to determine each child's needs, such as how long they needed to receive specialized academic instruction, what type of modifications, if any, needed to be made to their curriculum, and what type of accommodations they needed to access the curriculum.

156. Ms. Hagen met with Ms. Dale, who was going to be Student's Kindergarten teacher, before the start of the 2013-2014 school year to review his accommodations and discuss what he might enjoy in class and supports he might need. They also discussed modifications to Student's curriculum. Ms. Hagen began to prepare materials for Student so that he would have a modified curriculum as soon as he started school.

157. Ms. Hagen focused on having a modified curriculum available for Student throughout his Kindergarten year. She worked extensively with Ms. Dale, with whose curriculum she was very familiar. Typically, Ms. Hagen met with Ms. Dale before class started to talk about the upcoming day's activities and what Student would be working on that day. They were also in constant email communication about Student and his needs.

158. Ms. Hagen also trained Student's aides regarding Student's accommodations and the adaptations they were making to lessons. The modifications consisted of either shortening the lessons or using other materials that were designed for Student's level of understanding. Ms. Hagen often used a program called Unique that had different lessons that had already been modified to Student's educational level, which at the time was much lower than that of a typical Kindergarten student. Ms. Hagen used the Unique curriculum to supplement the modifications she made to the lessons Ms. Dale taught in class. The program provided a series of lessons with lesson plans and materials. The lessons or activities were short in length, which addressed Student's short attention span.

159. Ms. Hagen provided the modified curriculum to Student first in his classroom. When Student's IEP team amended his IEP in October 2013, Ms. Hagen provided the modified curriculum in the Learning Center. She was also in Student's classroom almost daily to support him and assist the aides, sometimes going more than once a day if needed. She gave the lessons to Student's aides or had them download the lessons from the internet. The aides then provided the modified lessons to Student in class, or, if they had removed him because of his behaviors, in the occupational therapy room. The lessons included the use of materials already in Ms. Dale's classroom such as puzzles and other hands-on manipulatives, in addition to the Unique lesson plans. The aides assisted Ms. Hagen with cutting and pasting of lesson plans and activities for Student as well.

160. Student participated with his classmates during art, music, physical education, dance, science, lunch, and recess, unless his aides had removed him to an alternate setting because of his behaviors. Just like his classmates, Student had his own book box and cubby to store his things. Student participated in the activity centers that Ms. Dale had in class through which the children rotated. He also had a journal, although attempting to write in it was challenging for him.

161. Ms. Hagen was in constant communication with Ms. Dale about the classroom lessons. In addition to almost daily verbal consultation, Ms. Dale emailed Ms. Hagen about what the class would be working on so that Ms. Hagen could provide modified lessons for Student. If Student did not finish something in class, Ms. Dale would leave it in a basket so that Ms. Hagen would be able to work on the activity with Student when he was in the Learning Center. However, most of Ms. Dale's curriculum in her developmental Kindergarten class was not based on worksheets or other written materials but rather was based on doing puzzles, games, using manipulatives, engaging in fine motor activities, music, and dance. Because of this teaching model, there were not as many written assignments as would have been expected in a more academically focused Kindergarten class. This made it easier to integrate Student into the classroom activities when the class was not specifically working on academic subjects.

162. The record is replete with the many examples of modified curriculum that either Ms. Hagen or Student's aides used with him.

163. Student's inclusion expert, Ms. Maier, disputed the validity of Student's inclusion program. Ms. Maier explained that a true inclusion program, as supported by all literature addressing the efficacy of inclusion programs, is one where a child is an integral part of the classroom in the same way as the typically developing children. Therefore, the ultimate goal of the program is for instructional staff to use the same curriculum that the class is using and just modify it to the child's developmental level so that the child can be part of the lessons given by the general education teacher.

164. Ms. Maier criticized Ms. Hagen's use of the Rethink and Unique programs since these were different curricula than that Ms. Dale was using with the rest of her class. However, school districts may choose the curriculum methodologies they use with their students as long as the methodology meets a child's needs. There is no evidence that either the Rethink or Unique programs were inappropriate for Student.

165. Ms. Maier also criticized the modified curriculum because she did not believe it was the same curriculum the other students in Ms. Dale's class were learning. She believed that Student was fully capable of accessing the same lessons, in a modified manner, as did his peers. However, Ms. Maier's opinion was based upon her observation of Student almost a year after his parents removed him from Tam Valley and after he had spent over

eight months in a one-on-one independent study program taught by his mother. Student flourished under that teaching model. But it was not in any way similar to the general education Kindergarten class that is the subject of this hearing.

166. Additionally, Ms. Dale's developmental Kindergarten class was not based on academics. Rather, it was more hands on learning, play and developmental based, and therefore was not conducive to written modification of lessons. Ms. Dale would often modify a lesson for Student on the spot. For example, all the children, including Student, kept a journal. Student would often throw his on the floor. Ms. Dale therefore sometimes would get him a separate piece of paper, wrote Student's name on it, and asked him to trace it, so that he was working on something related to journaling. Ms. Dale worked with Ms. Hagen to modify materials for Student. She told Student's aides where the supplies were and where manipulative were that they could use with Student if he showed resistance to the task they were working on. It was apparent that both Ms. Hagen and Ms. Dale were excellent, dedicated teachers who tried their best to work with Student during the year they were his instructors.

167. Student's parents had the perception that Student was excluded from class because his aides often took him to a separate table for some of his instruction. However, Student was working on goals that his peers were not, and the evidence is persuasive that his developmental level needed to be addressed with lessons modified to his understanding. Student's individual needs and IEP's called for the modified curriculum Mill Valley provided.

168. Ms. Maier did not have an opportunity to observe Student's interactions in class and therefore could not persuasively opine on how much Student was or was not integrated into the classroom activities. Her opinions were based on assumptions rather than actual observations of how the class was run.

169. In any case, there are no specific criteria for how much time a special needs child must spend doing the same lessons as his typically developing peers. Here, Mill Valley provided a general education placement and a modified curriculum for Student pursuant to his IEP. The methodologies and inclusive goals advocated by Ms. Maier speak to ideals and how to maximize a child's participation in class with his peers. However, there is no requirement that a school district meet that ideal.

170. For these reasons, Ms. Maier's criticisms of Mill Valley's curriculum for Student were not persuasive. Mill Valley provided Student a placement in a general education classroom, along with a modified curriculum as needed, pursuant to his IEP.

OCCUPATIONAL THERAPY, SPEECH THERAPY NEEDS AND OTHER UNIQUE NEEDS

171. Student's IEP's provided him with 30 minutes a week of direct occupational therapy services, along with consultation by the occupational therapist with Student's aides. Additionally, the occupational therapy room was available to Student on a daily basis for

sensory motor activities. Mill Valley provided Student with sensory items, such as access to a bolster swing, large beanbag pillows for climbing on, play tunnels to climb through, a space board to spin on, and fidgets. His occupational therapist provided activities to improve balance, strength, and coordination. She included other activities to address fine motor skills including the use of Play-Doh, puzzles, tongs to pick up and release things, and the use of manipulatives, as well as drawing. The occupational therapist also provided Student with a slant board to use when writing, thick pencils, and pencil grips. By the time the occupational therapist assessed Student for his triennial assessment in fall 2013, Student's level of involvement in activities was improving.

172. Student contends that his sensory needs were not addressed by Mill Valley. Student did not call Mill Valley's occupational therapist as a witness to question her about her recommendations and the occupational therapy goals she developed and did not offer testimony from any other occupational therapist in support of his contentions. The only evidence Student presented to dispute the suitability of Student's occupational therapy services or goals was through the testimony of Dr. Worcester, who opined that Student's sensory needs were not being met. However, Dr. Worcester is a behaviorist, not an occupational therapist. While she made vague references to the lack of specific sensory goals, she did not give specific recommendations as to how Student's needs should have been met. Nor did Dr. Worcester testify as to how Student failed to progress in the area of occupational therapy because of the lack of specific sensory goals. Dr. Worcester's testimony also ignored the occupational therapy assessment and the references in it to the wealth of sensory activities addressed by occupational therapist during therapy sessions, in Student's classroom, and in the occupational therapy room. For these reasons, Dr. Worcester's testimony regarding any alleged failure to address Student's sensory needs was not persuasive. Student did not provide any credible evidence that Mill Valley failed to meet his occupational therapy needs.

173. Dr. Worcester also criticized Student's speech and language goals and speech and language services. Dr. Worcester has experience using alternative communication with students such as the Picture Exchange Communication System, but she is not a speech pathologist. Student did not call any speech pathologist to testify.

174. The primary focus of Dr. Worcester's testimony regarding Student's speech needs was to criticize Mill Valley's use of the Picture Exchange Communication System with him. However, Dr. Worcester mischaracterized Student's speech goal. First, Student's speech goal did not call for the use of the Picture Exchange Communication System. Rather, the goal called for the use of a communication book to supplement rather than replace Student's verbal communications. Of note, Student's parents funded additional private speech therapy for him and the private speech therapist communicated with Student's speech therapist at Tam Valley regarding the use of communication icons and began using them with Student in her therapy as well. Student's speech goals were directed at increasing his verbal speech, which originally was quite minimal. The goals and supporting speech therapy

services were successful. By the end of Kindergarten, Student's verbal speech had improved. Student became more comfortable using verbal expression, to the point he began refusing to use the communication icons. His instructors stopped using them after that point and focused solely on improving Student's verbal communication.

175. Dr. Worcester's criticism of Student's speech and language goals and services were therefore not persuasive. Student failed to provide credible evidence that his speech goals and services denied him a FAPE.

176. Student also contended that Mill Valley failed to address his needs during the extended school year. However, Student did not elicit any testimony from any witness or present any documentary evidence regarding extended school year programming or services.

Remedies

177. Student presented no evidence at hearing related to the remedies proposed in his request for due process. In his closing brief, Student requests that if he prevails on any issues presented, the ALJ order remedies recommended by Dr. Worcester and Ms. Maier in their respective educational reports.

178. Dr. Worcester's report recommended that Student's school program include the following: support for challenging tasks, motivation and reinforcement; cues prior to transitions; support at unstructured recreation time; clear rules and expectations of behavior; a chair at the back of the room to sit in along with other peers; a clear and predictable schedule; a structured work system; teaching of language that Student could use to access attention or escape; and a visual daily schedule. However, most of these recommendations were already being implemented in Student's classroom while he attended Tam Valley. Dr. Worcester also recommended certain methodologies to use with Student. However, she did not state why her recommendations were required to provide Student with a FAPE. In any case, school districts may select their own methodologies as long as they provide FAPE.

179. Dr. Worcester also recommended specific classroom systems that could be implemented with Student; having him sit in front of the classroom; the use of prompt hierarchies that could be faded; the repetition and paraphrasing of directions to supplement with visual aids; and a litany of classroom accommodations, many of which were already part of Student's IEP's.

180. Dr. Worcester also recommended that Student have a one-on-one aide trained and supervised by a behavior analyst. She recommended that an in-depth functional behavior assessment be performed by a trained behavior analyst who would thereafter develop a behavior plan based upon the assessment. Dr. Worcester further recommended that Student continue to have a trained behavior analyst, as well as an inclusion expert, continue as part of his IEP team. She recommended that Student continue to be placed in a general education classroom and that his IEP team receives training in serving children with Down's syndrome.

181. Dr. Worcester did not assess Student. Many of her recommendations are based on assumptions, or amount to an attempt to micro-manage Mill Valley’s classroom. However, her recommendation that a legally adequate behavior assessment and behavior plan be provided to Student are appropriate given the ultimate findings of this Decision.

182. Neither expert specifically discussed her respective recommendations during her testimony or addressed how the recommendations should be implemented in a public school classroom without interfering with the educational methodologies and classroom management style of whatever teacher to whom Student may be assigned.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*⁸

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)⁹ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

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

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

⁹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 (*Mercer Island*) [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 local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on all issues.

Failure to Timely and/or Appropriately Assess and Provide a Behavior Support Plan (Issues 1(a), 2(c), 2(d), and 2(e))

5. Student raises several contentions regarding assessments. He contends that Mill Valley should have assessed him in the spring of 2013, including a functional behavior assessment, in preparation for his transition to Kindergarten. Student contends that Mill Valley waited too long to conduct a behavior assessment in the fall of 2013, and that Ms. Ertel’s behavior assessment was therefore untimely. Finally, Student contends that the assessment by Ms. Ertel was ultimately flawed, which resulted in a behavior goals and a behavior support plan that failed to meet his behavior needs, therefore denying him a FAPE.

6. Mill Valley responds that it offered to assess Student in the spring of 2013, but Student's parents declined the assessment. It contends that it had no reason to conduct a behavior assessment of Student in the spring of 2013 because Student's behaviors did not indicate that an assessment was necessary and because it needed to assess Student in his new school environment to obtain pertinent data about Student. Mill Valley further contends that it timely assessed Student when it realized that Student's behaviors were interfering with his learning and that of his classmates, and that Ms. Ertel's assessment was proper.

7. A state or local educational agency must conduct a full and individual initial assessment before the initial provision of special education and related services to a child with a disability. (20 U.S.C. § 1414 (a); 34 C.F.R. § 300.301; Ed. Code, § 56320). After a child has been deemed eligible for special education, reassessments must be performed if warranted by the child's educational or related service needs. (20 U.S.C. § 1414 (a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1)). "Once a child has been fully evaluated. . . any subsequent evaluation of that child would constitute a reevaluation." (71 Fed.Reg. 46640 (Aug. 14, 2006).) California law refers to a reevaluation as a "reassessment." (Ed. Code, § 56381.) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

8. A district must conduct a reassessment if it "determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation," or if the student's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a)(1).)

9. A local educational agency must assess a special education student in all areas of suspected disability, including if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social/emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. (20 U.S.C. § 1414(b)(2)(A)). No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e)). Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) The IEP team must consider the assessments in determining the child's educational program. (34 C.F.R. § 300.324(a)(1)(iii)).

10. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) However, not every procedural violation of IDEA results in a substantive denial of FAPE. A procedural violation may constitute a substantive denial of FAPE only if it:

- (a) Impeded the child's right to a free appropriate public education;
- (b) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
- (c) Caused a deprivation of educational benefits.

(20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

TRANSITIONAL ASSESSMENT

11. The evidence in this case supports a finding that Mill Valley attempted to assess Student in the areas of pre-academic achievement, cognitive development and learning ability, social/emotional/behavioral development, and self-help and adaptive skills. Student's parents convincingly testified that they did not receive an assessment plan for these assessments. However, they do acknowledge that they discussed the assessments with Ms. Fass and that they specifically told her that they would not consent to the assessments. Parents were concerned that the assessments would under-identify Student's strengths, would focus on his deficits, and would stereotype Student to an extent that Mill Valley would have reason to oppose placing Student in a general education classroom. Parents made it very clear to Ms. Fass, and later to Mill Valley staff at the May 15, 2013 IEP team meeting, that they would not consent to the assessment.

12. Student argues that Ms. Fass and Mill Valley staff should have given better explanations as to the necessity of the assessments. Mill Valley contends that it was under no obligation to do so and was not, in any case, obligated to assess a student transitioning from preschool to Kindergarten.

13. Mill Valley is correct in this regard. First, there is no requirement that a school district assess a child transitioning from preschool to Kindergarten unless there is a need to determine if he or she is still eligible for special education and related services. (Ed. Code, § 56445, subd. (a).) In this case, there is no dispute that Student remained eligible. Second, a school district is not required to give parents legal advice, or to insist that they do something the parents oppose. Nor is a school district required to use legal methods to force the assessment. If a parent refuses to consent to a reassessment, a school district

may, but is not required, to pursue consent override procedures provided in the Federal Regulations. Furthermore, a school district does not violate its statutory obligations if it declines to pursue the reassessment. (20 U.S.C. §§ 1414(a)(1)(D) and 1414(c); 34 C.F.R. §§ 300.300(c)(ii) and (iii).) In this case, even assuming that the assessments were necessary, which they were not, Mill Valley was not required to pursue the assessments once Student's parents declined to consent to them.

FUNCTIONAL BEHAVIOR ASSESSMENT IN THE SPRING OF 2013

14. Student contends that Mill Valley had sufficient information prior to the time he began Kindergarten that indicated that he was engaging in behaviors that interfered with his learning to warrant a functional behavior assessment as part of his transition to Kindergarten. Student points to the transition report prepared by Student's preschool teacher Mr. Sampson to support this contention.

15. However, although Mr. Sampson's report discussed Student's new behaviors of being more aggressive with his peers, screaming on the bus and in the school bathroom, and throwing things, there was no indication in the report or during the May 15, 2013 transition IEP team meeting that Student's behavior was interfering with his learning or that of his peers. To the contrary, Mr. Sampson believed that the behaviors could be addressed by the supports and accommodations that he recommended, most of which were already included in Student's December 2012 IEP.

16. The fact that Student's behaviors did not appear to be impeding his learning was supported by the class observation of him in his preschool class by Ms. Dale, Ms. Hagen, and Ms. Heise. Student did not engage in any behavior during the observation that indicated that a behavior assessment or a behavior plan was warranted.

17. The fact that Student did not demonstrate any behavior challenges warranting a behavior assessment prior to Kindergarten was also supported by his two successful visits to Ms. Dale's classroom, once in the spring of 2013, and then the day before school began in August 2013. Student participated in the class activities, was easily directed, and showed no difficulty transitioning between the activities. There was nothing in his behavior during his visits to Ms. Dale's class that should have clued Mill Valley to the fact that his behaviors needed to be assessed.

18. Dr. Worcester was the only professional who questioned the lack of early behavior assessment. Even Student's expert Ms. Maier agreed that there was not sufficient reason to have assessed Student before he began school. Dr. Worcester's opinion was not persuasive because the Kindergarten classroom and environment was very different from that of Student's preschool. Student's preschool class had no more than 5 to 10 children with 2 to 3 adults assigned to the classroom. It was a special day class for children who had moderate to severe disabilities, and had related services, such as occupational therapy, embedded in the

program. Student's Kindergarten class was going to be a general education classroom at a new school, with a new teacher, that would contain some 25 children, and entail Student transitioning to different parts of the school for related services and other activities. The Kindergarten classroom had very little in common with Student's preschool classroom. Assessing Student in his preschool environment would not have provided pertinent information as to how he might behave in Kindergarten.

19. Student has therefore failed to meet his burden of persuasion that Mill Valley should have conducted a behavior assessment before he began Kindergarten.

FAILURE TO CONDUCT A FUNCTIONAL BEHAVIOR ASSESSMENT/TIMELINESS OF THE FIRST BEHAVIOR SUPPORT PLAN

20. Student contends that Mill Valley's failure to conduct a functional behavior assessment immediately after Student began Kindergarten, and its failure to immediately develop a behavior support plan, denied him a FAPE by causing him a deprivation of educational benefit because his disruptive behaviors were not identified and addressed, resulting in Student's frequent removal from class. Mill Valley contends that its responses were timely and appropriate.

21. The evidence supports Mill Valley on these issues. Student began demonstrating disruptive behaviors of screaming, throwing things, and grabbing at his peers from the first day he began Kindergarten. Mill Valley staff immediately responded. Ms. Hagen conferred with Student's teacher, with Ms. Heise, and with Ms. Abramson. Ms. Hagen and Ms. Dale, along with Student's aides, attempted various interventions to re-direct Student from the behaviors. Their attempts were not successful. Within days of the start of the 2013-2014 school year, Ms. Heise began having Student's aides take data on his behavior. Based on this data, Ms. Heise developed a behavior support plan within three weeks of the start of school. It would not have been appropriate to develop a behavior plan without data, something that would have happened had Mill Valley proposed a behavior plan right after Student started school, as suggested by Student. Nor was Ms. Heise's decision to develop the behavior support plan without a formal behavior assessment improper given the need to address Student's behavior as rapidly as possible.

22. However, even assuming that Ms. Heise's decision to forego a formal behavior assessment was improper, it did not rise to the level of a procedural violation. When Ms. Heise's behavior support plan failed to decrease Student's behaviors, Mill Valley immediately contracted with a non-public agency to conduct a formal functional behavior assessment and develop another behavior support plan. Mill Valley was doing its utmost to address Student's behaviors. It contracted with Ms. Ertel's agency barely two weeks after Ms. Heise proposed her behavior support plan at the September 20, 2013 IEP team meeting. Ms. Ertel immediately began her assessment process. Mill Valley simultaneously completed its triennial assessment of Student. It thereafter convened an IEP team meeting for Student

in early December 2013, to develop his annual IEP, and to develop a behavior support plan. Therefore, even assuming Ms. Heise should have done a formal behavior assessment before developing Student's first behavior support plan, there was only about a two to three-day delay before Mill Valley contracted with Ms. Ertel's agency. Student has not demonstrated that this short delay denied him a FAPE, deprived him of educational benefit, or impeded the ability of his parents to participate in his IEP process.

APPROPRIATENESS OF THE FUNCTIONAL BEHAVIOR ASSESSMENT AND RESULTING BEHAVIOR SUPPORT PLAN

23. Student contends that the functional behavior assessment conducted by Ms. Ertel was flawed, resulting in a behavior support plan that failed to address Student's behaviors, thereby denying him a FAPE. Mill Valley contends that Ms. Ertel's assessment was proper as was her behavior support plan. It points to the fact that Ms. Ertel's data, taken from October 2013 to June 2014, demonstrates a decrease in Student's behaviors, validating both the assessment and the behavior support plan.

24. On this issue, Dr. Worcester was more persuasive than Mill Valley's witnesses. Dr. Worcester pointed to several flaws in Ms. Ertel's assessment. The assessment was based on two short observations of Student and failed to consider almost 100 pages of behavior data taken by Student's aides prior to Ms. Ertel's hire. Because Ms. Ertel only observed Student two short times and did not analyze the earlier data, she was unable to determine the antecedents of Student's behavior. Rather than doing another assessment to determine why Student was engaging in each of the disruptive behaviors, Ms. Ertel made hypotheses that were not based on data. The lack of antecedents for the behaviors also resulted in the failure to develop appropriate replacement behaviors for Student, particularly for his yelling in the classroom.

25. The end result of the deficits in the assessment and resulting behavior plan was that Ms. Ertel missed the probable underlying reason for Student's behaviors, particularly his yelling. Dr. Worcester, as well as Mill Valley expert witness Dr. Ashton, persuasively concluded that Student yelled in the classroom because he did not want to be there. Ms. Ertel's behavior plan directed that Student be removed from the classroom if his yelling disrupted the learning environment. However, Student's removal was exactly what Student wanted. He was therefore rewarded for his behavior, and not taught a replacement that would strive to keep him in the classroom.

26. A further flaw in the behavior plan was the lack of direction to Student's aides on exactly when to remove him and for how long. The aides were told to take Student to an alternate quiet location if his yelling reached a "five;" yet, there was no definition as to what a "five" meant. Rather, it was left to the aides' discretion what constituted such disruptive behavior that Student should be taken from his classroom to a secluded location where he was taught on a one-to-one basis without other children even being present. This was the

most restrictive environment Student could be in on a public school campus. Compounding this deficit in the behavior plan was the fact that the aides had no guidance as to when Student should be returned to his classroom. Although Mill Valley asserts that the aides were to return Student once he had stopped screaming and completed a lesson, the data Ms. Ertel took during the school year indicates that the aides kept Student in his alternate location for long periods, even after he was no longer engaging in the disruptive behaviors.

27. Dr. Worcester's testimony was persuasive that the objective of the behavior support plan should have been to develop a plan to keep Student in class through the use of appropriate replacement behaviors. Because the behavior support plan failed to do this, Student spent the entire school year being removed to a secluded location, sometimes several times a day.

28. It is unclear from the evidence exactly how much time Student spent outside his general education classroom because no data was taken minute by minute, day by day, of how Student spent each day at school. During the course of the hearing, Student offered varying degrees of how much time he spent out of general education, at one point suggesting that he was out of general education 90 percent of the time. In his closing brief, Student pointed to the fact that just during the few hours a week Ms. Ertel was at Tam Valley observing him, Student was either alone in the occupational therapy room or in the Learning Center when he was supposed to be somewhere else, 30 percent of the time. Mill Valley, on the other hand, asserts that Student spent at least 60 percent of the time in his general education classroom, indicating that he was not removed as often as Student claims.

29. The parties' emphasis on trying to determine the exact amount of time Student was out of class is misplaced. The real issue is whether Student's behaviors were being addressed so that he could remain in class. Student demonstrated that Ms. Ertel's behavior assessment was flawed. This resulted in behavior goals and a behavior support plan that did not address Student's behaviors and did not meet his needs. Student's IEP called for him to receive specialized academic instruction, speech therapy, and occupational therapy outside of general education, for a total of 30 percent of his school day. That time was not intended for Student to be removed to an alternative setting to receive one-on-one instruction from his aides. However, that is in fact what happened during the entire school year. Student would behave in a disruptive behavior, such as growling, yelling, grabbing at children, or throwing objects, and his aide would remove him from class. Student's behavior support plan did not contain any specific instruction when to return Student to class if the aide or his teacher determined he should be removed. No one gave the aides any concrete guidance on how long they were supposed to retain Student in an alternative setting or any guidance on how they were supposed to determine Student's readiness to return to class. Nor did anyone at Mill Valley involved with Student's education, such as his teacher Ms. Dale, his special education teacher Ms. Hagen, or school psychologist Ms. Heise, give any parameters to the aides as to how long and under what conditions they were supposed to retain Student in his alternative setting. Ms. Dale acknowledged that it was the aides and not she who determined when, for how long, and to where Student would be removed from class based on his behaviors.

30. The result was that Student spent a considerable amount of time not in the Learning Center receiving instruction from Ms. Hagen, but in the occupational therapy room by himself, receiving one-on-one instruction from an aide, segregated from both his general education and special needs peers. This violated both the spirit and intent of Student's placement in general education and placed him in an even more restrictive environment than he would have occurred if he had been placed in a special day class. Student's constant removal from general education demonstrated that the behavior support plan did not address his behaviors and therefore did not meet his needs.

31. Even assuming that Ms. Ertel's behavior support plan was adequate at the time it was first developed, it failed to accomplish what should have been the objective of Student remaining in his classroom. In accord with Dr. Worcester, Mill Valley expert Dr. Ashton agreed that the ultimate goal should have been to make Ms. Dale's classroom a place where Student wanted to be, not to remove him from it. Additionally, Dr. Ashton acknowledged that Ms. Ertel's behavior plan ultimately was not successful and should have been revised by at least February of 2014. The plan was never revised.

32. Mill Valley points to the fact that Student's behaviors decreased throughout the school year. It is correct that his behaviors decreased between October 2013 and March 2014. However, that fact does not take into account the whole picture of what was happening with Student throughout the school year. Although his behaviors initially decreased, between March 2014 and June 2014, the behaviors began resurging, another indication that the behavior plan was not effective. Additionally, Student continued to be removed from class at a fairly steady rate throughout the school year, which defeated the purpose of Student's placement in general education, and the behavior support plan.

33. Once Mill Valley realized that Student's disruptive behaviors were interfering with his ability to remain in the general education classroom, which his IEP team had determined was his least restrictive environment, it had two choices. The first was to determine what supports and services would have enabled Student to remain in general education. Alternatively, Mill Valley could have re-evaluated Student's needs to determine if a general education placement was, in fact, the least restrictive environment. Unfortunately, Mill Valley took neither course of action. It failed to re-evaluate Student's behavioral needs and amend his behavior support plan in an effort to determine what Student needed to stay in class, and it did not propose another placement. As a result, Student continued to be removed from class to a separate location, because his behaviors were never extinguished nor were replacement behaviors developed. Mill Valley never determined the underlying reasons Student was screaming in class, and never developed a plan that would keep him in the classroom and learn to get along with his peers.

34. For these reasons, Student met his burden of persuasion that Mill Valley's inadequate functional behavior assessment resulted in inappropriate behavior goals and a flawed behavior plan that failed to meet Student's needs. The lack of appropriate goals and

behavior support plan denied Student a FAPE because he was prevented from accessing his education in his general education classroom its resulting behavior support plan, which resulted in a denial of FAPE.

Adequacy of Student's IEP's (Issues 1(c), 2(a), 2(c), and 2(g))

35. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Rowley, supra*, 458 U.S. at p. 207; see also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006) 455 F.Supp.2d 1286, 1307-1309; *aff'd on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232; *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314; 20 U. S.C. § 1401(9).) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) The IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.)

36. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist, No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School Dist.* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

37. A school district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time. A district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted." (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

FAILURE TO PLACE STUDENT IN A TRANSITIONAL KINDERGARTEN CLASS

38. Student contends that Mill Valley should have placed him in a transitional Kindergarten class, normally intended for children who would not yet be five years old at the beginning of a school year, based upon Student's lower cognitive levels and his behavior challenges. Mill Valley contends that it appropriately placed Student in Ms. Dale's developmental Kindergarten class.

39. At Student's May 15, 2013 IEP team meeting, Student's parents requested the placement in transitional Kindergarten. Mill Valley declined the request because Student turned five in January 2013, indicating that he did not meet the age-based criteria for the placement.

40. However, Student has failed to meet his burden of proof that he was denied a FAPE by the failure to offer placement in a transitional Kindergarten class. First, Student failed to provide any persuasive evidence that placement in a developmental Kindergarten class denied him a FAPE. The only evidence regarding transitional Kindergarten was that the children were younger than Student, and that the class at Mill Valley was impacted, resulting in a larger class size than Ms. Dale's developmental classroom. Given Student's challenges in Ms. Dale's smaller class, the evidence supports a finding that the larger class size of the transitional Kindergarten would not have been appropriate for him. Additionally, there was no evidence that the transitional class would have provided educational opportunities or benefits unavailable to Student in the developmental classroom. To the contrary, the evidence adduced at hearing indicated that Mill Valley had thoughtfully considered Student's placement and determined that the developmental classroom would address his needs and permit him greater opportunity to access the curriculum because the class did not emphasize pencil and paper learning. Rather, the developmental model revolved around hands-on and play-based learning, with the use of manipulatives and objects, rather than the use of worksheets, to teach the core curriculum, as did the more academically focused Kindergarten classes. Student provided no evidence the developmental model was inappropriate for him. Second, even had Student been able to demonstrate that the transitional Kindergarten would have given him greater educational benefit, that fact alone would not meet the criteria for a denial of FAPE. A school district is not required to maximize a student's potential. (*Rowley, supra*, 458 U.S. at p. 200.)

INADEQUATE GOALS

41. Student alleged the goals contained in his December 2012 IEP, May 15, 2013 IEP as amended, and December 5, 2013 IEP, did not include adequate baselines, were not measurable, and failed to address all areas of need, specifically including academics, cognitive skills, language and communication, orientation and mobility, self-help, social/emotional functioning, and behavior. Mill Valley contends that the goals it developed met all statutory requirements and adequately addressed Student's needs.

42. An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance; a statement of measurable academic and functional goals; a description of the manner in which goals will be measured; a statement of the special education and related services that are to be provided to the student and the date they are to begin; the anticipated frequency, location and duration of services and modifications; an explanation of the extent to which the child will participate with

nondisabled children in a regular class or other activities; and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

43. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

44. The purpose of measurable goals and objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial evaluation or most recent evaluation of the child; and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.) There is no requirement that an IEP include baselines for the goals, other than addressing a student's present level of performance. (*Student v. San Diego Unified School District* (2011) Cal.Offc.Admin.Hrngs Case No. 2011080459, at pp. 10-11.)

45. The weight of the evidence does not support Student's contention that his goals were inadequate in any area other than in behavior. In each of Student's IEP's, Mill Valley reviewed his present levels of performance and determined whether Student had met his prior goals. If Student had not met the goal, Mill Valley reviewed Student's progress and in-class performance to determine why the goal had not been met. Mill Valley then either revised the goal or developed new goals to address the area in which Student was not progressing. The goals were based on Student's present levels of performance, the objectives of the goals were clearly defined, and the goals were measurable. The IEP documents indicated how the goals would be evaluated, and indicated who would be responsible for implementing the goals. The goals met every area of Student's known needs in academics, speech and language, occupational therapy, self-help, and independence.

46. Dr. Worcester's opinion that Student required a specific goal to address his sensory needs was not persuasive. First, Dr. Worcester is a behaviorist, not an occupational therapist. While her profession and experience have provided her with opportunities to work

with occupational therapists in addressing the occupational therapy needs of her students, that experience alone does not make her an expert in the field. Student provided no testimony from an occupational therapist addressing Student's occupational therapy needs or that contradicted Mill Valley's position that it met his needs in that area. Second, Mill Valley persuasively demonstrated that Student's occupational therapy needs were being met through his weekly therapy sessions, and through the sensory activities and devices provided to Student in therapy and throughout his school day. Student offered no persuasive evidence that Mill Valley failed to address his occupational therapy needs.

47. Student likewise failed to establish that his speech and language goals were inadequate. Dr. Worcester also offered criticism regarding Student's speech and language goals, although she is not a speech and language pathologist. She was particularly critical of Student's goal for using a communication book. She opined that Mill Valley was not properly adhering to a Picture Exchange Communication System program and that, in any case, Student did not require the program. However, Dr. Worcester failed to recognize that Student's goal did not contemplate the use of the Picture Exchange Communication System. Rather, it focused on the use of a communication book developed by Ms. Hagen and Ms. Novotny, Mill Valley's speech and language pathologist. The goal acknowledged that Student's primary method of communication was verbalization and that the communication book was meant to supplement rather than replace verbal communication. When Student improved in his verbal communication skills and no longer wanted to use the communication book, Mill Valley ceased using it. Additionally, Student's private speech and language therapist endorsed the use of the communication book. Student therefore failed to meet his burden of proof that his speech and language goals were inadequate and denied him a FAPE.

48. Nor did the weight of the evidence demonstrate that Student's academic goals failed to address his needs. Each IEP at issue contained goals to address Student's pre-academic skills in the areas of language arts and math. The goals focused on teaching Student to identify letters and sounds, to identify numbers, and to be able to count. Each goal met a specific need of Student's. Each goal was modified based upon Student's progress or lack of progress at the time of his IEP's. The only basis for Student's argument that the goals were improper is based upon the fact that he did not meet all of them. However, where Student failed to meet his goals, Mill Valley evaluated the cause and revised the goal or developed new ones to meet Student's needs. Student failed to meet his burden of proof that Mill Valley failed to develop adequate academic goals at any time at issue in this case.

49. Student failed to offer any evidence that his goals in the areas of cognitive skills, orientation and mobility, or self-help were inadequate. He therefore failed to meet his burden of proof as to those areas of need.

50. However, the evidence supports Student's position that the three behavior goals based upon his behavior support plan were inappropriate to meet his needs. In this regard, Dr. Worcester's testimony as a doctorate-level behaviorist was persuasive that the

defects in the behavior assessment and behavior plan resulted in the development of inadequate behavior goals. For the yelling behavior, the goal ultimately had Student removed from class if he became disruptive. Yet, removing Student from class did not teach him any replacement behaviors for the yelling. It also did not accomplish the goal of finding a way to retain Student in the classroom. The goal therefore did not address the underlying basis for Student's yelling and did nothing to help him extinguish the behavior.

51. Dr. Worcester was also persuasive that the goals for aggression and throwing suffered from the same weakness as the yelling goal because there were no concrete replacement behaviors offered. Student continued to engage in these behaviors until he left Mill Valley near the end of the school year. The fact that Student's aggression and throwing resurged between March and June 2014 is evidence that the behavior plan and goals did not address the reasons Student engaged in the behaviors and did not offer appropriate replacement behaviors that would address extinguishing these behaviors. Because no antecedents had been determined, no appropriate replacement behaviors were developed, and Student continued to engage in these behaviors. Student therefore has met his burden of proof that the three behavior goals developed in his behavior support plan failed to meet his behavior needs and therefore denied him a FAPE.

FAILURE TO PROVIDE APPROPRIATE RELATED SERVICES

52. In California, related services are also called designated instructional services and the terms are used interchangeably. (Ed. Code, § 56363.) Related services include speech and language services, occupational therapy services, and other services as may be required to assist a child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527.) Related services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

BEHAVIOR

53. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies and supports, including positive behavioral interventions, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) However, neither Congress, the U.S. Department of Education, nor any statute or regulation has created substantive requirements for a behavior plan as contemplated by the IDEA. (*Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221* (7th Cir. 2004) 375 F.3d 603, 615.) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but the implementing regulations of the IDEA do not require the team to use any particular method strategy or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).)

54. In California, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (Ed. Code, § 56341.1, subd. (b)(1).) During the 2013-2014 school year, a behavior intervention was “the systematic implementation of procedures that result in lasting positive changes in the individual’s behavior.” (Cal. Code Regs., tit. 5, § 3001, subd. (d), repealed July 1, 2014.) It includes the design, evaluation, implementation, and modification of the student’s individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student’s behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*)

55. Here, Student has met his burden of proof that Mill Valley, despite its good intentions, did not offer him behavior supports to meet his needs, because it failed to provide adequate interventions that produced a significant improvement in Student’s behavior, as well as adequate goals to address and modify the behaviors.

56. Student’s IEP stated that he would receive 12 hours a month of behavior intervention services. However, the services Ms. Ertel provided did not adequately direct behavior intervention. After completing her functional behavior assessment and her proposed behavior support plan, Ms. Ertel only took observation data of Student. She did not believe that she was contracted to intervene in Student’s program in any way. She therefore never interceded when Student’s teacher or aides made the decision to remove him from class. She did not inform them if the decision was incorrect or not anticipated by the behavior support plan. Further, once Student was removed to an alternate setting, Ms. Ertel did not intercede to inform Student’s aides that Student’s behavior had calmed to a point where the aides should return him to class. Nor did she give the aides guidance during her observations as to whether they were properly addressing the points of the behavior support plan. The behavior support plan was very vague as to exactly when Student was supposed to be removed from class and for how long Student was to remain in an alternate location. Neither Ms. Goy nor Ms. Garcia had a clear idea of how long to maintain Student in the alternate location. For example, on March 12, 2014, Student spent the entire time he was supposed to be in the Learning Center in the occupational therapy room, although Ms. Ertel’s observation notes state Student’s yelling and aggression had decreased. On March 13, 2014, Student spent 40 minutes in the occupational therapy room during Ms. Ertel’s short observation time. On April 2, 2014, he again spent the entire time he was supposed to be in the Learning Center in the occupational therapy room.

57. Ms. Goy and Ms. Garcia were not trained behavioral aides and did not receive specific instructions on the circumstances of Student’s removals from class. Therefore, rather than returning Student to class once his screaming or yelling had stopped, Ms. Goy and Ms. Garcia often retained Student in the occupational therapy room, giving him academic instruction and having him access the sensory equipment in the room. Student therefore remained in the occupational therapy room for extended periods when he could have, and should have, been returned to class.

58. It is clear from the records that do exist, as well as the testimony of both Ms. Goy and Ms. Garcia, that Student spent an inordinate amount of time outside of his general education classroom due to his behaviors, particularly his yelling, which interfered with Ms. Dale's ability to teach, his classmates' ability to learn, and Student's own ability to access his education. Mill Valley acknowledged that Student was out of class for more time than he was supposed to be according to his IEP. At the December 5, 2013 IEP team meeting, Mill Valley stated that the overall goal was to get Student back in the classroom for longer periods. Unfortunately, that did not happen to any significant degree, particularly since Ms. Ertel did not take any affirmative actions to provide behavior interventions at the moment Student's behaviors were occurring.

59. As stated above, the functional behavior assessment was flawed, resulting in behavior goals and a behavior support plan that did not address Student's behavior needs. These flaws, coupled with Ms. Ertel's failure to provide any behavior intervention beyond training Student's aides, resulted in a failure to significantly reduce Student's behaviors enough to keep him in the classroom. This resulted in a denial of FAPE to Student for the 2013-2014 school year in the area of behavior.

SPEECH AND LANGUAGE AND OCCUPATIONAL THERAPY

60. Similar to his arguments that his speech and language and occupational therapy goals were inadequate, Student contends that Mill Valley failed to provide him with appropriate speech and language and occupational therapy services. However, the only evidence Student offered to support these two contentions was through the testimony of Dr. Worcester, who is not an expert in either field. Her testimony therefore was not persuasive as to either related service.

61. With regard to Student's speech and language services, Dr. Worcester's chief criticism was with regard to the use of a communication book with picture icons as a supplementary mode of communication. As stated above, Mill Valley did not intend to substitute the communication book for Student's verbal communication. When Student's verbal communication improved and he no longer wanted to use the picture icons, Mill Valley discontinued their use, responding appropriately to Student's needs. The only evidence from anyone qualified to critique Student's communication methods and services came from email communications between Student's private speech and language provider and Ms. Novotny, Student's speech and language pathologist at Tam Valley. In their communications, both providers agreed that the communication book was appropriate to use with Student at the time.

62. As to occupational therapy, the documentary evidence indicated that Mill Valley appropriately assessed Student's occupational needs. The evidence indicates that Mill Valley knew that Student had sensory needs, and that those needs were acknowledged and addressed through the 30 minutes per week of occupational therapy sessions and through

Student's access to sensory equipment in his classroom and in the occupational therapy room. Further, Student failed to offer any evidence on what educational benefit he has lost by Mill Valley's failure to offer him a higher level of occupational therapy services to address his sensory needs.

63. Finally, Student provided no testimony from a speech and language pathologist or from an occupational therapist in support of his assertion that his needs in those areas were not being met. He has therefore failed to meet his burden of proof that Mill Valley failed to address his speech and language or occupational therapy needs.

ONE-ON-ONE INSTRUCTION

64. Student contends that Mill Valley failed to provide aides that were adequately trained to address his needs. However, except to the extent that Student's aides were not trained to provide the behavior intervention services detailed in Student's IEP, the weight of the evidence supports Mill Valley's contention that its aides provided Student with a FAPE. All three aides received training by Ms. Hagen, Ms. Heise, and later by Ms. Ertel. The aides were trained to prompt Student, to redirect him, and to provide him with a modified curriculum that was either developed by Ms. Hagen or was part of the Rethink and Unique methodologies. The aides met weekly with Ms. Hagen to review Student's program and any issues that had arisen during the previous week. The aides provided Student with the one-on-one instructional support contemplated by his IEP. Student has failed to meet his burden of proof as to this issue.

EXTENDED SCHOOL YEAR

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

66. Student's due process request asserted that Mill Valley failed to address his needs during the extended school year. However, Student failed to address this issue at all at hearing. The only evidence presented indicated that Mill Valley offered Student placement in an extended school year program. Student put on no evidence that the offered program would have denied him a FAPE. Student therefore failed to meet his burden of persuasion as to this issue.

FAILURE TO PROVIDE APPROPRIATE ACCOMMODATIONS AND MODIFICATIONS TO ADDRESS STUDENT'S SENSORY, BEHAVIORAL, AND ACADEMIC NEEDS

67. Student contends that Mill Valley failed to provide appropriate accommodations and modifications to address his sensory, behavioral, and academic needs. Although not argued as such, Student's arguments appear to be based on the fact that many recommendations made by Dr. Worcester or Ms. Maier in their education reports were not being implemented at Mill Valley. However, Student failed to present any persuasive evidence that his academic or sensory needs were not met through the IEP's developed first by the staff at his preschool and later by Mill Valley. Each of his IEP's was based upon his present levels of performance, contained appropriate goals, offered modification to the curriculum so that he could access it, provided supportive accommodations and a one-on-one aide, and provided instruction by a knowledgeable, experienced, dedicated, and caring staff. Student has therefore failed to meet his burden of proof that his program lacked appropriate sensory and academic modifications and accommodations.

68. Nevertheless, as detailed above, Student has met his burden of proof that Mill Valley did not meet his behavioral needs.

Failure to Implement Student's IEP's / Least Restrictive Environment (Issues 2(b) and 2(f))

69. Student contends that Mill Valley failed to implement his IEP. Student focuses primarily on three aspects of his IEP's. He contends that Mill Valley failed to provide him with an inclusive education in the least restrictive environment because he was often provided a modified curriculum at a table set apart from his classmates. Student also contends that his removal from the classroom amounted to a change in placement and, by extension, a failure to provide him with a general education placement. Finally, Student contends that Mill Valley failed to implement his behavior support plan.

70. When a student alleges the denial of a FAPE based on the failure to implement an IEP, to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*)). The materiality standard of *Van Duyn* does not require that the child have suffered "demonstrable educational harm" to prevail, although a child's progress or lack of progress may be probative on the issue of whether the failure to implement was material. (*Ibid.*) The court cautioned that nothing in its decision was intended to weaken a school's obligation to provide services in accordance with an IEP. (*Ibid.*) However, the court also stated that "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 denials of a free appropriate public education." (*Id.* at p. 821.)

71. Federal and State law require school districts to offer a program in the least restrictive environment for each special education student. (See 34 C.F.R. §§ 300.114, et. seq.) A special education student must be educated with non-disabled peers “[t]o the maximum extent appropriate,” and may be removed from the regular education environment only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii).) A placement must foster maximum interaction between disabled students and their non-disabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031.) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045; see also § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) However, if it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.)

72. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the “least restrictive environment” for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting.” (*Rowley, supra*, 458 US at 197.)

73. Student’s contention, supported by the testimony of inclusion expert Ms. Maier, is that inclusive education under the above standards means that even if child requires a modified curriculum, the curriculum will always be provided alongside the typically developing children in the class. Therefore, it would not be appropriate for a student included in a general education classroom to receive instruction on a modified curriculum at a table apart from his peers.

74. There are several flaws in Student’s analysis. First, neither federal nor state statutes define the scope of inclusive education or what percentage of a curriculum is appropriately provided separately from the typical peers in a classroom. Given the individual nature of special education, it goes without saying that a determination as to how much separate instruction a given child requires must be based on an analysis of that child’s specific needs. While full inclusion in the entire curriculum may be an ideal for which to aspire, it is neither mandated nor workable in every situation.

75. Ms. Maier opined that Student was capable of fully accessing a modified curriculum alongside his Kindergarten peers. However, her opinion was based on a faulty premise because she never had an opportunity to observe Student in his Kindergarten class. Her opinion was based on her review of Student's progress while he was in an independent home study program taught by his mother, a program in no way similar to Ms. Dale's Kindergarten classroom. Her opinion as to Student's capabilities therefore was not persuasive.

76. Additionally, the *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at pp. 207-208.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeals noted, the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*Ibid.*) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley, supra*, 458 U.S. at p. 207-208).)

77. The reauthorized IDEA does not mandate that a district use a particular methodology. For example, courts have consistently rejected the proposition that an Applied Behavior Analysis-only program is the only effective method of instruction for autistic students. (*Deal v. Hamilton County Dept. of Educ.* (E.D.Tenn., April 3, 2006, No. 1:01-cv-295) 2006 WL 5667836, pp. 16-19, [which provides a comprehensive summary of decisions discussing the matter].) Rather, courts have determined that the most important issue is whether the proposed instructional method meets the student's needs and whether the student may make adequate educational progress. (*Id.* at pp. 65-68.)

78. The Ninth Circuit, in *Mercer Island, supra*, 592 F.3d at p. 952, reiterated its position that a district is not necessarily required to disclose its methodologies. The Court found that it is not necessary for a school district to specify a methodology for each student with an IEP if specificity is not necessary to enable the student to receive an appropriate education. In finding that the district had not committed a procedural violation of the Act by failing to specify the teaching methodologies it intended to use, the court stated, "We accord deference to the District's determination and the ALJ's finding that K.L's teachers needed flexibility in teaching methodologies because there was not a single methodology that would always be effective." (*Ibid.*)

79. In the instant case, Student’s teachers made a determination that his educational needs were served by the use of the Rethink and Unique programs to modify his curriculum, and by having Student sometimes receive instruction separately from his class. Ms. Maier’s suggested approach may have maximized Student’s inclusion with his classmates, but that is not a standard required under the IDEA.

80. The weight of the evidence indicates Student was provided a general education placement according to his IEP. He was removed from the classroom when he was disruptive pursuant to his behavior support plan, which was part of his IEP. Student’s behavior support plan did not define or determine for how long he could be removed. Therefore, his removals were in accord with the plan and did not constitute a failure to implement it. Student has not met his burden of proof that Mill Valley materially failed to implement any aspect of his IEP.

Additional Procedural Violations (Issues 1(b), 3, and 4)

FAILING TO CONSIDER INPUT FROM STUDENT’S PARENTS BEFORE PLACING HIM IN A KINDERGARTEN CLASS

81. Special education law places a premium on parental participation in the IEP process. School districts must guarantee that parents have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(1).) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Parental participation in the IEP process is also considered “(A)mong the most important procedural safeguards.” (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.)

82. An educational agency must therefore permit a child’s parents “meaningful participation” in the IEP process. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131-1132 (*Vashon Island*).) The standard for “meaningful participation” is an adequate opportunity to participate in the development of the IEP. Although a student’s parents have a right to meaningful participation in the development of an IEP, a district “has no obligation to grant [a parent] a veto power over any individual IEP provision.” (*Ibid.*) As the Ninth Circuit explained:

In discussing parents’ participatory role in developing IEPs for their children, the [Supreme] Court observed that Congress, “apparently recognizing that [a] cooperative approach would not always produce a consensus between the school officials and the parents, and that in any dispute the school officials would have a natural advantage, ... incorporated an elaborate set of what it labeled ‘procedural safeguards’ to insure the full participation of the parents and proper resolution of substantive disagreements.” We construe the Court’s language as a recognition that, although the formulation of an IEP is ideally to

be achieved by consensus among the interested parties at a properly conducted IEP meeting, sometimes such agreement will not be possible. If the parties reach a consensus, of course, the [IDEA] is satisfied and the IEP goes into effect. If not, the agency has the duty to formulate the plan to the best of its ability in accordance with information developed at [prior] meetings, but must afford the parents a due process hearing in regard to that plan.

(*Id.* at 1131-32 (quoting *Doe by Gonzales* (9th Cir. 1986) 793 F.2d 1470, 1490, *aff'd sub nom. Honig v. Doe* (1988) 484 U.S. 305, [108 S.Ct. 592, 98 L.Ed.2d 686].)

83. Merely because the IEP team does not adopt the placement, services, or goals advanced by parents, does not mean that the parents have not had an adequate opportunity to participate in the IEP process. (*B.B. v. Hawaii Dept. of Educ.* (D.Hawaii 2006) 483 F.Supp.2d 1042, 1051.)

84. Here, Student argues that Mill Valley did not consider the opinion of his parents when placing him in Kindergarten. However, the evidence does not support this contention. Student's parents participated in his IEP team meetings. They commented on all aspects of Student's IEP's. Their proposals were discussed among Student's entire IEP team. At times the proposals were adopted. At times they were declined. Parents suggested placing Student in a transitional Kindergarten class. Mill Valley staff considered the proposal but rejected it because Student did not qualify for the placement due to his age. Additionally, Mill Valley believed that a developmental Kindergarten would offer Student an equal, if not better, opportunity to make meaningful progress. The fact that Mill Valley did not adopt the proposal by Student's parents is not evidence that it did not consider it.

85. Additionally, Student's parents requested that Student be placed in a general education classroom, although Mill Valley had reservations, as expressed by Student's preschool teacher. Mill Valley ultimately agreed to the proposal based upon the strong position taken by Student's parents who put a heavy emphasis on the social benefits Student would obtain from a general education placement. Mill Valley's agreement to the request by Student's parents for a general education placement wholly contradicts Student's contention that Mill Valley failed to consider the input of his parents regarding his Kindergarten placement. Student has failed to meet his burden of proof on this issue.

MISREPRESENTING OR OMITTING FACTS ABOUT STUDENT'S EDUCATION TO HIS PARENTS

86. Student contends that Mill Valley misrepresented or omitted facts concerning Student's placement. Basically, Student contends that his parents were not informed of his programming, where he was each school day, and the amount of time Student was spending outside of his classroom.

87. The evidence fails to support Student's contentions. Ms. Hagen was in constant communication with Student's parents concerning his programming and behaviors. Student's parents were present and participated in the numerous IEP team meeting convened during all times covered by this case. They were informed of exactly what constituted Student's IEP's, including all his goals and his behavior support plan. They were aware that the behavior support plan contained provisions for Student to be removed from the class based on his behavior and that he was, in fact, removed.

88. Part of the concern Student's parents expressed, and what may be the underlying motivation for this issue, was the fact that they sometimes did not know exactly where Student was at school and had to go look for him. However, Student was never without adult supervision and was always in a location where an adult had taken him either so that he could access one of his related services, or because his behavior had resulted in his removal from class. Student's IEP did not require that he be at a particular place during every moment of his day. Mill Valley was within its rights to manage its classrooms and the movement of its students without having to get permission or agreement from the students' parents. Student has therefore failed to meet his burden of proof as to this issue.

FAILING TO GIVE PRIOR WRITTEN NOTICE AFTER PARENTS REMOVED STUDENT FROM MILL VALLEY

89. The IDEA requires an educational agency to provide "prior written notice" whenever the agency proposes or refuses to initiate or change "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education." (20 U.S.C. § 1415(b)(3); see also 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must contain: (1) a description of the action proposed or refused by the agency, (2) an explanation for the action, and (3) a description of the assessment procedure or report which is the basis of the action. (34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (b).)

90. The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopin School Dist.* (3d Cir. 2010) 606 F.3d 59, 70.) When a violation of such procedures does not actually impair parental knowledge of or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

91. Student contends Mill Valley was required to provide his parents with legal prior written notice after they notified Mill Valley that they were removing Student from school and placing him in a public charter school independent home study program.

92. Student's arguments on this issue border on the frivolous. Mill Valley did not propose any changes to Student's "identification, evaluation, or educational placement" or the "provision of a free appropriate public education" to him. Mill Valley did not refuse to initiate or change any of those aspects of his special education program, either. Mill Valley

did not refuse a request from Student's parents for a different program, or for any type of evaluation for Student. Mill Valley did not do anything that should have triggered its obligation to send prior written notice to Student's parents. Rather, it was Student's parents who initiated the change by removing Student from school. A change by a student's parent does not trigger a school district's obligation to send any type of notice to the parent who initiated the change. Student provided no viable legal support for this contention and therefore has failed to meet his burden of proof as to it.

Remedy for Mill Valley's Failure to Provide Student with an Adequate Behavior Support Plan, Adequate Behavior Goals, and Adequate Behavior Services

93. School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir.1994) 31 F.3d 1489, 1496. (*Puyallup*) 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 p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*) The court is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*Burlington, supra*, 471 U.S. at p. 369.) The authority to order such relief extends to hearing officers. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, [129 S.Ct. 2484, 2494, fn. 11, 174 L.Ed.2d 168].)

94. Here, Student has demonstrated that Mill Valley's functional behavior assessment was inadequate, which resulted in inadequate behavior goals and an inadequate behavior support plan that did not meet Student's needs. Student has also demonstrated that Mill Valley denied him a FAPE by failing to provide him with appropriate behavior intervention services.

95. Student did not provide any evidence at hearing in support of potential remedies and did not present any argument concerning remedies in his brief. Rather, he asks that Mill Valley be ordered to implement the recommendations made by Ms. Maier and Dr. Worcester in their respective educational reports. However, as discussed above, many of those recommendations are overbroad. Further, given the narrow scope of the issues on which Student has prevailed, the recommendations would be overreaching to address the narrow finding that Mill Valley's behavioral interventions did not provide Student with a FAPE.

96. Therefore, considering the equities in this case, and considering Dr. Worcester's recommendations in light of the issues on which Student has prevailed, the ALJ finds it reasonable to order Mill Valley to provide Student with an independent functional behavior assessment, to be conducted by a doctorate level Board Certified

Behavioral Analyst from an outside agency, from an agency other than Gateway and with a behaviorist who has not previously worked with Student. Additionally, Mill Valley shall be ordered to fund the development of a behavior support plan by the same Board Certified Behavioral Analyst should that assessor deem one necessary. Finally, Mill Valley shall be ordered to fund 12 hours a month of behavior intervention services by either a doctorate level or master's level Board Certified Behavioral Analyst, through a non-public agency other than Gateway, for a minimum of one school year, to remedy Student's loss of educational benefit due to the inadequate behavior goals, behavior support plan, and behavior services.

97. Since Student failed to prevail on any other issue he raised at this hearing, the many other requests he made for remedies are not warranted.

ORDER

1. Within 10 business days of Student re-enrolling in Mill Valley and beginning to attend classes, whichever is later, Mill Valley shall contract with a doctorate-level Board Certified Behavior Analyst from a non-public agency of its choice, other than Gateway or other individual who has previously worked with Student, to conduct a functional behavior assessment of Student. Mill Valley will ensure that the assessment is completed within 60 calendar days of the date it executes the contract with the non-public agency. Mill Valley shall also fund the cost for up to two hours of the assessor's time to attend the IEP team meeting convened to discuss the assessment

2. If the Board Certified Behavior Analyst recommends the development of a behavior support plan for Student, Mill Valley will fund the cost of developing the plan, including the cost for the behavior analyst to attend up to two hours of any IEP meeting for Student convened to discuss the proposed behavior support plan.

3. Mill Valley shall fund 12 hours a week of behavior intervention services by a master's level or doctorate level Board Certified Behavior Analyst from a non-public agency of its choice, as long as the agency and selected assessor have not yet worked with Student. Mill Valley will fund up to 36 weeks of behavior intervention services as compensatory education for Student.

4. Student's remaining requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student partially prevailed on Issues 2(a), 2(c), and 2(g). Mill Valley prevailed on all other issues.

