

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SPENCER VALLEY ELEMENTARY
SCHOOL DISTRICT.

OAH Case No. 2014120575

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on December 5, 2014, naming the Spencer Valley Elementary School District.

Administrative Law Judge Darrell Lepkowsky heard this matter in San Diego, California on February 2, 3, 4, 5, 6, and 10, 2015.

Amy Langerman,¹ Student's designated representative, and Attorney Tania Whiteleather appeared on behalf of Student. Paralegal Joseph Langerman was also present for the entire hearing. Student's mother was present for all hearing days. Student's father was present for several of the hearing days. Student did not attend the hearing.

Attorney Diane Willis represented Spencer Valley. Attorney Karin Anderson was present for the first day of hearing. Julie Weaver, Spencer Valley's Superintendent and the Principal of Spencer Valley Elementary School, was present throughout the hearing on behalf of Spencer Valley.

A continuance was granted for the parties to file written closing arguments and the record remained open until February 27, 2015. Upon receipt of written closing arguments on February 27, 2015, the record was closed and the matter was submitted for decision.

¹ Ms. Langerman is licensed to practice law in Arizona, but is not licensed in California.

ISSUES²

1. Between August 18, 2014, and September 25, 2014, did Spencer Valley deny Student a free appropriate public education by failing to address his behavioral needs through appropriate services, supplementary aids, and supports?

2. As of September 25, 2014, did Student require a behavioral management program that included relationship development intervention (RDI) provided by a highly trained and certified behavioral consultant and an instructional assistant supervised by the consultant, both trained in RDI, for Student to receive a FAPE in the least restrictive environment?

3. Did Spencer Valley deny Student's parents the right to participate in Student's individualized educational program process at the September 25, 2014 IEP team meeting by failing to engage in an interactive and collaborative discussion about Student's then-current behavioral issues and by refusing to respond at the meeting to Student's requests for changes to Student's behavior program?

4. Did Spencer Valley deny Student a FAPE by failing to offer a placement and related services that would implement his stay put extended school year program during the summer of 2014?

SUMMARY OF DECISION

The parties to this matter agree that Student has significant behavior challenges that need to be addressed through behavior supports and a behavior plan supervised by a professional trained in behavior intervention. They disagree as to whether Student's behavior deteriorated between January and September 2014, and whether Spencer Valley failed to properly address Student's behavior during that time. They also disagree regarding the behavior intervention methodology that should be used to address Student's behavior.

Although school districts generally get to make decisions regarding the methodologies they will use with their students, this Decision finds that Student has met his burden of persuasion that Spencer Valley did not address his escalating behaviors between January and September 2014. This Decision finds that that Student's behaviors were significantly interfering with his ability to access his education, and that the methodologies used by Spencer Valley, including some use of Applied Behavior Analysis (ABA), failed, and continued to fail to be successful in addressing Student's maladaptive behaviors.

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Student also met his burden of proof, by a preponderance of the evidence, that Spencer Valley denied him a FAPE by not providing him with an RDI behavior intervention program because Student required RDI interventions in order to allow him to gain educational benefit in the least restrictive environment.

However, Student has failed to meet his burden of proof that Spencer Valley committed any procedural violations by failing to respond to his parents' request for an RDI program at his September 25, 2014 IEP team meeting, or by failing to materially implement his extended school year program in summer 2014.

FACTUAL FINDINGS

Background Information

1. Student is a 12-year-old boy who lives with his family within Spencer Valley's boundaries. He was and remains eligible for special education and related services due to an intellectual disability resulting from Down's syndrome. Student was in the mild range of intellectual disabilities. He was in fifth grade during the 2014-2015 school year.

2. Spencer Valley consisted solely of one elementary school with two classrooms serving approximately 40 students in kindergarten through eighth grade. Student began attending school there in April 2013. Student's parents removed him from Spencer Valley on September 26, 2014, to a private placement. Student remained at the private placement at the time of this hearing.

STUDENT'S PRIOR DUE PROCESS HEARINGS

3. Student has a history of behavior problems which were addressed at home and at Julian Charter School, where Student attended school prior to Spencer Valley. Initially, at Julian Charter Student was aggressive, often hitting and biting staff and peers. He would not focus on lessons. Student's behavior resulted in his frequent removal from class, which affected his ability to make educational, behavioral, and social progress. Student missed instruction up to 90 percent of the time.

4. Student had received ABA interventions and instruction in his home through the San Diego Regional Center. His teachers and aides at Julian Charter also employed ABA strategies and principles to address Student's behaviors at school. However, the ABA strategies that were being employed did not decrease Student's behaviors.

5. As of 2010, ABA methodologies were ineffective in addressing Student's behavior needs at home and in school. As a result, the San Diego Regional Center began providing RDI at home which, unlike ABA, was effective in reducing Student's aggressive

and non-compliant behaviors. Soon after, Julian Charter agreed to implement RDI at school. The school and home programs were implemented and supervised by a non-public agency then called The Autism Group, Inc., which has since changed its name to Therapeutic Approaches to Growth.³

6. The Autism Group aides used RDI methodology together with other behavior strategies, including ABA, to support Student at school. This combination of RDI and other behavior methodologies and supports proved successful with Student. His aggressive behaviors were almost fully extinguished. Although Student had previously been unable to participate in class for any length of time, within a year or so of the introduction of RDI Student was able to spend the majority of his school day in his general education classroom. Student began making academic, behavioral, and social progress at school, which had not occurred while he was receiving pure ABA behavioral interventions.

7. Student's parents and his IEP team at Julian Charter agreed that RDI was necessary for Student to access the general education classroom and make progress on his goals, and that his aide should be trained in RDI. However, none of Student's IEP's specifically indicated that RDI was a required methodology or that The Autism Group was required to provide the RDI behavior services.

8. In April 2012, Student and his family moved into Spencer Valley's boundaries. Student's parents initially would not enroll him at Spencer Valley because Spencer Valley declined to specify that the aide and behavioral support required by Student's IEP would be based on RDI methodology and would be provided through The Autism Group. Spencer Valley also initially did not believe that Student should be fully included in a general education classroom. Student remained at Julian Charter School, which was chartered by the Julian Elementary School District. Julian Charter, through Julian Elementary School District, then sought to change Student's placement to a special day class.

9. In April 2013, Student's parents informed Spencer Valley of their intent to enroll Student. Student's parents informed Spencer Valley of Student's need for RDI based behavioral supports. Student insisted that Spencer Valley was required to provide him with an RDI trained aide and supervision through The Autism Group as well.

10. Spencer Valley initially resisted Student's requests because it believed that it, not Student, should determine the behavior program and/or methodology to use in addressing Student's behavior needs. However, after its initial opposition, Spencer Valley ultimately agreed through letters between the parties to contract with the Family Guidance and Therapy

³ Since all of the documents in Student's case refer to the agency by its former name of The Autism Group, this Decision will use that name as well for purposes of clarity.

Center of Southern California to supervise Student's behavioral interventions. Family Guidance is the only other non-public agency in San Diego certified to provide RDI support. Spencer Valley also agreed that it was required to provide Student with a highly trained one-on-one aide, and agreed to have an aide on its staff trained in RDI methodology by Family Guidance.

11. Spencer Valley contracted with Jennifer Palmiotto, the owner and clinical director of Family Guidance, to train the aide and provide the 480 minutes per month of behavior support services required under Student's IEP. The contract with Ms. Palmiotto indicated that she was qualified in, and would use, ABA strategies as well as other identified behavior interventions. The contract did not mention RDI. However, Ms. Palmiotto never utilized ABA behavior interventions with Student and never trained Student's aide in anything other than RDI.

12. Although the master contract between Spencer Valley and Family Guidance did not mention RDI, Spencer Valley agreed to have its aide trained in the RDI methodology. It hired Holly Pawlicki, who was completing the process to become a credentialed general education teacher, as the aide for Student. Ms. Pawlicki had been working as an aide in a special education class at another school district. She was Student's aide from April 22, 2013, when he enrolled at Spencer Valley, until she left employment with Spencer Valley at the end of 2013.

13. Ms. Palmiotto began providing RDI training to Ms. Pawlicki before Student began attending school at Spencer Valley on April 22, 2013. In addition to direct training by Ms. Palmiotto, which continued throughout the time Ms. Pawlicki was Student's aide, Ms. Pawlicki also received training using the RDI internet based training platform. Ms. Pawlicki learned the behavior methods utilized with RDI and successfully applied them while working with Student.

14. Ms. Palmiotto did not train Ms. Pawlicki in the use of ABA methodologies and did not instruct her to use them. Throughout the time she spent as Student's aide, Ms. Pawlicki utilized the RDI methods she learned from Ms. Palmiotto and the RDI training materials. These methods were successful in redirecting Student's behavior and keeping him on task so that he could be access his education and make meaningful educational progress.

Student's Behavioral Issues

APRIL 2013 THROUGH OCTOBER 2013

15. Spencer Valley convened an annual IEP team meeting for Student on May 28, 2013. By this time Student had partially met one of his behavior goals, substantially met the second, and fully met the third, with the assistance of his RDI trained aide and the RDI supervision from Ms. Palmiotto. Student participated in class and during recess and interacted positively with his classmates. He had some aggressive behavior, such as slapping

at peers, name calling, and leaving the area of instruction to either go outside the class or to areas of the class where instruction was not being provided. Student also had the habit of touching other children and of slipping his hands inside his pants. Student was often distracted but responded quickly to re-direction from Ms. Pawlicki.

16. Student had progressed academically as well, meeting or exceeding many of his academic goals.

17. The IEP team determined that Student needed a behavior intervention plan. The team began developing one, initially relying heavily on the input from Student's designated representative Ms. Langerman (who attended Student's IEP team meetings along with Student's parents) Ms. Palmiotto, and special education teacher Jennifer Brown (who began providing academic and behavioral support to Student during the 2013-2014 school year). Although Student's IEP did not specify the use of RDI, Ms. Langerman and Ms. Palmiotto integrated what they considered to be RDI concepts into the behavior plan they proposed for Student.

18. At the May 28, 2013 IEP team meeting, Student's parents requested Spencer Valley fund an independent psychoeducational evaluation and that it conduct a functional behavioral assessment of Student. Spencer Valley agreed to both requests. It contracted with Dr. Rienzi Haytasingh, a former school psychologist who had opened a private practice, to conduct both assessments.

19. Dr. Haytasingh conducted his assessments after Student returned to school for the 2013-2014 school year. The purpose of the functional behavior assessment was to determine why Student was engaging in behaviors that might have been interfering with his learning, how the function of his behaviors could be addressed, and what interventions should be used to address the behaviors. Spencer Valley Principal and Superintendent Julie Weaver, Student's teachers Heidi Schlotfeldt and Liz Jacobson, Ms. Pawlicki, and Student's mother assisted Dr. Haytasingh in collecting the necessary data on Student's behavior.

20. The data compiled during the fall of 2013 indicated that although Student had previously engaged in aggressive behaviors such as hitting or kicking people, swinging objects around, such as shovels, and pushing staff, all of these aggressive behaviors had extinguished by the time of Dr. Haytasingh's functional behavior assessment.

21. By October 2013, only three behaviors were impeding Student's learning: touching others, putting his hands in his pants and his fingers in his mouth, and being off task. The off task behaviors consisted of Student ignoring the task at hand, looking around the classroom, talking to others during instruction, or saying non-task related or non-learning related comments. Student's off task behavior lasted from 10 to 60 seconds. Ms. Pawlicki was easily able to redirect Student to the task at hand.

22. During this assessment period, Student had four instances of leaving the class without permission and 49 instances of refusing to transition from one task or area of the school to another.

23. Dr. Haytasingh determined that Student's off task behavior stemmed from Student not understanding instruction because it was not being given at his level or when he was transitioning from a preferred to a non-preferred activity or task.

24. Dr. Haytasingh helped revise the behavior plan originally proposed by Ms. Langerman, Ms. Palmiotto, and Ms. Brown. The plan included a number of supports and strategies to address Student's resistance behaviors, his self-touching, and his touching of others. A few of the strategies, such as spotlighting Student's successes with specific references to what he had done well, holding meetings to discuss inappropriate behavior, and the use of indirect cues, were specific RDI strategies. The behavior plan also contained specific phrases to use with Student to highlight when he engaged in appropriate behavior. However, many of the other strategies and supports contained in the behavior plan were either also used in ABA or were general good practice methods for teachers as a whole.

25. Student had never responded well to most positive reinforcements used in ABA, such as receiving a reward for good behavior or correct answers. This system is also sometimes called a token economy. The behavior support plan therefore did not contain a specific positive reward system. The only system of this type to have worked at all with Student was when it was used as a general classroom tool for all students, as Spencer Valley teachers did, because it was being used for the entire class and not just for trying to obtain Student's compliance on tasks or work.

26. Spencer Valley convened an IEP team meeting for Student on October 25, 2013. By the time of this meeting, not only had Student's behavior improved at school, but he had also made significant strides academically. In the past, no one had believed Student would ever read. By October 2013 Student had begun to read basic sight words, and had reached story eight in a beginning reader program called Project Read. Student had improved his ability to write letters and numbers and to locate letters on a keyboard and copy words from a visual model. Student had also begun to demonstrate emerging math skills.

27. By the time of the October 25, 2013 IEP team meeting, Student had made considerable educational, behavioral and social progress since enrolling in Spencer Valley six months earlier. The progress was due in substantial part to the fact that his maladaptive behaviors had decreased and because Ms. Pawlicki, using RDI techniques, was easily able to re-direct Student when he was off task.

BEHAVIOR AND PROGRESS BETWEEN OCTOBER 2013 AND DECEMBER 2013

28. During the time subsequent to Student's October 25, 2013 IEP meeting, and through the end of 2013, Student continued to have similar behavior challenges as he had in the beginning of the school year. He sometimes called people names, sometimes failed to

follow directions, would not always transition between activities, and was often distracted. However, there was only one time when Student showed aggression during this time, when he picked up a stick in the school yard and swung it around to play with it. In all cases, Ms. Pawlicki was easily able to redirect Student or to get him to transition between tasks.

29. There was no significant change in Student's behavior or continued academic progress when comparing the time of August through October 2013 through December 2013. The main impediment to Student's learning continued to be his off-task behavior. However, Ms. Pawlicki used her RDI techniques to re-direct Student and to engage him in his lessons. Although he was often off task, during the last two months of 2013, Student was either on task the majority of the day or for a good portion of it and engaged in his lessons. He would participate in general direct instruction in class. Ms. Pawlicki would give him modified instruction in the subject matter. Student progressed in reading. By the end of 2013 he had read through the 15th story in Project Read. He also continued to make strides in math and writing. Student continued to make this progress until Ms. Pawlicki left Spencer Valley at the end of 2013, to accept a full-time teaching position in another school district.

BEHAVIOR AND ACADEMIC PROGRESS BETWEEN JANUARY 2014 AND JUNE 2014

30. Spencer Valley did not to renew its contract with Family Guidance after it expired at the end of 2013. It also decided not to contract with any outside agency to provide the supervision of behavior intervention that Family Guidance had provided. Rather, Spencer Valley decided to have special education teacher Jennifer Brown assume responsibility for supervising Student's behavior supports. Ms. Brown had a strong background in special education, including classroom and behavior management. However, she was not specifically trained as a behavior specialist either in ABA or any other behavior methodology. She also had not received any training in RDI.

31. Spencer Valley was not able to contract with a permanent aide for Student from the time Ms. Pawlicki left its employ in mid-December 2013, until the beginning of the 2014-2015 school year, August 2014. Rather, it used several substitute aides who were supervised by Ms. Brown. Ms. Brown did not train any of the aides in any behavior methodology. Neither did Spencer Valley provide any type of specific training to the aides in behavior methodology or intervention.

32. Although the aides attempted to implement Student's behavior intervention plan, they were not given any specific training on its implementation or the strategies included in the plan. Where Student had previously had a behavior program based specifically on RDI principles and methodologies, overseen by a certified RDI behaviorist, his program from January to June 2014 was implemented haphazardly by individuals who were not given training in Student's specific needs or in any behavior modification methods. One of the aides, Lanson Moles, was a retired teacher. He was more successful than the others in establishing a rapport with Student and using some of the RDI based strategies in Student's behavior plan. However, Mr. Moles' participation with Student was inconsistent, and other aides were not as successful in addressing Student's needs.

33. Spencer Valley contends that Student's behavior and educational progress remained static after the departure of Ms. Pawlicki and Ms. Palmiotto. It contends that Student's behavior was consistently poor and that, as a result, he continued to fail to make academic progress. However, although Spencer Valley staff may have perceived that to be the case, the records they kept on Student's progress during this time contradict that position. Student's behavior, in fact, significantly worsened. He also failed to make any of the educational progress he had made from May to December 2013.

34. Spencer Valley recorded the progress Student made on all of his goals. Although Student had made significant progress on all of his goals by the October 25, 2013 IEP team meeting, particularly in the areas of behavior and academics, by June 2014 Student's progress in those areas had either stalled or regressed.

35. Student had a life skills goal to address safety issues. In October 2013 he had already learned to state his parents' first names and last names with prompting. He was beginning to learn the telephone number to call for emergencies. By June 2014 while Student still could state his parents' first and last names, he was still unable to recite his telephone number or the city in which he lived.

36. By May 2013, Student had partially met one of his behavior goals, had substantially met the second, and had fully met the third. Student was able to participate in class by taking turns, sharing school materials, follow instructions, and participate in preferred and non-preferred class jobs, such as passing out class assignments. Student behaved appropriately and participated in class much of the time. His aide assisted him when needed. During recess, Student was able to line up for a snack and play games with his classmates without aide assistance. Student was generally in good spirits at school, acted independently at times, interacted with his peers, participated to some extent with the class, and took directions from Ms. Pawlicki. These positive behaviors continued throughout the fall of 2013, when Student returned to school.

37. However, the progress reports on Student's behavior goals for January to June 2014 paint an entirely different picture. Student's transition goal called for him to be able to transition between tasks or locales within five minutes when given verbal warnings three minutes and one minute prior to the transition, by his annual IEP review in 2014. Student did not meet any of the benchmarks for this goal in January, April, or June 2014. Where he had only required two to three prompts in May and October 2013 to transition, by June 2014 Student required more prompts to follow directions, sometimes requiring 12 prompts from staff. Where Ms. Pawlicki had been able to re-direct Student within 5 to 60 seconds, by June 2014 it was taking Student an average of 29 minutes to be re-directed to another activity. His transition time frames ranged from two to 87 minutes.

38. Student's other behaviors had also escalated or, in some cases, returned where they had previously been extinguished. As of October 2013, Student had stopped hitting, pushing, shoving, and kicking other children. Between January and June 2014, Student was

observed hitting and pushing classmates, crawling under tables and chairs, and even threatening injury to staff. None of the latter behavior had been observed between August and December 2013.

39. Ms. Pawlicki had not had significant difficulties in getting Student to initiate tasks. She was able to prompt him the majority of time to the task at hand. Student had a task goal in 2014 as well. It required him to start a new activity within five minutes of the request without verbal refusal, by Student's annual IEP review in 2014. Student did not meet any of the benchmarks for this goal in January, April, or June 2014. By the latter date Student was still taking five to 55 minutes to start a new task, usually verbally refused to engage in the task, and often left the classroom to avoid doing it.

40. From January to June 2014, Student was refusing to engage in lessons at school. This resulted in his failure to make any academic progress. While Student had made significant progress in reading and mathematics from April 2013 to December 2013, his progress either stagnated or regressed from January to June 2014.

41. By May 2013, Student was near to meeting his goals in the following areas: writing numbers one to 15 in random order from memory; retelling four details of a story read to him; producing words with consonant clusters during sentence imitation activities; rounding up numbers when pretending to buy things; and copying three, five-word sentences from a far point model.

42. By that same date, Student had met or exceeded his goals in the following areas: improving his social pragmatic skills by using conversational turn taking; using appropriate verbal statements to decline engaging in conversations with no more than one indirect prompt or cue; copying two to three sentences of four to five words from a near point model; taking turns with peers; reading the first 20 sight words out of context with 90 percent accuracy; identifying the first 20 sight words in a written passage or book and reading them aloud correctly 80 percent of the time; correctly identifying letters of the alphabet on cards without prompts or cues 90 percent of the time; correctly identifying letters of the alphabet in written documents without prompts or cues with 80 percent accuracy; and verbally stating the sound of consonants displayed on cards without prompts or cues with 70 percent accuracy.

43. By October 2013, Student surpassed his goal of reading 20 sight words⁴ with 90 percent accuracy and was reading stories from Project Read. By the end of 2013 Student had finished reading 15 of the Project Read stories. His ability to recognize sight words had also increased to more than 25.

⁴ Sight words are also known as "dolch" words. It is a list of words that children are taught to identify by sight, rather than having to sound them out. The ability to identify and understand this list of words is considered a prerequisite to learning to read. Student's IEP's and progress reports refer to the words interchangeably as "sight words," "dolch words," and/or "high frequency words."

44. However, Student's reading skills regressed from January to June 2014. His annual goal for 2014 required him to read 50 sight words with 80 percent accuracy or greater. Student did not meet any of the benchmarks. By the January 2014 progress report Student was only reading 19 of 28 words with 68 percent accuracy. This was a regression from his reading ability in the fall of 2013. By June 2014 Student's reading ability had declined even further to only reading 16 of 28 words with 57 percent accuracy.

45. In the fall of 2013, Student had begun to decode words. He demonstrated this ability to Ms. Pawlicki when reading the Project Read stories. Student was able to actually read sight words and three letter consonant-vowel-consonant words by sounding them out phonetically.

46. However, Student was not able to do any full decoding of words between January and June 2014. While he was previously sounding out three-letter words, Student had regressed to the point where he could only sound out the first letter of a word. His accuracy in fully decoding sight words and three-letter words dropped to zero in January and remained at zero through the end of the 2013-2014 school year.

47. Student's ability with numbers showed the same regression from January to June 2014. Student had previously demonstrated emerging math skills as of fall 2013. He understood the concept of size and shapes. In class Student had started being able to use a ruler to measure items and use manipulatives to do simple addition. Using dots, Student was able to add sums to the number 12. Student had developed the latter skills since enrolling at Spencer Valley in April 2013. Student had surpassed his initial math goals. Ms. Pawlicki had therefore begun working on additional skills with him.

48. The object of Student's 2014 addition and subtraction goal was for him to be able to add and subtract up to number 20. Student did not meet this goal. Where he had previously been able to add dots up to number 12, by June 2014, Student did not even understand the concept of addition and subtraction. He was only able to add using numbers one to four by counting up from the number. Student had zero accuracy when attempting to subtract. This was a regression from his abilities the fall of 2013 when Student could add to number 12, and beginning to understand how to subtract.

49. By October 2013, Student had made good progress on his speech and language goals, including the area of pragmatics. He improved his ability to produce words with consonant clusters. He also improved in his social pragmatic skills. Student could make two conversational turns with a classmate when discussing what they were both building, but still needed prompting to continue the conversations for a longer time.

50. However, Student did not make the same progress on his speech goals from January to June 2014. He did not meet his benchmarks in speech intelligibility or in pragmatics.

51. Nor did Student meet any of his benchmark goals in spelling short words, writing legibly, or in typing.

52. From January to June 2014, Spencer Valley was working on 22 goals with Student. While the previous May and October Student had either met or made progress on the majority of his goals, from January to June 2014, he only met three of his goals: two goals in the area of expressive language, and one goal of recognizing 10 functional sight words, such as “exit” and “stop.”⁵

53. Part of Student’s worsening behavior is attributable to the use of a token reward system by Student’s aides between January and June 2014 in an effort to get him to comply with directions. The aides were permitting Student to play a game on the computer as a reward and, sometimes, even as a way to distract him. Student began demanding the same type of rewards and computer access to games at home, which his parents did not permit. When refused access to the games at home, Student became angry, combative and hostile. He became verbally resistant to the idea of going to school and would not respond to directives from his parents or siblings. Student was not the same person he had been for the first eight months he attended Spencer Valley.

54. The evidence therefore demonstrates that Student’s behaviors worsened from January to June 2014, and that he failed to make academic progress during that time.

BEHAVIOR AND ACADEMIC PROGRESS IN AUGUST AND SEPTEMBER 2014

55. As discussed below, Student did not attend school for the extended school year in summer 2014 although it was offered as part of his IEP, except for sessions of adapted physical education.

56. The 2014-2015 school year for Spencer Valley began on August 18, 2014. Student’s parents were concerned that Spencer Valley was not going to have staff in place to implement Student’s IEP. Gayle Patterson, the person hired to support Student’s inclusion in general education, had retired. Jennifer Brown, who had provided specialized academic instruction supervision and behavior supervision, had promoted to another job and was no longer available to work at Spencer Valley. Student’s parents were additionally concerned because of Student’s declining behavior the previous school year, his lack of progress, and the fact that there was no RDI behaviorist supervising Student’s behavior interventions or behavior plan.

⁵ Spencer Valley was unable to contract with an adapted physical education provider, so it was unable to work on student’s three goals in that area.

57. Student's parents requested that Spencer Valley put Student on independent study for the first few weeks of the 2014-2015 school year, until the school had all staff in place to implement Student's IEP. Spencer Valley declined the request. Student's mother therefore decided to only bring Student to school part time for the first week or so of the school year.

58. Spencer Valley began working on hiring staff to support Student's IEP prior to the beginning of the 2014-2015 school year. Spencer Valley hired Kathleen McKenzie as an aide for Student to start at the beginning of the school year. She was highly educated, with a doctorate in Organic Chemistry from Yale University. She had experience working at a summer camp for disabled children and adults while in college, experience as a special education teacher's aide, and as a substitute teacher. However, Dr. McKenzie had no education or training in behavior management or interventions. She had not received training in either ABA or RDI methodologies. No one trained her in preparation for her job as Student's aide. Basically, she was handed Student's behavior plan and told to implement it.

59. Spencer Valley also contracted with special education teacher Rebecca Taylor to supervise modifications to Student's academic program and to provide him with the behavior intervention services specified in his IEP. Ms. Taylor worked for a non-public agency. Spencer Valley contracted with her to come to its school once a week for just five weeks. Ms. Taylor did not start at Spencer Valley until about 10 days after the school year started.

60. Ms. Taylor had 35 years of experience as a special education teacher. She also had a master's degree in special education. While Ms. Taylor did review Ms. Brown's notes from the previous school semester, she was not a trained behaviorist, did not consider herself to be a behavior specialist, and had never trained anyone on how to address behavior interventions. She did not receive any training in RDI and was not familiar with it. She was not told to implement any particular behavior program with Student. Rather, she was given a copy of Student's behavior plan and directed to assist Dr. McKenzie in implementing it.

61. Spencer Valley contends that Dr. McKenzie adequately addressed Student's behavior. It contends that Student's behavior and academic progress from the start of school in August 2014, until the end of September 2014, when his parents removed him from school, was substantially similar to his previous behavior and progress. However, Student's records did not support that position. Rather, the records from August and September 2014 indicated that the decline in Student's academic progress and behavior steadily worsened from January to June 2014 and continued to deteriorate once he returned to school for the 2014-2015 school year. Student's behavior and lack of academic progress in September and August 2014 was manifestly worse than his behavior and academic progress from April to December 2013.

62. Between August 22, 2014, and September 26, 2014, Student left his instructional area 34 times to either leave the classroom, go to a computer room to play on the computer, or go to a loft area in the classroom to look at books. During this time away from class, Student lost anywhere from a couple of minutes of instruction to 88 minutes. Neither his aide nor his teachers had success in redirecting Student to his lessons. In contrast, during a longer period in the fall of 2013, when Dr. Haytasingh and Spencer Valley staff were taking data on Student's behavior for Dr. Haytasingh's assessment, Student only left the instructional area four times and was easily redirected back to his studies.

63. From August 22, 2014, to September 26, 2014, Student's aide noted that Student engaged in the following aggressive behaviors, some of which occurred several times: threw rocks and sticks at his classmates and aide; kicked cabinets and chairs; threw stuffed animals and bean bag chairs; picked up shovels and a rake aggressively; locked himself in a bathroom; barred a smaller child from leaving the bathroom; picked up a large stick and waived it at classmates; threw water on a small child; blocked the doorway to the bathroom with a box; tried to lock the auditorium with a broom; rolled chairs around a room; grabbed another child's leg; squeezed another child's neck; threw stuffed animals out of the classroom loft, hitting children below; threw a box holding glue sticks; pushed another child while running laps; punched and pushed another child out of his way; shook a child by the shoulders; went into the bushes and began throwing things and breaking branches from a tree. Student also hit his teacher on her backside with a ruler.

64. In contrast, when Spencer Valley used RDI to address Student's behaviors, Student did not engage in any aggressive behaviors from August to December 2013, other than once picking up a stick, which he put down when directed to by Ms. Pawlicki. By October 2013 Student's aggressive behaviors had been extinguished. The primary behavior addressed by Dr. Haytasingh in the behavior plan he developed was Student's off task behavior.

65. The behavior logs compiled by Dr. McKenzie between August 22, 2014, and September 26, 2014, are replete with references to Student "choosing" not to participate in lessons and "choosing" instead to leave the lesson area and go somewhere else to engage in a preferred activity, such as playing with a computer or I-pad, or choosing to do something else, such as drawing. Student's aide was not able to redirect him to the task at hand and therefore simply permitted Student to play or draw instead of finding a way to keep him engaged in instruction.

66. Every day, Student's aide had to prompt him hundreds of times just to get him to return to a task. Many times, the aide was unsuccessful in doing so. The behavior logs indicate that Student's behavior was out of control.

67. Although Ms. Taylor believed that Dr. McKenzie was one of the best aides she had ever worked with, Ms. Taylor acknowledged that Student was constantly engaging in escape behavior, leaving the instructional area, refusing directives from his aide and his teachers, and that he generally could not be re-directed. As Ms. Taylor acknowledged,

Student's behavior was impeding his learning and that of his peers. Student was not able to obtain any significant benefit from his education from August 22, 2014, to September 26, 2014, because Spencer Valley staff was not able to redirect him to his lessons and instead allowed him to "choose" to be absent from instruction.

68. At hearing, there was considerable disagreement between Student and Spencer Valley as to whether Student's behavior plan was based on RDI principles. Ms. Langerman, who helped create the plan with Ms. Palmiotto and Dr. Haytasingh, stated that her intent was to imbed RDI strategies into the plan even if they were not identified as such. Ms. Palmiotto agreed with that characterization of the plan.

69. However, Spencer Valley's witnesses disagreed that the strategies were RDI based. Ms. Taylor stated that the strategies were similar to ABA strategies and general teaching strategies that she had used during her long career as a special education teacher. Student's teacher, Heidi Schlotfeldt, agreed that many of the strategies were just best practice for teachers.

70. Spencer Valley presented the testimony of two expert witnesses. Dr. Haytasingh has a doctorate in school and educational psychology. He worked as a school psychologist, had his own practice through a non-public agency called Brain Learning, and taught part-time at several universities.

71. Dr. Haytasingh, who had assessed Student and helped develop Student's behavior plan, agreed that the strategies in the plan were not exclusive to RDI. Even the strategies which Ms. Langerman specifically included as being RDI based, such as spotlighting success, highlighting Student's positive achievements, overdramatizing successes by using exaggerated facial expressions, and giving positive, specific praise, were also part of good ABA techniques. However, Dr. Haytasingh agreed that Student responded better to intrinsic reinforcement than to the extrinsic rewards often used in ABA practices.

72. The most significant behavior that Dr. Haytasingh observed during his 2013 assessment of Student was his off task behavior and failure to transition. However, Ms. Pawlicki was able to easily redirect Student and get him to transition to the next activity. Because Student easily complied with Ms. Pawlicki's verbal prompts, Dr. Haytasingh had found the intensity of Student's non-compliance to be moderate rather than severe.

73. Dr. Haytasingh acknowledged that if the data for Student during 2013 indicated that he met or exceeded his goals, it would indicate Student had made progress. Dr. Haytasingh also acknowledged that when he assessed Student in the fall of 2013, Student was not engaging in aggressive behaviors, which had all abated, and was not threatening teachers. If such behavior were observed in 2014, it would present a very different picture than what he observed in 2013.

74. Dr. Haytasingh opined that the behaviorists working with a child whose behavior had become aggressive would have a duty to address the behavior. If some or all of the strategies in Student's behavior plan were not working, Dr. Haytasingh would have expected the behaviorists to have stopped and/or modified the strategies. If the behavior continued, then the appropriate course of action would be for the behaviorists to convene an IEP team meeting so the child's entire IEP team could discuss and address why the behavior plan was not working. Reasons for the failure could include the fact that the plan was not appropriate for the child, the plan was not being implemented properly, the people implementing the plan might not be adequately trained, or changes could have occurred in the child that made the plan no longer viable.

75. Spencer Valley also presented the testimony of Dr. Matthew Howarth. Dr. Howarth has a doctorate in Applied Behavior Analysis, and is therefore a doctorate level Board Certified Behavior Analyst. He is President and Chief Executive Officer of a non-public agency called Verbal Behavior Associates. He is also a certified special education and general education teacher. In addition to the behavior services offered through his non-public agency, Dr. Howarth's experience includes teaching in the public schools and supervising ABA based behavior programs in California and other states.

76. Dr. Howarth reviewed the behavioral data of Student taken by Dr. McKenzie in August and September 2014. Based upon the data, Dr. Howarth opined that the behavior strategies Spencer Valley was utilizing with Student were not effective because Student's escape behavior was increasing, as were his sensory behaviors such as putting his fingers in his mouth and his hands down his pants.

77. Dr. Howarth also agreed that many of the strategies delineated in Student's behavior plan were ABA based and were ones he had often included in plans he had formulated. However, he also agreed that whatever strategies Spencer Valley was actually using with Student were not effective and needed to be altered. Dr. Howarth agreed that, as of September 25, 2014, Student's behaviors were preventing Student from accessing his learning and that Student was not receiving educational benefit to the extent that he should have been.

78. The data showed Student had become more aggressive and less compliant. Therefore, the behavior management staff supervising Student's behavior program should have analyzed the data and discussed it with Student's IEP team. Dr. Howarth would have expected the behavior supervisor to have ideas on how to address the increased maladaptive behavior. Dr. Howarth opined that Student required a highly trained instructional aide and a behaviorist with a high level of expertise to supervise Student's behavior plan and the aide to successfully address Student's behaviors. However, although Dr. Howarth believed that the intensity of Student's maladaptive behaviors required the supervision of a behaviorist from a non-public agency, he also believed that he could train any aide to adequately implement a behavior plan for Student.

79. In Student's case, although his maladaptive behaviors sharply increased and his progress on his goals sharply decreased beginning in January 2014, and continued to do so, culminating in the return of his aggressive behaviors when he started school in August 2014, Spencer Valley failed to address the behaviors, modify Student's behavior plan, or call an IEP team meeting to determine what solutions Student's IEP team could recommend.

80. The evidence thus supports Student's contention that his behavior deteriorated after Ms. Pawlicki's departure and Spencer Valley's decision to cease implementing RDI strategies with Student at school. The evidence further demonstrates that Student's behavior plummeted even further after he returned to school for the 2014-2015 school year, and that Spencer Valley staff was unable to address the behaviors and assure Student was able to access his education.

Disputes Concerning the Efficacy of RDI versus ABA

OPINIONS OF STUDENT'S EXPERTS BROOKE WAGNER AND JENNIFER PALMIOTTO

81. The parties dispute whether RDI is an appropriate and effective behavior intervention and if it had been successful in addressing Student's behaviors. Parties also dispute whether ABA should instead be used as the basis for Student's behavior program. Student contends that ABA was unsuccessful with him in the past, that ABA techniques utilized with him by Spencer Valley staff after 2013 had been unsuccessful, and that the only behavior intervention that had successfully addressed his behaviors and permitted him to make meaningful academic progress had been RDI.

82. ABA is a methodology for behavioral intervention. As used with autistic children, ABA consists of breaking down activities into discrete individual tasks and rewarding a child's accomplishments in completing the tasks. The goal is to have the child eventually learn to integrate the information and associate instruction with a given activity. The ABA methodology teaches behavior (and language) through repetition. It uses the promise of extrinsic rewards, such a favorite food or time doing a preferred activity, to obtain the desired behavior or response from the child.

83. ABA has been successful in addressing problematic behavior and communication deficiencies with autistic children and with children who have intellectual disabilities. It is a research-based, peer-reviewed behavior methodology whose studies have been duplicated.

84. RDI, on the other hand, teaches the child to think through responses by focusing on the consequences of decisions and behaviors. It teaches the child to problem solve and act accordingly. The methodology is based on establishing a guide-apprentice relationship between the RDI aide and the child. The guide teaches the child to solve problems and make discoveries on their own rather than being told what to do by the guide. RDI uses several different tactics to accomplish this. The guide uses spotlighting to give feedback on what the child is doing so that the child can connect meaning to that moment.

The concept of reflection gives the child an opportunity to think about what is important to the child and why it is important. The goal of the RDI approach is for the child to take information and apply it to other situations. RDI emphasizes internal rather than extrinsic rewards.

85. Brooke Wagner has been the owner and Chief Executive Officer of The Autism Group since 2004. She has a master's degree in human behavior. She underwent the two-year RDI certification program and has maintained that certification since 2005. Ms. Wagner is trained in, and can provide, behavior intervention services in a variety of methodologies, including ABA. Her agency provides individual therapy to children, often funded by the San Diego Regional Center as an in-home therapy to address the needs of children who have developmental delays. The Autism Group also has provided in-school RDI therapy services to 10 to 15 public schools. The Autism Group has provided aides, supervision and/or consultation to the schools. The Autism Group had one certified general education teacher and one certified special education teacher on staff. The Autism Group has provided in-home services to Student since approximately 2010. It is now also providing services to him at The Autism Group's offices.

86. During the entire time Ms. Wagner has worked with Student, he has been resistant to ABA strategies and would only respond positively to RDI strategies. Student had the ability to establish a rapport with the adults working with him, such as his aide, and to continue to strive for intrinsic reinforcement from knowing he was successfully accomplishing things and pleasing those adults. Student was not responsive to direct prompts yet could be easily directed when the indirect prompting strategies of RDI were used with him. Although The Autism Group continued to work with Student in his home, his behavior at home became much more resistant and non-compliant after Spencer Valley ceased using RDI with Student at the end of 2013, when it did not renew its contract with Family Guidance.

87. Ms. Wagner observed Student at Spencer Valley on September 23, 2014. Student was non-compliant throughout much of her observation. He resisted directions from his aide, never responded positively to her, hissed at her, blocked her movement with furniture, and left the area of instruction. At one point, Student locked both his aide and Ms. Wagner out of the classroom. Ms. Wagner had not seen this level of resistance from Student since she had first observed him four or five years ago before The Autism Group became involved in his programming. Ms. Wagner was further concerned during her observation because the aide's response to Student's resistance was to merely write the behavior down on her clipboard without taking any action to address the behavior.

88. Ms. Wagner explained that RDI emphasized intrinsic rewards, guiding children to want to learn to do things by themselves and for themselves. Her observations of Student over five years indicated that Student took pride in learning to do things and in receiving praise rather than tangible rewards for doing so. Further, Student, as do most children who have specific behavior programs, needed consistency between his home

program and his school based program. Inconsistency could greatly reduce the efficacy of both programs, which is part of what happened with Student once RDI was discontinued at school.

89. Ms. Wagner acknowledged that the RDI program was originally developed to address the inability of many autistic children to develop interpersonal relationships and that the program literature does not specifically address non-compliant behaviors or children with intellectual disabilities. However, the program has evolved over the last few years as more certified RDI behaviorists used it with people who had disabilities other than autism. Regional Centers and school districts referred clients and students to The Autism Group who were not on the autism spectrum to address aggressive behaviors. The Autism Group had been successful with these referrals.

90. Jennifer Palmiotto's company, Family Guidance, is the only other non-public agency in San Diego County that is presently certified in RDI. Ms. Palmiotto has a master's degree in Marital and Family Therapy and is working on her doctorate in the same area. She originally was trained in ABA and worked for many years for a non-public agency that provided ABA based therapies. However, she was one of the first 10 people world-wide to have been certified in RDI, and has been certified since 2003. She was contracted by Spencer Valley in April 2013 to train an aide on Spencer Valley staff in RDI principles, practices, and methodology, and to supervise Student's behavior intervention program. Ms. Pawlicki was the aide hired by Spencer Valley. Ms. Palmiotto continued training Ms. Pawlicki and providing supervision until her contract terminated at the end of 2013.

91. Ms. Pawlicki had prior training in ABA and had to unlearn the practices. Ms. Palmiotto had ongoing discussions with her on the differences between the two methodologies. She would review mistakes Ms. Pawlicki made and correct them with her.

92. Ms. Palmiotto was part of Student's IEP team in 2013. She was an instrumental part of the team that developed the first draft of Student's behavior plan after his May 28, 2013 IEP team meeting. The team agreed that the strategies in the plan would be based on RDI principles. However, Ms. Palmiotto acknowledged that many of the strategies in the final plan were not based on RDI but rather on ABA, or general behavior methodologies.

93. During her months with Student, Ms. Palmiotto observed substantial improvement in his behavior based on the RDI interventions. Student stopped throwing things and stopped hitting people. The focus of her interventions became decreasing Student's overall refusal behavior and increasing his interest in participating in lessons. By October 2013 Student's escapes from the classroom had substantially decreased, he had less problems transitioning between activities and locales, and his skills had increased. Throughout the fall of 2013, Student demonstrated the ability to be redirected and to therefore participate in learning even if he was often initially off task.

94. Student responded well to the RDI model. He did not respond well to ABA token economy practices. His personality was such that the more he received as a tangible reward, the more he would want. If he did not receive something, he could become much more intransigent. Rather, Student responded more to intrinsic motivation because he delighted in being able to do things himself, to do them correctly, and receive praise as a result.

95. Ms. Palmiotto agreed that RDI was originally used with people who had autism; however, autism was not the exclusive disability that RDI could address. The theory and concepts of RDI could and had been used with many other diagnoses. The primary goal of the program was to develop interpersonal and intrapersonal skill sets. Since the original development of the RDI program, it had undergone five substantial revisions. Like The Autism Group, Family Guidance had been successful in addressing behavioral challenges in children and adults who have disabilities other than autism. All of the clients with whom Ms. Palmiotto used RDI approaches had non-compliant behaviors that had been successfully addressed through RDI. Ms. Palmiotto believed that Student required RDI and that an RDI certified behaviorist was necessary to supervise Student's behavior interventions. Ms. Palmiotto was successful in training Ms. Pawlicki and had been successful in training instructional aides employed by other school districts.

96. Student's teachers and Ms. Weaver, the Spencer Valley Principal, did not believe that RDI had a positive effect on Student. Ms. Weaver was concerned that some of the requirements of Student's behavior plan, such as having a meeting when he was non-compliant, disrupted the other children in class. She also believed that Student's behaviors had flat-lined, and that Student continued to exhibit the same maladaptive behaviors he had demonstrated when first enrolling at Spencer Valley. However, the perceptions of Student's teachers and Ms. Weaver did not match the documentary evidence. The evidence showed that Student's behaviors had been fairly well controlled in 2013, particularly between September 2013 and December 2013. Student had extinguished aggression, was not escaping much from instructional areas, was redirected to a task or to transition in no more than 60 seconds, and was progressing academically. He did not begin to drastically change until January 2014, when he no longer had an RDI trained aide or RDI trained behaviorist supervising his behavior program or behavior plan.

OPINIONS OF SPENCER VALLEY'S EXPERTS DR. HAYTASINGH AND DR. HOWARTH

97. Dr. Haytasingh was familiar with RDI. In 2005 he participated in a week-long RDI training. He had read the books by Dr. Steven Gutstein, the developer of the RDI methodology, and had been to discussions about RDI presented by The Autism Group.

98. Dr. Haytasingh did not believe that RDI was an effective methodology for addressing non-compliant or aggressive behaviors. It is not based on any solid research or studies. The only research study done is questionable because it was done by Dr. Gutstein, which undermined its value since it was not done by a neutral researcher. In any case, the RDI literature and what studies have been completed were all directed at children with

autism and not at children such as Student who had intellectual disabilities. RDI was based on fostering relationship building in autistic children. Children with Down's syndrome, such as Student, already were social people, which was where their strengths were. They did not need a program focused on behavior. Since ABA was research-based and peer reviewed, and had studies that have been duplicated, Dr. Haytasingh believed that it was the approach that should be utilized with Student.

99. However, Dr. Haytasingh acknowledged that the data on Student's behavior for the fall of 2014 indicated that Student's behaviors were much more serious than those he had seen the previous year. He also acknowledged that Student responded to and desired intrinsic rewards.

100. Additionally, in spite of his belief that RDI was not a concrete methodology and that an ABA based program was more appropriate for Student, Dr. Haytasingh acknowledged that the ultimate goal of a behavior modification program was to alter behavior. Therefore, if something worked, it should be used. If a behavior plan was not working, but had previously been successful, then the question needed to be asked was: what was different about the child or the environment? If there had been a change to the environment, then you would want to revert to what existed prior to the change.

101. Dr. Howarth was equally critical of RDI. He also had strong concerns about RDI's lack of research-based, peer-reviewed studies, specifically in the area of autism, to support its effectiveness. However, Dr. Howarth also acknowledged that there have been numerous clinical studies demonstrating that RDI is effective, even if the studies have not been research-based or peer-reviewed.

102. Spencer Valley contracted with Dr. Howarth on September 25, 2014, to provide behavior services for the district, and to specifically provide services to Student. It was Dr. Howarth's intention to base his program for Student on ABA grounded interventions. Spencer Valley provided him with Dr. McKenzie's behavior logs for Student for August and September 2014. Dr. Howarth determined from the logs that Student's behavior program was not working, and that his behaviors were then capable of being re-directed. Dr. Howarth then observed Student while Student was at The Autism Group in November 2014. Based on his review of the behavior logs and his observation, Dr. Howarth developed a proposed behavior plan for Student. He believed the plan was just a starting point and that he needed to do another behavior assessment of Student to solidify his proposed interventions.

103. Although Spencer Valley provided Dr. Howarth with Student's behavior records for August and September 2014, it did not provide him with Student's behavior records for any time prior to that or discuss the successes Student had under an RDI based behavior program. Dr. Howarth did not have any knowledge that RDI had been utilized with Student from approximately 2010 to December 2013, did not know that Student had had an

ABA based program at Julian Charter that had failed, and did not know that Student had made meaningful progress while in an RDI program supervised by an RDI certified behaviorist.

104. Dr. Howarth acknowledged that it would have been important to know if a prior behavior intervention had been successful for Student and that his behavior had declined when the program was discontinued. He also acknowledged, once shown the behavioral data on Student from 2013 that Student's resistive, non-compliant, and escapist behaviors had dramatically increased.

105. Dr. Howarth acknowledged that it was good behavior management technique to use whatever was effective in decreasing maladaptive behaviors. If a program was working, or had worked, you would want to replicate it. Ultimately, the goal of any good behavior management program was to enable a child to access his or her academics.

106. Dr. Haytasingh and Dr. Howarth are highly educated and trained behaviorists. They both have substantial backgrounds in behavior interventions and both have been successful in altering maladaptive behaviors using ABA techniques. Dr. Howarth has not had any failures with the children and adults with whom he has worked. Both doctors were competent, gave direct testimony without dissimulation, and readily acknowledged that there were situations where non-ABA programs might be effective.

107. However, the opinions of Drs. Haytasingh and Howarth that Student required an ABA based program and that RDI should be avoided were less persuasive than they otherwise might have been. Neither expert was aware that an ABA program had previously been a failure with Student and that Student had only made meaningful progress when RDI was implemented to address his behaviors. For these reasons, the opinions of Ms. Wagner and Ms. Palmiotto, both of whom had worked directly with Student, and both of whom were able to provide concrete evidence of Student's progress while RDI was being used, were more persuasive in this particular case. The evidence therefore demonstrated that RDI could be an effective behavior intervention, even with children not on the autism spectrum and in spite of its lack of research-based, peer-reviewed support.

September 25, 2014 IEP Team Meeting

108. As Student's behavior worsened at school during August and September 2014, it worsened at home, as well. Student's siblings, who were in the same third through 8th grade classroom at Spencer Valley as Student, brought home complaints that Student was permitted to do whatever he wanted at school and that no one was trying to make him attend to his studies. One of Student's brothers, who had always been successful in rapidly redirecting Student when he was doing something other than what he should be doing, was no longer able to obtain positive compliance from Student. Student's behaviors were having an effect on his family at school as well as at home.

109. In response to Student's continued decline in behavior and his lack of educational progress, Student's parents requested an IEP team meeting. Spencer Valley convened the meeting on September 25, 2014. Present at the meeting were Student's parents; Ms. Langerman, their designated representative and educational advocate; Student's two teachers; Ms. Taylor; Spencer Valley Principal and Superintendent Weaver; two of Spencer Valley's attorneys; an administrative designee; Student's case manager; and the Director of the North Inland Special Education Local Plan Area. Brooke Wagner, the Director of The Autism Group, attended the meeting by telephone. Ms. Wagner and her agency had continued to provide RDI intervention to Student in his home since 2010. She had also done an observation of him at school on September 23, 2014.

110. The primary concern of Student's parents at the IEP team meeting was to address Student's declining behaviors at school. Ms. Wagner discussed her observation of Student and her opinion that Student's decline in compliance and his increase in aggression were because an RDI program was not being implemented with him.

111. At this meeting, Student's parents and Ms. Langerman asked Ms. Taylor to give input about what she considered to be the basis for Student's resistive behavior and to make suggestions to address it. Ms. Taylor was unable or unwilling to do so. She stated that she would need to speak with someone else about Student's behavior plan and that she was not yet prepared to respond to questions about his behavior.

112. Although Spencer Valley's position at hearing was that Student's behaviors had remained static since he enrolled, the evidence indicates that Spencer Valley had realized even before Student returned to school for the 2014-2015 school year that his behaviors had escalated. It only contracted with Ms. Taylor for her to go to Spencer Valley five times. It believed, even as it was contracting with her, that a more structured behavior program would be necessary for Student. Within weeks of school starting on August 18, 2014, Spencer Valley began to search for another non-public agency to provide an aide for Student and to supervise his behavior interventions.

113. Spencer Valley contacted Verbal Behavior Associates, Dr. Howarth's non-public agency, in mid-September 2014 to discuss a contract with him. Spencer Valley emailed him a master contract and an individual service agreement for Student on September 23, 2014. Dr. Howarth signed the contract and service agreement on September 25, 2014, and emailed it back to Spencer Valley that morning. Spencer Valley had initially hoped to have Dr. Howarth attend the September 25, 2014 IEP team meeting, but he was not available.

114. Ms. Weaver did not see the signed contract before the September 25, 2014 IEP team meeting began at approximately 1:00 p.m. that afternoon. It is unclear whether any other Spencer Valley staff present at the meeting had seen Dr. Howarth's email before the meeting began. The contract was not finalized until the evening of September 25, 2014, when the Spencer Valley school board approved it.

115. At the September 25, 2014 IEP team meeting, Spencer Valley representatives informed Student's parents that Spencer Valley was working on securing services from a non-public agency with experience in behavior intervention. However, although Spencer Valley had already forwarded a contract to Dr. Howarth, none of the Spencer Valley representatives at the IEP team meeting mentioned that a specific agency had been located, that a contract had been forwarded, or that the agency was specifically hired to implement an ABA program.

116. At the IEP team meeting, Student's parents specifically requested that Spencer Valley again retain an RDI certified agency to implement an RDI based program with Student, with an RDI aide and an RDI certified supervisor. Student's parents made an alternate request that if Spencer Valley did not formally want to institute RDI through Student's IEP, that Spencer Valley at least agree to a 60-day diagnostic trial using an RDI certified aide and supervisor. After the 60 days, Student's IEP team could then evaluate whether the intervention had been effective. The Spencer Valley representatives were not ready to respond to either request and stated they would do so in the near future after considering them.

117. Based upon their frustrations with Student's deteriorating behavior and lack of engagement with his academics, as well as their frustration with Spencer Valley's unwillingness to respond to their requests at the IEP team meeting, Student's parents informed Spencer Valley that they were withdrawing Student from school and were going to privately place him and request reimbursement from Spencer Valley. Student returned to school for one day on September 26, 2014, and has not returned since. On October 2, 2014, Student's parents filed a private school affidavit with the California Department of Education, indicating that they were going to home school Student, at least for part of his education.

118. On October 1, 2014, Spencer Valley, through its attorneys, sent a prior written notice letter to Student's parents, through their designated representative, declining the request of Student's parents for an RDI based program and declining their request for a 60-day diagnostic trial with RD. Spencer Valley stated that it did not believe that RDI had been effective with Student and that it did not believe that Student required RDI to make progress. This had been their position since Student enrolled at Spencer Valley in April 2013. Spencer Valley agreed to make related services available to Student even while he was privately placed, although it did not believe that it was required to do so.

119. After Student left school, Spencer Valley attempted to convene his annual IEP team meeting. Spencer Valley intended to have Dr. Howarth attend the meeting to explain how he wanted to address Student's behavioral needs. Initially, Student's parents agreed to attend the meeting, but there were problems finding a mutually agreeable date and time for the meeting. In November 2014, based upon Student's departure from school and notice of unilateral placement, Spencer Valley withdrew Student from its enrollment. Based on this withdrawal and based upon their subsequent filing of the instant due process complaint, Student's parents have declined to attend any further IEP team meetings for Student despite

many attempts Spencer Valley has made to convene an annual meeting. Spencer Valley has therefore been unable to have any conversations with Student's parents about its proposals to address Student's behavior or the development of an annual IEP.

Student's Extended School Year Program for Summer 2014

120. Extended school year is a summer school program for children with IEP's that is designed to prevent regression during the summer break. Due to Student's unique needs, his IEP's have included extended school year instruction. The parties do not dispute that Student required extended school year services to prevent regression.

121. Student's stay put extended school year program was defined by his April 11, 2012 IEP. Although his parents agreed to some modifications in Student's extended school year program for the summer of 2013, those agreements were only for that summer and never officially modified Student's extended school year program as contained in the April 11, 2012 IEP.

122. Student's stay put extended school year program consisted of the following: individual specialized academic instruction 20 hours a week for two weeks; individual speech and language therapy 120 minutes a week for two weeks; adapted physical education 90 minutes a week for two weeks; and behavior intervention services 120 minutes a week for two weeks. Student's stay put IEP did not define who would provide the specialized academic instruction or the behavior intervention services.

123. Student's stay put IEP only required extended school year services to last for two weeks. However, since its extended school year program normally lasted four weeks, for summer 2014 Spencer Valley offered to provide Student with four weeks of services as follows: 20 hours a week of individual specialized academic instruction, with services provided by Student's then instructional aide, who had an emergency teaching credential; 120 minutes per week of speech and language services by a speech and language pathologist; six hours of adapted physical education by a private contractor at a location mutually agreeable to Student's parents; and five hours total of behavior support services by Student's current behavior support staff. Spencer Valley informed Student's parents that the personnel providing the services were subject to change.

124. Student's parents declined the offer of specialized academic instruction because Student's aide was not a credentialed teacher and was not trained in RDI. However, Student's stay put IEP did not require the person providing this instruction to have a specific type of teaching credential or to be trained in RDI. An emergency credential qualified the aide to provide instruction to Student.

125. Student's parents declined the offer of five hours of behavior support because it was not going to be provided by an RDI trained behaviorist. Student's stay put IEP did not require that his behavior support be provided by an RDI trained behaviorist, either during the

regular school year or during the extended school year. Spencer Valley's intention was to have either Jennifer Brown or Gayle Patterson provide the service. Both were credentialed special education teachers who can legally provide behavior support services.

126. Student's parents agreed to access the speech and language services offered by Spencer Valley for extended school year 2014. However, the first session, which was to be given on June 18, 2014, was no longer available by the time Student's parents agreed to have Student attend the session, and Spencer Valley did not offer to re-schedule the time. Student could have attended the remaining scheduled speech and language sessions, which would have totaled six hours and 20 minutes, but his parents were not able to take Student to the sessions because they were unavailable. However, it was not Spencer Valley's duty to arrange special dates outside of its normal summer program because Student's parents had other commitments. Even with one session being unavailable, Spencer Valley was still prepared to offer Student more than two hours additional speech and language therapy sessions than what was required by his stay put IEP.

127. Student's parents agreed to accept the offer of six hours of adapted physical education. They were able to access two to three sessions of 60 to 90 minutes. Thereafter, Student's parents were not able to contact the private provider with whom Spencer Valley had contracted. The provider would not answer calls or text messages. However, although less than the six hours initially offered by Spencer Valley, the amount of adapted physical education that Student received during summer 2014 comported with his stay put IEP, which only required that Spencer Valley provide a total of 180 minutes during the extended school year.

Student's Unilateral Placement

128. Student's unilateral placement has been composed of three primary components: the home school program developed by his mother; behavior intervention and academic instruction provided by The Autism Group at its offices; and group tutoring in art, music, science, and movement exercises provided by a company called Studio Samadhi.

129. The underlying basis of the home program is a modified curriculum provided by Ms. Langerman. Ms. Langerman modified the language arts and social studies portion of the curriculum herself. She obtained a modified science curriculum from one of the other clients she represented who attended school at another district.

130. Ms. Langerman is licensed as an attorney in Arizona, although not in California. Although she is certified as a substitute teacher in California, she has never held either a general education or a special education teaching credential. She has, however, attended numerous trainings in educational programs, including training for reading disabilities.

131. During the hearing, Ms. Langerman reviewed the curriculum modifications she prepared for Student as well as the science curriculum prepared by the other school district. Four credentialed teachers testified during this hearing: Ms. Weaver, Ms. Taylor, Ms. Brown, and Student's former teacher Ms. Schlotfeldt. None of these teachers testified that the curricula Ms. Langerman created was improperly modified, that it was inadequate, or that it would not permit Student to make educational progress. A comparison of Ms. Langerman's curricula with the curricula Ms. Taylor modified for Student demonstrates a marked similarity between them.

132. Ms. Langerman spent 14.4 hours adapting curricula for Student and demonstrating to Student's mother how to use it. Ms. Langerman charged Student's parents 60 dollars an hour for her services. She based her fee on the amount of the hourly rate Spencer Valley paid to Ms. Taylor's agency for Ms. Taylor's services as a special education teacher. The fee for 14.4 hours amounts to \$864.

133. Ms. Langerman charged parents \$313.85 for the cost of materials she purchased to prepare the modified curricula.

134. As of the hearing, the bill from Studio Samadhi for tutoring services provided to Student was \$854.50. Spencer Valley presented no evidence at hearing that the services provided were not appropriate for Student or that Studio Samadhi was not qualified to provide them.

135. Beginning October 1, 2014, The Autism Group began providing one-on-one educational services to Student as well as consultative supervision services. Student first attended for two, four-hour sessions a week. This was later increased to three, four-hour sessions. The Autism Group charged \$40 per hour for the one-on-one educational services and \$125 per hour for consultation services. Its total bill to Student's parents for the time from October 1, 2014, when The Autism Group began providing the educational services to Student, to January 23, 2015, was \$10,366.25. Spencer Valley provided no evidence that the academic services or behavior services The Autism Group provided to Student were inappropriate or not warranted.

136. The Autism Group is located approximately 40 miles from Student's home. For the time from October 1, 2014, to January 23, 2015, Student's parents traveled approximately 2814.7 miles to take him back and forth from home to The Autism Group offices. Parents are asking for a reimbursement of \$1576.22, based upon the federal rate for mileage reimbursement of \$.56 per mile.

137. Parents are also requesting reimbursement for the time it took Student's mother to transport Student to and from The Autism Group. They are requesting an hourly rate of \$9 for 66.5 hours of time transporting Student, for a total cost of \$598.59.

138. As of the date of the hearing, Student continued to attend The Autism Group for 12 hours a week, driven there by his parents. Student’s evidence indicated that he made meaningful educational progress while in his unilateral placement. Spencer Valley did not present any evidence that contradicted Student’s evidence in that regard.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*⁶

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)⁷ 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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

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

⁷ All references to the code of federal regulations are to the 2006 edition, unless otherwise indicated.

Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA, 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); 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, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) 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 Address Student’s Behavioral Needs between August 18, 2014, and September 25, 2014

5. Student contends that Spencer Valley failed to address his behavioral needs through appropriate services, supplemental aids, and supports beginning in January 2014, culminating in a total breakdown of his behavior in August and September 2014, including the return of behaviors that he had extinguished the prior year. Student contends that the cause of his maladaptive behaviors was Spencer Valley’s failure to address his behavior needs by failing to provide adequately trained aides, failing to provide a qualified behavior intervention specialist to train his aides and oversee his program, and by failing to implement his behavior plan properly. Spencer Valley contends that it did not fail in any of these aspects and that Student’s behavior in August and September 2014 was not substantially different from his behaviors during the prior 12 months.

6. To determine whether a school district’s program offered a student a FAPE the focus must be on the adequacy of the district’s proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district’s program was designed to address the student’s unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student’s IEP, then the school district provided a FAPE, even if the student’s parents preferred another program and even if his parents’ preferred program would have resulted in greater educational benefit. However,

to meet the level of educational benefit contemplated by *Rowley* and the IDEA, the school district's program must result in more than minimal academic advancement. (*Amanda J. v. Clark County School Dist., et al.* (9th Cir. 1996) 267 F.3d 877, 890.) Furthermore, educational benefit in a particular program is measured by the degree to which the student is making progress on the goals set forth in his IEP. (*County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467.) (*County of San Diego.*)

7. The evidence hear clearly supports Student's contention that his behaviors were not being addressed, that his maladaptive behaviors increased and that, as a result, he failed to make more than de minimis progress on all but three of his 22 implemented IEP goals.

8. Student enrolled at Spencer Valley in April 2013. Although Student's IEP did not require a specific behavior methodology to address his behavior, Spencer Valley agreed informally to provide him with an RDI trained aide supervised by an RDI certified behaviorist. It contracted with Family Guidance and with Ms. Palmiotto, the company's owner, to provide the supervision. Spencer Valley hired Ms. Pawlicki as Student's aide. Ms. Palmiotto began training Ms. Pawlicki in April 2013. The training was ongoing and included training through the RDI internet training platform.

9. As a result of the RDI interventions, Student's behaviors began improving. His IEP team met in May 2013 and agreed that he was making improvements, but that further intervention through a behavior plan was advisable. Spencer Valley agreed to fund independent psycho-educational and functional behavior for Student. It contracted with Dr. Haytasingh to conduct both assessments.

10. Dr. Haytasingh conducted the assessments in the fall of 2013. His assessment concluded that Student had extinguished all of his aggressive behaviors and was no longer hitting, kicking, biting, or aggressively swinging things like shovels or branches. Additionally, Student's elopement from instructional settings only occurred four times, and his aide was able to redirect him in 10 to 60 seconds when he was off task or refusing to transition between locales or activities. Student's behavioral progress continued under Ms. Pawlicki's direction until the end of 2013.

11. Student made meaningful educational progress between April 2013 and the end of 2013. He learned to read sight words, learned to read simple stories, began to understand numbers, and began to be able to add using dots. Student made progress on the majority of his goals.

12. Ms. Pawlicki left Spencer Valley at the end of 2013 to accept another job. Spencer Valley's contract with Family Guidance expired at the end of 2013 and Spencer Valley decided not to renew it. Spencer Valley did not thereafter contract with another non-public agency, either to provide RDI support or to provide supervision of another behavioral methodology. It did not hire anyone who had specific training as a Board Certified Behavior

Analyst, or anyone who even had specific training in behavior modification. Instead, Spencer Valley decided to have Ms. Brown, the special education teacher it hired to supervise Student's specialized academic instruction, provide behavior support services and supervision over Student's behavior plan. Under California Code of Regulations, title 5, section 3051.23, subdivision (a), a special education teacher is one of the professionals qualified to design and plan behavioral interventions. However, Ms. Brown, while a highly trained and experienced special education teacher, did not have any specific training or education in behavior management. No one trained her in any specific methodology or gave her direction other than giving her Student's behavior plan and telling her to implement it.

13. Further, although Student's IEP stated that his aide was to be "highly trained," Spencer Valley did not provide a highly trained aide to Student after Ms. Pawlicki left in 2013. Between January and June 2013, it was unable to hire a permanent aide for Student on its staff, and did not want to hire an aide from a non-public agency. Instead, Student had several aides who were never available for long periods of time. Ms. Weaver, Spencer Valley's Principal, even acted as Student's aide on occasion. None of the aides, including Ms. Weaver, were trained in RDI, none were specifically trained in other behavior methodologies, and none were trained by anyone in how to address Student's behaviors.

14. As a result, Student's maladaptive behaviors from January to June 2013, sharply increased. Student became extremely non-compliant, began hissing at staff and students, and refused to attend to his lessons. Where Ms. Pawlicki had been able to redirect him within about a minute, by June of 2013, Student took up to 87 minutes to transition back to class.

15. Student's academic progress halted or regressed between January and June 2013. During those five months, Spencer Valley was working on 22 goals from Student's IEP. Student made no progress on 19 of those goals. The previous year he had either fully, substantially or partially met all his goals.

16. Although Spencer Valley kept meticulous behavior logs of Student from January to June 2014 which described his maladaptive behaviors, and although it compiled reports detailing Student's severe behavioral issues and lack of progress during that time, Spencer Valley failed to convene an IEP meeting to discuss how to address the problems and failed to seek help from a behaviorist trained to address the behaviors Student was exhibiting.

17. Spencer Valley chose not to immediately hire a trained behaviorist for the 2014-2015 school year. Instead, it replaced Ms. Brown with Ms. Taylor, another special education teacher with many years of teaching experience but no real training in behavior intervention or modification. Spencer Valley hired Ms. Taylor to oversee his specialized academic instruction and to provide behavior support. However, Ms. Taylor received no specific training regarding Student. She was not informed about his past successes with RDI,

was not trained in RDI, and did not receive any training in other behavior methodologies. She attempted to implement Student's behavior plan to the best of her ability, but most of her interventions were ABA based, to which Student had never responded positively.

18. Spencer Valley also hired Dr. McKenzie as Student's aide. Dr. McKenzie, with a doctorate degree in science, is highly educated and very intelligent. However, she had no prior training in behavior intervention or behavior modification and was given none after being hired to be Student's aides. She had no RDI training and no ABA training. Since Ms. Taylor was supervising Dr. McKenzie's work with Student, any instruction Dr. McKenzie received was also ABA based, which was the only type of behavior intervention of which Ms. Taylor had any familiarity.

19. Student returned to school on or about August 22, 2014. The five weeks he spent at Spencer Valley through September 26, 2014, were extremely difficult. His behaviors became even more extreme than the previous spring. The aggressive behaviors that he had extinguished by October 2013 returned. In addition to threatening teachers, he was throwing rocks and sticks, locking people out of rooms, swinging sticks, throwing items, kicking, pushing, and hitting.

20. In addition, Student was non-compliant the majority of the day. Dr. McKenzie was not successful in getting Student to return to tasks or to transition. The behavior logs she kept are filled with constant references to Student "choosing" to do something other than the lessons he was supposed to be doing. It is clear that Student did not gain educational benefit during this time. It is clear that his behavior was much worse than it had been the year before. It is clear that neither Ms. Taylor nor Dr. McKenzie were able to address the behaviors in a way that would allow Student to access his education.

21. Spencer Valley's belief that Student's behaviors were static from the time he enrolled in April 2013 until when he left on September 26, 2014, is not supported by its own records. Student's behavior had been improving steadily through 2013, his non-compliance and off-task behaviors had been easily redirected, and he made educational progress. His maladaptive behaviors radically increased throughout 2014 and his educational progress plummeted as well.

22. Spencer Valley's position that Student's maladaptive behaviors had not increased and were being successfully addressed first by Ms. Brown and then by Ms. Taylor is also belied by the fact that it finally realized that Student required the support of a trained behaviorist. Within a couple of weeks of Student's return to school for the 2014-2015 school year, Spencer Valley had begun its search for a non-public agency to supervise Student's behavior interventions. If Student's behaviors had been static and properly addressed by present staff, there would have been no need to do that.

23. Spencer Valley also suggests that Student's poor behavior in August and September 2014 was the result of his failure to attend extended school year the prior summer. Had Student's behavior from January to June 2014 remained similar to his improving

behavior in 2013, Spencer Valley's position might have some validity. However, the evidence clearly demonstrates that Student's behavior was in constant decline from January to June 2014, and worsened when he returned to school in August 2014. Therefore, Spencer Valley's contention is unpersuasive.

24. Spencer Valley's behavioral interventions for Student were not reasonably calculated to provide him with educational benefit because there was no concrete behavior program. Other than the existence of a behavior intervention plan, there was no true oversight of the interventions needed to address Student's behavior. For nine months, Student was provided with aides who had no training in any type of behavior intervention and no training in how to implement Student's behavior plan. Student had no consistent aide. Spencer Valley did not provide supervision of Student's behavior needs by anyone specifically trained in behavior intervention. While Ms. Brown and later Ms. Taylor were highly qualified special education teachers and certainly have the education, training, and experience to address everyday behavior issues in special education classrooms, they had no specific training in behavior management. They were therefore unable to train the aides working with Student. This caused an immeasurable gap in the behavior services Spencer Valley provided to Student, resulting in the halting and even regression of Student's progress in almost all aspects of his education. Spencer Valley failed to address Student's behavior even though his progress reports starting in January 2014 showed that Student's behavior was having a tremendous detrimental effect on his education.

25. In conclusion, Student has clearly met his burden of proofing by a preponderance of the evidence that his behavior was substantially worse in fall 2014 than it had been the previous year. He has demonstrated that Spencer Valley denied him a FAPE by failing to properly address his behavior because the lack of proper behavior interventions and supports prevented Student from making more than de minimis educational progress.

Student's Need for RDI

26. Student contends that he requires RDI to address the behaviors that impede his access to his education. Spencer Valley contends that RDI is not a proven behavioral intervention because it is not research-based and peer-reviewed, and because it was specifically designed by its developer to address relationship building deficits of people, particularly children, who are on the autism spectrum. Spencer Valley further contends that an ABA based behavior intervention program implemented by a behaviorist trained in ABA will successfully address any issues with Student's behavior. It contends that as Student's school district it, not Student, is charged with determining the behavior methodology it will use to address Student's behavior challenges.

CHOICE OF METHODOLOGIES

27. 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 v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *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).)

28. The reauthorized IDEA did 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. 2006) 2006 WL 5667836, [46 IDELR 45, 106 LRP 29290], *affd.* (6th Cir. 2008) *Deal v. Hamilton County Dept. of Education* 258 Fed.Appx 863 [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.16-19.)

29. The Ninth Circuit, in *Mercer Island, supra*, 592 F.3d at p. 952, reiterated its position in *Adams* 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.*)

30. Title 34 Code of Federal Regulations, part 300.320(a)(4) provides that IEP’s shall include a statement of the special education and related services and supplementary aids and services to be provided to the student, based on peer-reviewed research to the extent practicable. The United States Department of Education clarified that the service based upon the greatest body of research is not the service necessarily required for a child to receive a FAPE, or that a school district’s failure to provide services based on peer-reviewed research necessarily results in a denial of a FAPE. (*Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed.Reg. 46665 (August 14, 2006).) Further, the Department of Education has explained that services need only be based upon peer-reviewed research to the extent possible, given the availability of peer-reviewed research. (*Ibid.*) The Ninth Circuit continued to adopt that position in *R.P., et al. v. Prescott Unified School District*

(2011) 631 F.3d 1117, 1122, finding that “The IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, *provided those practices are reasonably calculated to provide him with educational benefit.*” (Emphasis added.)

31. However, a school district’s ability to determine methodology is not absolute. In all of the cases cited above the courts or administrative tribunals found in favor of the school districts because the methodology each had chosen was successful with the child involved in the case. If the district chooses a methodology and then fails to implement it correctly or chooses one that does not work, a tribunal may find that it denied a student a FAPE if the Student failed to progress. For example, in *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, (*Miller*), the Albuquerque Public Schools had selected particular reading intervention programs for use in its schools. It used one of the programs for the student who filed the case. The student’s parents wanted the district to use a different program. When the district declined to use it, the parents self-funded their choice of program. The administrative decision, which was affirmed by the district court, found that the district’s original decision to use its choice of program was proper. However, the following year the student was moved to a different teacher who did not use consistent, properly implemented reading instruction in any of the school’s programs. As a result, the Student failed to progress. The administrative decision, as affirmed by the district court, therefore found that the student’s parents were entitled to reimbursement for the costs of funding their choice of program for the period after the student stopped receiving appropriate instruction in the District’s program and stopped progressing.

32. In this case, Student presented substantial evidence that ABA based behavioral interventions were not effective with him. When Student first began attending Julian Charter prior to 2010, his aide at school was trained in ABA and attempted to use ABA methodologies with him. But the ABA interventions did not work. Student’s behaviors prevented him from accessing his education. Student often spent 90 percent of the time outside the classroom because his behaviors were interfering with his ability to access his education and the ability of his classmates to access theirs.

33. It was not until Julian Charter agreed to implement an RDI based program with an RDI trained aide, supervised by an RDI certified behaviorist that, Student’s behavior changed. Thereafter, he spent 90 percent of the time in class. Student began to make educational progress, so much so that he was able to benefit from being in a general education classroom.

34. Student’s educational progress initially continued after he enrolled at Spencer Valley in April 2013. Spencer Valley agreed to hire an RDI certified behaviorist to train Student’s aide in RDI. Under the guidance of Ms. Pawlicki, with Ms. Palmiotto supervising the behavior interventions, Student made meaningful educational progress, academically as well as behaviorally. By October 2013 Student’s aggressive behaviors had been

extinguished. Although Student was often off task, Ms. Pawlicki was easily able to redirect him. Student was participating in his education and with his peers. He began to read, something no one thought he would be able to do a few years previously. Student began to understand numbers and to add. The strides he made were meaningful.

35. However, Student's progress ceased after Ms. Pawlicki left Spencer Valley at the end of 2013 and after Spencer Valley decided not to renew its contract with Family Guidance. Spencer Valley did not ensure that Student continued to have an RDI trained aide and did not ensure that an RDI certified behaviorist was involved in Student's behavior intervention program.

36. Although at the time it could have chosen another behavior modification program to address Student's needs, Spencer Valley did not replace Student's RDI based program with anything else. It hired a series of aides for Student who had no specific training in any type of behavior intervention and hired special education teachers to provide behavior intervention who had no specific training in any methodology and no training as behaviorists.

37. Student's behavior plan included strategies based both on RDI and ABA principles. However, since there was no one trained in RDI implementing the plan, for the most part, the RDI based strategies were not utilized. The only methodology with which Student's aides and behavior supervisors were familiar after Family Guidance left at the end of 2013 were ABA type strategies, such as using extrinsic rewards for compliance and using direct prompts. These strategies had significantly failed before when Student was at Julian Charter. They failed again at Spencer Valley from January 2014 to September 26, 2014, after RDI was no longer being implemented with Student.

38. Spencer Valley's experts, Dr. Haytasingh and Dr. Howarth, questioned the efficacy and viability of RDI for several reasons. First, they were concerned because RDI was not research-based and peer-reviewed. However, the fact that it was not does not mean it was not effective. As stated above, administrative tribunals and the courts have consistently validated the use of methodologies such as Floortime, TEACCH, and "eclectic" methodologies, where those methods have been shown effective with a given child.

39. Dr. Haytasingh and Dr. Howarth further questioned the use of RDI with Student because it is a program initially designed and developed for autistic children. However, the ABA interventions which were also initially developed for autistic children were later demonstrated to be helpful with people who have other disabilities, including intellectual disabilities as has Student.

40. Importantly, Dr. Howarth and Dr. Haytasingh were unaware of Student's failure to progress behaviorally and academically under an ABA trained aide and unaware of the strides Student made while RDI was being used to address his behavior. Their expert opinions therefore cannot be given the weight they would have been accorded had they been

in possession of all the facts concerning Student. Both Dr. Haytasingh and Dr. Howarth acknowledged that if a method was successful with Student and another was not, the successful method should be continued, no matter what it was.

41. Spencer Valley now contends that an ABA program supervised by an ABA trained behaviorist, such as Dr. Howarth, will address Student's behaviors and permit him to make educational progress. However, Spencer Valley failed to offer any such program while Student's maladaptive behaviors were increasing and his academic progress was in regression. In any case, the evidence shows that ABA programs were not successful with Student. The very records created and maintained by Spencer Valley indicate Student made meaningful progress while RDI was used as his behavior intervention methodology and lack of meaningful progress with the regression that occurred when RDI was withdrawn and primarily ABA strategies used.

42. Here, Student has met his burden of proof by a preponderance of the evidence that as of September 26, 2014, he required an RDI based behavioral program, supervised by an RDI certified behaviorist, to permit him to gain educational benefit in his least restrictive environment. Student has demonstrated that the failure to provide him with an RDI based behavior intervention program denied him a FAPE.

Parental Participation in the September 25, 2014 IEP Team Meeting

43. Student contends that Spencer Valley denied his parents the right to participate in Student's individualized educational program process at Student's September 25, 2014 IEP team meeting because Spencer Valley staff failed to engage in an interactive and collaborative discussion about Student's then-current behavioral issues and by refusing to respond at the meeting to Student's requests for changes to Student's behavior program. Spencer Valley contends that it was not required to immediately respond to the requests made by Student's parents.

44. 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.)

45. 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*), *superseded on other grounds* by 20 U.S.C. § 1414(d)(1)(B).) The standard for "meaningful participation" is an adequate opportunity to participate in the development of the IEP.

46. Parents have an adequate opportunity to participate in the IEP process when they are “present” at the IEP meeting. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subd. (a).) An adequate opportunity to participate can include a visit by the parent to the proposed placement. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 461.) An adequate opportunity to participate can include participation at the IEP meeting by outside experts retained by the parents, and the incorporation of suggestions made by such experts into the IEP offer. (*D.S. v. Bayonne Board of Educ.* (3rd Cir. 2010) 602 F.3d 553, 565; see also *W.T. v. Board of Educ. of the School Dist. of New York City* (S.D.N.Y. 2010) 716 F.Supp.2d 270, 288 [reports from child’s private school].) An adequate opportunity to participate can occur when parents engage in a discussion of the goals contained in the IEP. (*J.G. v. Briarcliff Manor Union Free School Dist.* (S.D.N.Y. 2010) 682 F.Supp.2d 387, 394.) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP meeting, expresses her disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools.* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.)

47. 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.)

48. A school district must provide written notice to the parents of a pupil whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must contain: 1) a description of the action refused by the agency; 2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal; 3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards; 4) sources of assistance for parents to contact; 5) a description of other options that the IEP team considered, with the reasons those options were rejected; and 6) a description of the factors relevant to the agency’s refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd. (b).) A district’s failure to provide adequate prior written notice is a procedural violation of the IDEA.

49. In this case, Spencer Valley convened Student’s September 25, 2014 IEP team meeting at the request of Student’s parents. Student’s mother and father were present at the meeting as was their designated representative. Student’s in-home RDI supervisor, Brooke Wagner, was able to participate by telephone, discuss her observations of Student, and give her opinions concerning what she thought were the deficiencies in Student’s behavioral program and why she believed that RDI was needed to address his behavioral challenges. Student’s parents were given the opportunity to express their concerns, ask for a particular program, give their reasons why they believed it should be adopted, and present the opinions of their chosen expert at the IEP team meeting.

50. Spencer Valley chose not to immediately respond to the requests of Student's parents for Student's IEP to be modified to include RDI or for a diagnostic trial of RDI to be implemented. Instead, staff informed Student's parents that they would consider the requests and respond to them in the near future. Less than a week after the meeting, Spencer Valley sent a prior written notice letter to Student's parents informing them that Spencer Valley was declining their requests and the reasons why they were declining them.

51. There is no requirement that a district immediately respond to a parental request for programming or placement changes. That is exactly why the concept of "prior written notice" exists. Here, Spencer Valley convened an IEP meeting as requested, listened to Student's parents, listened to their expert, took the requests under advisement, and subsequently sent a prior written notice letter that met all legal requirements.

52. For these reasons, Student has failed to meet his burden of persuasion that Spencer Valley impeded his parents' ability to participate in Student's IEP process. There was no denial of FAPE or violation of the rights of Student's parents by Spencer Valley's failure to immediately respond to requests made by Student's parents at the September 25, 2014 IEP team meeting.

Stay Put Program for Extended School Year 2014

53. Student contends that Spencer Valley failed to offer him an extended school year program for summer 2014 that comported with the requirements of his April 2011 IEP, which presently defines his stay put extended school year program. Spencer Valley contends that it not only offered a program that comported with Student's stay put IEP, but further asserts that it offered more than what was required.⁸

54. Extended school year services shall be included in a student's IEP if the IEP team determines that the services are necessary to provide a FAPE in excess of the instruction and services offered during the regular academic school year. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3); Cal. Code Regs., tit. 5, §§ 3043 and 3043, subd. (f).) Students who are eligible for extended school year are those who have disabilities which are likely to continue indefinitely or for a prolonged period, and for whom interruption of their education may cause regression which, when coupled with limited recoupment

⁸ In his closing brief, Student conflates the issue of whether Spencer Valley failed to offer to implement his stay put extended year program with the offer Spencer Valley made for a new summer program in conjunction with its October 25, 2013 IEP offer. They are two separate issues. Whether Spencer Valley predetermined its new offer of a summer program is not relevant to the extended school year issue presented by Student in the instant case, which is based on whether Spencer Valley materially offered to implement Student's extended school year program from his stay put April 2011 IEP.

capacity, renders it unlikely or impossible that the child would attain the level of self-sufficiency and independence that would otherwise be expected in view of the child's disability. (*Ibid.*)

55. A failure to implement a student's IEP will constitute a violation of the student's right to a FAPE if the failure was material. There is no statutory requirement that a school district must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2008) 502 F.3d 811, 820-822.)

56. Here, the evidence does not support Student's contention that Spencer Valley's programming offer for summer 2014 failed to comport with Student's April 2011 IEP. Student's stay put summer placement was 20 hours per week of individual specialized academic instruction, 120 minutes a week of speech and language therapy, 90 minutes per week of adapted physical education, and 120 minutes a week of behavior intervention services. The duration of the summer program was for two weeks.

57. For summer 2014, Spencer Valley offered Student 20 hours a week of specialized academic instruction for four weeks, twice as much as required by Student's IEP. His IEP does not define a particular professional who was to provide the service and does not define what type of training or credential the instructor was required to have. There was no requirement that the instructor be trained in RDI. Spencer Valley proposed having a teacher with an emergency teaching credential, who legally could teach a class unsupervised, provide the instruction to Student. This fully complied with Student's IEP.

58. Spencer Valley proposed providing Student with between two hours and two hours, twenty minutes per week of speech and language therapy. This was twice the amount required by Student's stay put IEP. Spencer Valley was not able to offer Student the first session of speech therapy because of scheduling conflicts and did not offer to reschedule it. However, the remaining three sessions would still have provided Student with more speech and language therapy than that required by his IEP. Parents did not bring Student to the therapy because they were involved in the previous due process hearing. However, Spencer Valley was not required to create a special school session for Student because of his parents' other commitments. The speech and language therapy offered to Student, even with one missing session, fully complied with his stay put IEP.

59. Spencer Valley contracted with a private company to provide adapted physical education to Student. Its intention was to provide Student with 90 minutes per week of this service. However, the private agency only provided two to three 60 to 90 minute sessions and thereafter failed to respond to communications from Student's parents. Even with this failure, Student still received the three hours of adapted physical education required by his stay put IEP. There was no failure to materially implement his IEP in this regard.

60. Spencer Valley offered to provide Student a total of five hours of behavior supervision during summer 2014, by a special education teacher. Student's stay put IEP only required a total of four hours of supervision during the extended school year. The IEP does not define what type of professional would be providing the behavior supervision. As stated above, special education teachers are authorized in California to provide that type of service. Spencer Valley's offer of behavior supervision services did not materially fail to comport with his IEP.

61. For these reasons, Student has not proven by a preponderance of the evidence that Spencer Valley failed to offer him an extended school year program for summer 2014 that did not materially comport with his stay put IEP.

Remedies for Failure to Provide a FAPE

62. Student seeks remedies in the form of reimbursement for all the costs associated with his unilateral placement, compensatory education, and an order that his IEP be amended to reflect a requirement that his one-on-one aide be trained in RDI, be provided by a non-public agency, and that his behavior supports be supervised by an RDI certified behaviorist from a non-public agency as well.

REIMBURSEMENT

63. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at pp. 369-71.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. The placement does not have to provide all services required by a special needs student in order for full reimbursement to be ordered, or meet all requirements of the IDEA. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14. [114 S.Ct. 361, 126 L.Ed.2d 284.]; *C.B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159 (*Garden Grove*).

64. Here, Student seeks reimbursement for the cost of tutoring, of materials purchased for his private home placement, for Ms. Langerman's time in preparing his modified materials, for the costs of The Autism Group's services and transportation to The Autism Group's offices, as well as for his mother's time in transporting him.

65. Under the *Burlington* analysis, and the IDEA, Student is entitled to reimbursement for the costs of his unilateral placement if Spencer Valley denied him a FAPE, if the unilateral placement was appropriate, and if there are no statutory or equitable reasons to deny or diminish the reimbursement. As was discussed above, Spencer Valley denied Student a FAPE by reason of the failure to provide him with an adequate behavior

program, including adequate behavior supports, which resulted in his failure to make more than de minimis progress at school from January 2014 to September 26, 2014. Student is thus entitled to reimbursement of the costs associated with his private placement.

66. Spencer Valley contends that Student has not adequately shown a need for the tutoring. However, the tutoring provided Student with art, music, and science, all of which are subjects he would have been taught at Spencer Valley. The amount of time Student spent there was reasonable. Student's parents are entitled to reimbursement for those costs in the amount of \$854.50.

67. Spencer Valley contends that Student's parents are not entitled to the costs incurred in having Ms. Langerman modify Student's curricula because there is a conflict of interest associated with her representing Student and then receiving payment for costs of a unilateral placement that she helped to create. However, the inquiry in determining whether reimbursement should be ordered is whether the Student required the service, whether it was reasonable, and whether the costs were reasonable. Here, there is no question that Student required a modified curriculum. Although Ms. Langerman is not a credentialed teacher, Spencer Valley provided no evidence that the modified curriculum she created or provided to Student was somehow inadequate. As stated above, four credentialed teachers testified at this hearing. Not one stated that Ms. Langerman's modifications were wrong or failed to meet Student's needs. Additionally, the \$60 an hour Ms. Langerman charged was based on what Ms. Taylor's agency charged Spencer Valley for Ms. Taylor's services. There is no evidence that such a charge for modifying curriculum is unreasonable. Further, the charges for the materials associated with modifying Student's curriculum were equally reasonable. Student's parents are therefore entitled to reimbursement for Ms. Langerman's fees for modification of curriculum and the costs of materials associated with the curriculum in his private placement, in the amount of \$864 for time spent preparing the modified curricula and \$313.85 for the cost of educational materials.

68. Spencer Valley also questions the propriety of Student's unilateral placement because it consisted of one-on-one instruction at The Autism Group, and small group instruction along with his siblings at his home school. Spencer Valley questions the placement because Student's least restrictive environment is a general education classroom with his peers. However, the Ninth Circuit in *Garden Grove, supra*, was clear that a private placement did not have to comport with the requirements of the IDEA or with a child's least restrictive environment. Student's home school was appropriate. The Autism Group provided additional academic instruction to Student as well as behavioral interventions based on RDI principles, which this Decision has found Student requires in order to access his education. The evidence demonstrated that Student made educational progress while in his unilateral placement. His academic skills have flourished and his behavior issues have decreased. Student's parents are therefore entitled to reimbursement for the cost of The Autism Group's services, in the amount of \$10,366.25, as well as for the cost of transporting Student to and from home to The Autism Group's offices, in the amount of \$1,576.22.

69. Student further requests reimbursement for costs of his mother's time in transporting him to school. Student cites to cases outside of the Ninth Circuit and outside of California in support of this remedy. The ALJ however declines to extend a reimbursement remedy to include a parent's cost in transporting a child to a service the parent has selected.

70. Student also requests that Spencer Valley be ordered to reimburse Student's parents for the continuing cost of Student's placement at The Autism Group, including a request that his hours there be increased, until such time as Spencer Valley institutes an RDI based behavior intervention program for Student. In considering the equities in this case, including the refusal of Student's parents to attend IEP meetings for Student subsequent to the filing of this case, the ALJ declines to order prospective reimbursement for Student's unilateral placement.⁹ However, in considering all the equities in this case, this Decision will order Spencer Valley to reimburse Student's parents for the cost they have already paid for The Autism Group's services up to the date this Decision issues.

COMPENSATORY EDUCATION

71. School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a free appropriate public education. (*Student W. v. Puyallup School District, supra*, 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Ibid.*) 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.*)

72. This Decision finds that Spencer Valley failed to provide Student with adequate behavior supports, services, and aids during August and September 2014, resulting in a total regression of his behavior after Student returned to school for the 2014-2015 school year. Spencer Valley failed to provide Student with a program designed to meet his unique needs. As a result, Student failed to make educational progress and was thus denied a FAPE during calendar year 2014. This Decision also finds that Student required RDI interventions in order to address his behavior challenges and allow him to access his education and make more than de minimis progress.

⁹ A school district is required to continue developing IEP's for disabled children no longer attending its schools when a prior year's IEP for the child is under administrative or judicial review. (*M.M. v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 537-538; see also *Amann v. Stow School System* (1st cir.1992) 982 F.2d 644, 651, fn. 4.) Spencer Valley was therefore meeting its legal obligations by attempting to convene ongoing IEP team meetings for Student during the pendency of the instant case.

73. As stated above, compensatory education is an equitable remedy. Considering the gains Student made earlier under an RDI based program, at both Julian Charter and at Spencer Valley, his regression when RDI was no longer provided is troublesome. Student basically has lost almost a year of educational progress because the behaviors that impeded his learning were not addressed.

74. Student has requested that the ALJ order Spencer Valley to modify his IEP to include a provision that his one-on-one aide be provided by an RDI certified non-public agency with behavior consultation and supervision provided by an RDI certified behaviorist from the same agency. However, in weighing the equities in this case, as well as mindful that not all available behavior methodologies have been utilized with Student, and that his present needs may change in the future, the ALJ declines to make such an order. Instead, after considering all the equities, it is appropriate to order Spencer Valley to provide Student with an RDI trained aide one-on-one aide through either The Autism Group or Family Guidance, or, if they are not available, through another RDI certified non-public agency, along with RDI supervision through the same agency by an RDI certified behaviorist, as compensatory education for Student's loss of educational benefit and behavioral regression. This remedy will be ordered for the period of one calendar year, to commence within 30 days of the time Student's parents notify Spencer Valley of their intent to re-enroll Student at Spencer Valley.

ORDER

1. Within 60 days of the date of this Decision, Spencer Valley shall reimburse Student's parents the total amount of \$13,974.82, for the cost of Student's unilateral placement through January 23, 2015. Documents submitted in this hearing constitute adequate proof of payment by Parents to the various entities and/or persons, or notice of outstanding monies due to be paid.

2. Spencer Valley shall reimburse Student's parents for the cost of The Autism Group's services from January 23, 2015, to the date of this Decision, within 60 days of receipt of proof of those costs. Proof of cost shall consist of either invoices from The Autism Group indicating services rendered and/or cancelled checks or credit card statements.

3. Spencer Valley shall reimburse Student's parents for the cost of transporting Student to and from The Autism Group's offices from January 23, 2015, to the date of this Decision, within 60 days of receiving the mileage calculations from Student's parents. Spencer Valley shall reimburse the mileage based upon the Internal Revenue's Mileage Reimbursement allowances that were applicable for the pertinent time period.

4. Within 30 days of receipt of notification from Student's parents that they intend to re-enroll Student at Spencer Valley, Spencer Valley will provide Student with a one-on-one instructional aide from either The Autism Group (Therapeutic Approaches to Growth) or Family Guidance, who is trained in RDI per the requirements of the respective

non-public agency, as well as provide Student with the behavior intervention consultation and supervision required by his IEP, from an RDI certified behaviorist from the same agency providing his instructional aide.

5. All other relief requested by Student is denied.

PREVAILING PARTY

Pursuant to 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. In accordance with that section, the following finding is made: Student prevailed on issues one and two of his complaint. Spencer Valley has prevailed on issues three and four of Student's complaint.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

DATED: March 9, 2015

/s/
DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearing