

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2015100365

**DECISION**

Student filed a due process complaint with the Office of Administrative Hearings, State of California, on October 8, 2015, naming Los Angeles Unified School District. The matter was continued for good cause on November 23, 2015.

Administrative Law Judge Cole Dalton, Office of Administrative Hearings, State of California, heard this matter in Van Nuys, California, on January 19, 20, 21, 22, 26, 27 and 28, 2016, and on February 2 and 3, 2016.

Jane DuBovy, Attorney at Law, and Carolina Watts, paralegal and advocate, represented Student. Student's mother attended all days of hearing, except for January 22, 2016. Student was not present during the hearing. Diane Willis, Attorney at Law, represented District. Diana Massaria, Due Process Department Administrator, was present on behalf of District on the first day of hearing. Francine Metcalf, Natalie Hofland, Patricia Tamez-Simplicio, Maria Ek Ewell, and Theresa Kent, District Due Process Specialists, were also present on behalf of District, on various dates of hearing.

At the conclusion of the hearing, OAH granted the parties' request for a continuance to February 24, 2016, to submit written closing briefs. Briefs were timely filed and the matter was submitted on February 24, 2016.

## ISSUES<sup>1</sup>

1. Did District commit a procedural violation, and thereby deny Parent meaningful participation and cause Student a loss of educational benefit, thereby denying Student a free appropriate public education by:

a. Failing to offer services comparable to those in Student's last agreed upon and implemented individualized education program of February 26, 2015, as amended by the IEP's of April 10, 2015 and May 27, 2015, upon Student's transfer into District on June 1, 2015;

b. Failing to provide prior written notice of (i) its refusal to continue implementation of all services in Student's IEP of February 26, 2015, as amended by the IEP's of April 10, 2015 and May 27, 2015, and (ii) its proposal to change Student's placement at the onset of the 2015 – 2016 school year;

c. Failing to convene an IEP team meeting within 30 days of Parent's written request in (i) August 2015, and verbal requests in (ii) September 2015, and (iii) October 2015?

2. Did District deny Student a free appropriate public education by failing to implement consented-to portions of Student's IEP dated February 26, 2015, as amended by the IEP's of April 10, 2015 and May 27, 2015:

a. From June 1, 2015 through the filing of the complaint, in the areas of (i) one-on-one instruction, (ii) speech and language, (iii) social skills, (iv) occupational therapy, and (v) educationally related intensive counseling services;

b. From August 1, 2015 through the filing of the complaint, in the area of (i) behavior intervention implementation services, and (ii) behavior intervention development services;

3. Did District deny Student a FAPE by failing to offer and provide an appropriate program to meet Student's unique needs, provide educational benefit and comport with his IEP from June 1, 2015 through the end of the 2014 – 2015 school year, the 2015 extended school year, additional weeks during the summer of 2015, and for the 2015 – 2016 school year up to the filing of the complaint on October 8, 2015, by failing to offer and provide appropriate and sufficient related services in the following areas:

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<sup>1</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- a. Behavior;
- b. Speech and language;
- c. Counseling;
- d. Educationally related intensive counseling services;
- e. Social skills;
- f. Occupational therapy; and
- g. One-on-one special academic instruction on a daily basis in all areas of academic need?

### SUMMARY OF DECISION

Student did not meet his burden of establishing that District violated its duty to offer comparable services upon Student's transfer into District. Further, Student failed to establish that the obligation to provide prior written notice was triggered as District offered to implement services comparable to those in Student's effective IEP of February 26, 2015, as amended by the IEP's of April 10, 2015, and May 27, 2015. Further, District did not seek to unilaterally change Student's placement; it merely changed service providers.

Student persuasively demonstrated that District failed to timely hold an IEP team meeting after Parent's written request. However, Student failed to establish what compensatory education he required, if any, as a result of this violation. District showed that it offered services throughout all relevant time periods but that Student refused these services. Further, Student persuasively demonstrated a material failure to implement Student's behavior services, which denied Student a FAPE. However, Student did not meet his burden of a material failure to implement all other portions of Student's IEP.

### FACTUAL FINDINGS

#### *Jurisdiction*

1. Student was nine years old in fourth grade at the time of hearing. He was initially found eligible during the 2011 – 2012 school year, while in kindergarten, as a Student with other health impairment due to attention deficit hyperactivity disorder.

2. Student lived with his foster parent within District's jurisdictional boundaries from the 2012 – 2013 school year, through the time of hearing. He attended District's Sunny Brae Elementary School, his home school, for the first six months of first grade. Student

then enrolled in Multicultural Learning Center on February 23, 2013, then re-enrolled in District on June 1, 2015. Learning Center operated as an independent charter school<sup>2</sup> within the same Special Education Local Plan Area (SELPA) as District.

### *Background*

3. Student had many needs related to his diagnoses of attention deficit hyperactivity disorder, partial fetal alcohol syndrome, alcohol related neurodevelopmental disorder, reactive attachment disorder – inhibited type, developmental coordination disorder, oppositional defiant disorder, anxiety disorder – not otherwise specified, and transient tic disorder. In school, he had difficulties staying on task, completing work, managing frustration, and regulating emotions. He enjoyed interaction with peers and adults, but increasingly engaged in aggressive and threatening behaviors.

4. Student underwent psychiatric hospitalization on June 13, 2013, for one week, at University of California, Los Angeles. UCLA doctors recommended outpatient psychiatric care, medication management, and placement in a small, highly structured, supportive, and self-contained special education class.

5. On December 20, 2013, Learning Center held an IEP team meeting to address Student's recent psychiatric hospitalizations and escalating school behaviors. Parent submitted a psychiatric referral for home/hospital instruction and requested such placement pending investigation of an appropriate nonpublic<sup>3</sup> school placement. The team agreed that once the nonpublic school was selected another IEP team meeting would be held to identify that school as Student's new placement. In the meantime, the IEP maintained a general education placement as home/hospital was an interim placement that would need to be renewed by psychiatric referral pending Parent's consent to a nonpublic school. Parent signed consent to the IEP on January 14, 2014.

6. Student's doctors placed him on home/hospital instruction through psychiatric referrals, beginning on December 20, 2013. They reported he was unable to attend school due to dysregulated mood and behavior, and severe anxiety. His doctors recommended

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<sup>2</sup> Under a memorandum of understanding with District, Learning Center was independently responsible for the provision of special education services under the Individuals with Disabilities Education Act. The memorandum required Learning Center to use District IEP forms, however, District had no part in developing or implementing IEP's for Learning Center students.

<sup>3</sup> A nonpublic school means a private, nonsectarian school that enrolls special education students pursuant to an IEP and is certified by the California Department of Education. (Cal. Ed. Code, § 56034.) A nonpublic agency means a private, nonsectarian establishment or individual that provides related services necessary for a special education student to benefit educationally from the student's IEP and is certified by the California Department of Education. (Cal. Ed. Code, § 56035.)

placement in a contained classroom/environment and indicated that nonpublic or special school placement was pending, since January 10, 2014. On the doctor's referral of August 18, 2014, Parent wrote, "NPS placement has been recommended; awaiting testing and/or IEP meeting to move forward." The last referral for home/hospital instruction ended March 21, 2015.

7. From December 2013 through May 2015, Learning Center researched and recommended several nonpublic schools that it determined would meet Student's unique needs. Parent did not agree that any of them were appropriate for her child and dis-enrolled Student.

#### *Transfer into District*

8. Student re-enrolled at Sunny Brae Elementary School on June 1, 2015. Student's annual IEP<sup>4</sup> of February 26, 2015, as amended by IEP of April 10, 2015, and May 27, 2015, constituted the last agreed upon and implemented IEP upon Student's return to District. The contents and meaning of the IEP were in dispute at this hearing and in an underlying matter by Student against Learning Center.

9. The weight of the evidence showed Student's effective IEP offered 10 hours weekly resource specialist program services, described as one-on-one specialized academic instruction, 300 minutes in math and 300 minutes in English language arts to be provided through a nonpublic school; and nonpublic agency services as follows: 30 hours weekly behavior implementation intervention; six hours monthly behavior intervention development; 120 minutes weekly educationally related intensive counseling services; 60 minutes individual and 60 minutes family counseling; 120 minutes weekly speech and language therapy; 60 minutes social skills and 60 minutes pragmatics; 60 minutes weekly occupational therapy, provided in two-30 minute sessions; and 60 minutes weekly vision therapy, provided in two-30 minute sessions, for a total of 26 sessions. The services could be provided in a home or clinic setting, and this was arranged through the nonpublic agencies and Parent. Behavior services were allowed to overlap with other related services, to help Student attend. Student was provided "additional weeks" of service so that he would have no break between school years, to help his transition to a nonpublic school placement in the fall of 2015.

10. Parent consented to the effective IEP on May 28, 2015, noting that she did not agree to a "proposed change in one-on-one instruction Educational Therapy to an NPS at this time." From this statement of non-consent came Student's untenable position at hearing that his educational program was not an interim pending nonpublic school placement, but an ongoing program of individual services to be provided either at home or in a clinic. As part

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<sup>4</sup> "IEP" or "effective IEP" refers to Student's February 26, 2015 IEP, as amended in April and May, unless otherwise specified.

of this position, Student argued that District tried to change placement from a nonpublic agency to a nonpublic school and that he could only receive educational benefit from particular providers using particular behavior techniques. The evidence did not support this position as addressed more thoroughly below.

11. The weight of the evidence did show that Parent believed there were no nonpublic schools that could address her son's needs and that she wanted her son to continue receipt of specialized academic instruction and related services outside of the school setting with providers and at locations of her choosing.

12. District effectively demonstrated, and the bulk of Student's evidence supported, that Parent had agreed to transition Student to a nonpublic school placement upon his release from home/hospital instruction as early as December 2013, long before his re-enrollment. This agreement was confirmed in letters from Ms. DuBovy's office. Parent consented to several IEP's and amendments that provided for interim services while Student transitioned to a nonpublic school. Parent observed several nonpublic schools, questioned personnel there, went through the interview process and submitted applications. Expert and lay testimony from both sides consistently opined that Student required a small, structured setting and that he should be transitioned from the home and into a structured setting sooner, rather than later.

*Dr. Marie Davies*

13. Dr. Marie Davies, who conducted an independent education evaluation of Student, prepared a Report of Neuropsychological and Psychoeducational Evaluation on April 6, 2015. The Learning Center IEP team reviewed the report on April 10, 2015. Dr. Davies has a doctorate in developmental psychology and was licensed by the California Board of Psychology in 2011. Dr. Davies was not a school psychologist but had experience conducting psychoeducational assessments since July 2011, in her post-doctoral work. She began her practice as a pediatric clinical neuropsychologist in June 2012.

14. Dr. Davies observed Student's specialized academic instruction, in the home, as part of her underlying evaluation. She described several escape behaviors, Student running into his room, and Parent intervening during instructional time. She persuasively testified that the IEP team's goal, at the time of the addendum meeting of April 10, 2015, was to place Student in a classroom with individualized support. The individualized services offered in the IEP were meant to support Student to transition into a classroom environment.

15. Dr. Davies agreed that Student required a small classroom environment to address attention, behavior, sensory needs, and emotional dysregulation. In her report, she opined that, "[t]he longer appropriate intervention is delayed, the lower the child's motivation and ability to benefit from it." At hearing, she credibly explained that this was especially true for children who are neurologically delayed, and the sooner appropriate interventions could be provided, the better.

16. Dr. Davies, did not maintain that Student required a particular methodology for behavior intervention. Neither did any of the many reports reviewed by Dr. Davies as part of her evaluation. This evidence was inconsistent with Student's theory that he could only work with providers who did not use applied behavior analysis techniques.

*Andrea Watkins, M.S.*

17. Andrea Watkins provided clinic based one-on-one academic instruction to Student from April 2015, through the time of hearing. Learning Center funded the initial week of services, until it determined Ms. Watkins was not certified by the State to provide academic instruction. Ms. Watkins obtained a master of science degree in special education in 2013, a California clear credential in special education for moderate to severe students in kindergarten through 12th grade, and holds certifications in various behavior intervention techniques. She found that, on most days, Student could not benefit from academic instruction without one-on-one behavior support.

18. Ms. Watkins failed to persuasively support Student's theory that he only benefitted from academic instruction she provided or that he needed to work with the same provider continuously, until finally accepting a nonpublic school placement. Further, she did not support his theory that he was only successful using behavior intervention other than applied behavior analysis.

19. Ms. Watkins attended the May 25, 2015 IEP meeting where Learning Center changed the service provider of one-on-one specialized academic instruction from nonpublic agency to nonpublic school. She confirmed that she was not certified by the State as a nonpublic school or agency and, for that reason, Learning Center could not contract with her to provide services to Student.

DISTRICT'S OFFER OF PLACEMENT AND SERVICES FOLLOWING STUDENT'S  
RE-ENROLLMENT

20. Ms. Massaria serves as the District's administrative coordinator of the Due Process Department. She holds a pupil personnel services credential in school counseling and school psychology, a clear California administrative credential, and is a licensed educational psychologist. She was a school psychologist for District for approximately 10 years, during which she attended thousands of IEP team meetings and conducted several psychoeducational assessments. She worked as a due process specialist; a coordinator of the Compliance Support and Monitoring Department; director of litigation research, Office of the General Counsel; and interim administrative coordinator, Compliance Support and Monitoring, before obtaining her current position. She has extensive experience in the provision of special education services, substantive and procedural legal requirements, and assisting school teams and families during disputes. She persuasively demonstrated that District correctly interpreted and attempted to implement Student's IEP upon his transfer into District.

21. In response to letters from Student's advocates, Ms. Massaria communicated with her compliance department and staff at Sunny Brae to ensure Student's enrollment and the provision of services pursuant to his effective IEP. She worked with staff in the Operations Department, which oversees nonpublic agencies and nonpublic schools, to determine which agencies could provide comparable services to comply with the IEP, and to secure an appropriate nonpublic school placement for the 2015 – 2016 school year.

22. Elizabeth Ingraham-Ono worked as a specialist in the Operations Department of District since July 2009. She holds a clear administrative services credential, a multiple subjects teaching credential, has a master's degree in educational administration. She has worked in the special education arena for over two decades as a teacher, inclusion facilitator, program specialist, and special education coordinator. As an operations specialist, she works with nonpublic agencies and nonpublic schools to coordinate placement and services, provides support and oversight, monitors legal compliance, and negotiates and implements contracts with outside providers.

23. Ms. Ingraham-Ono coordinated efforts with Ms. Massaria and credibly explained District's efforts to offer Student a placement and services comparable to those in his effective IEP at the time of his re-enrollment in District. Ms. Ingraham-Ono contacted various nonpublic agencies to locate qualified and available providers for Student's related services. She communicated with nonpublic schools that had appropriate placements for Student and confirmed availability before sending offer letters to Parent. The offer letters contained her contact information.

24. On June 8, 2015, District offered 30 hours per week of behavior intervention implementation, and six hours per month of behavior intervention development services through Child Development Institute, a nonpublic agency and Student's then current provider for these services. The offer was consistent with Student's IEP. The evidence showed that District also continued vision therapy services through Student's provider, Valley Vision. Student accepted the behavior and vision therapy services by letter dated July 10, 2015, from Ms. DuBovy's office. There was no dispute that behavior and vision services were consistently provided at this point, during Student's transfer into District.

25. On June 16, 2015, District offered 60 minutes per week speech and language services in the area of social skills and 60 minutes per week of one-on-one speech and language services to address pragmatics, through McRory Pediatrics Services, a nonpublic agency. The offer was consistent with Student's IEP. Further, District offered to fund 120 compensatory minutes of one-on-one speech and language for pragmatics, and 120 minutes of speech and language for social skills, due to the delay in obtaining a service provider.

26. Student rejected District's offer of speech and language services through McRory on July 10, 2015. In the denial letter, Student acknowledged that McRory was able to provide service to a child with Student's special needs. However, Student had previously

received therapy from a McRory therapist who terminated services on April 12, 2013, and for that reason, Student concluded that McRory could not provide appropriate services. This was not justification for refusing similar services in 2015.

27. On June 16, 2015, District offered three nonpublic school placement options for Student: Almansor Education Center, Tobinworld, and Five Acres. Parent was asked to contact each location for interviews of Parent and Student to initiate the application process. After the interviews, the IEP team would meet to consider a specific nonpublic school as the appropriate offer of a FAPE. Several witnesses credibly demonstrated that each of the nonpublic schools offered had programs appropriate to address Student's unique needs. Student failed to present credible evidence that showed otherwise.

28. Student declined nonpublic school placement in each of the three schools offered by District. Parent contacted all of the schools and determined that none were appropriate for her son. Further, in the letter of July 10, 2015, Ms. Martinez explained that none of the offered placements could provide one-on-one instruction to Student, nor could they implement each of the nonpublic agency services identified in Student's effective IEP. Though untenable, Student's position remained that his IEP offered specialized academic instruction through a nonpublic agency only. It remained unclear throughout hearing as to why Student believed a nonpublic school could not provide the services and specialized academic instruction called for in the IEP, why they would offer individualized nonpublic agency services in their school program, or why Student believed that they should.

29. On June 17, 2015, District offered 60 minutes per week, each, of occupational therapy, individual counseling and family counseling, through Total Education Solutions, a nonpublic agency. The offered services were consistent with Student's IEP. Further, District offered to fund 120 minutes of compensatory occupational therapy and 240 minutes of compensatory counseling/educationally related intensive counseling services.

30. On July 10, 2015, Student rejected counseling and occupational therapy services. On July 30, 2015, Student accepted occupational therapy services through Total Education Solutions, which would be provided in the home, based on Parent's discussions with the provider.

31. On June 18, 2015, District offered 10 hours of weekly resource specialist program services (300 minutes in English language arts and 300 minutes in math) through a credentialed special education teacher, to be provided in the home. District could not find an available nonpublic school to provide these services and the California Department of Education did not allow it to contract with a nonpublic agency for this type of service. Further, District was not required to match services in the IEP identically. The offer of a qualified District teacher was comparable to the specialized academic instruction called for in Student's IEP.

32. On June 23, 2015, Joe Salvemini, principal of Carlson Home Hospital School, assigned a certificated special education teacher, Jeana Steele, to Student. Ms. Steele tried on several occasions to provide instructional services to Student. On July 2, 2015, Mr. Salvemini wrote to Parent regarding the services. Carlson, a certified nonpublic school, provided teachers through its home-based specialized academic instruction services and also provided a home/hospital program. Student received services through the home/hospital program while under psychiatric referrals from mid-January 2014 through mid-March 2015, and claimed that home/hospital service was ineffective. However, Student had not worked with the credentialed special education teacher assigned to him after his transfer to District. Carlson had several appropriate teachers through whom services could be provided.

33. Mr. Salvemini persuasively demonstrated that Parent rejected teaching services from Carlson as she wanted to use a specific provider instead. His testimony and letter of July 2, 2015, are consistent with the weight of the evidence presented at hearing. In the July letter, Mr. Salvemini advised Parent that Carlson would continue to offer the teaching services. Parent described the correspondence as “harassment” in an email she sent to Ms. Steele on or about July 13, 2015. However, this was merely documentation of the efforts Carlson made to provide Student with the specialized academic services called for in his IEP.

34. In the last week of August 2015, Child Development Institute abruptly terminated Student’s behavior services, without providing District the 20 days notice called for in their contract. Citing non-compliant and aggressive behaviors in the home, resulting in some injuries to the teacher, the Institute agreed to renew behavior services once Student was in a structured school setting.

35. Ms. Ingraham-Ono credibly demonstrated that several nonpublic agencies were contacted but none would agree to provide services in the home. The providers reasoned that these services would not provide educational benefit to Student as they should be part of the supports received in a structured setting to help the Student access his curriculum.

36. District finally offered a new behavior service provider on January 8, 2016, California Psyche Care. In addition to the services called for in the IEP, District offered compensatory education to make up for the lapse of services from August 28, 2015 through January 8, 2016, not counting days when school was out for 5 days or more. The compensatory offer provided Student a choice of reimbursement for up to 560 hours of behavior intervention implementation services at a rate of up to \$100 per hour and up to 30 hours of behavior intervention development at a rate of up to \$150 per hour; or, alternatively, 560 hours of behavior intervention implementation services and 30 hours of behavior intervention development provided by California Psyche Care to begin January 13, 2016 and be completed by December 31, 2017.

37. On September 1, 2015, Ms. DuBovy's legal administrator, Diana Martinez, wrote to Ms. Massaria and requested speech and language and behavior services through Haynes Family of Programs. If District did not agree to contract with Haynes within two days, Student would initiate services with Haynes and seek reimbursement.

38. Based on all of the evidence produced at hearing, it is found that District made reasonable efforts to review and interpret Student's effective IEP from Learning Center; undertook investigation into nonpublic agencies and schools appropriate to meet Student's needs; and located available appropriate service providers. District made offers of placement and services in a reasonably timely manner and offered compensatory education for any lapse between Student's enrollment and District's adoption of his IEP. District failed to timely offer replacement behavior services from August 28, 2015 through January 8, 2016. This resulted in a deprivation of educational benefit, in regards to behavior services.

#### *Request for IEP Team Meeting*

39. On August 14, 2015, Ms. Martinez wrote to Ms. Massaria and Mark Garren, assistant principal at Sunny Brae, requesting an IEP team meeting. The first day of school was August 18, 2015.

40. On August 17, 2015, Ms. Martinez again wrote to Ms. Massaria to request an IEP team meeting, as Parent wanted to explore options by visiting any potentially appropriate special day classes, particularly at Sunny Brae Elementary School or Vanalden Elementary School, as well as any additional options that could be discussed at the meeting.

41. On August 18, 2015, Ms. Watts wrote to Ms. Massaria to request intervention with Sunny Brae staff's contact with Parent. Someone at the school had apparently advised Parent that her son was assigned to a classroom and that the IEP called for placement in a general education setting. In response, Parent called Mr. Garren, who Ms. Watts described as attempting to "intimidate or coerce" Parent into accepting a placement not called for in the IEP.

42. Student persuasively demonstrated that Mr. Garren did not have a firm grasp on placement and services described in the IEP. However, Mr. Garren had just come back from summer break and had not contacted District administrative staff about the offer of placement and services made over the summer break.

43. On September 15, 2015, Ms. Martinez wrote to Ms. Massaria requesting an IEP team meeting to review Student's program and the assistive technology report from Believe Ability, conducted while Student received services from Learning Center. District was warned that the IEP needed to be held by September 18, 2015, 30 days after the start of the school year, or it would be out of compliance.

44. On October 1, 2015, District sent Parent an assessment plan, dated September 30, 2015, for speech and language, health and development, academic performance, motor abilities and social-emotional status. Parent did not provide consent.

45. On October 26, November 2, and November 12, 2015, District sent truancy letters to Parent, regarding Student's non-attendance at Sunny Brae. On November 13, 2015, Ms. Watts wrote the attendance clerk of Sunny Brae describing what she perceived to be Student's program and requested that truancy be discussed at an IEP team meeting.

46. On November 18, 2015, Mr. Garren wrote to Parent offering three IEP dates in December 2015. The meeting would be held on the last date, December 8, 2015, if Parent did not confirm her attendance on any date.

47. On November 25, 2015, Ms. Watts wrote to Summer Dalessandro, counsel for District, to confirm Parent would not be available on IEP dates proposed by the District and that Parent did not consent to holding a meeting without her.

48. Student requested an IEP team meeting in six separate letters sent to various District employees, at varying locations. District should have held an IEP meeting by September 18, 2015, but, by that time, had not even proposed IEP meeting dates to Student. At hearing, District took the position that it needed to assess Student before a meaningful IEP meeting could be held. However, the need for assessments did not justify a delay in holding the IEP meeting. District again blamed Parent for not agreeing to meeting dates. By the time of the instant hearing, an IEP meeting still had not been held.

49. There was no dispute between the parties that Student had refused all nonpublic school offers of placement since December 2013. With the exception of behavior services, at all times since the beginning of the 2015-2016 school year District had been ready, willing and able to implement the IEP of February 26, 2015, as amended, with the use of many District and non-District service providers until a new IEP could be developed. The lapse in behavior services was complicated by Parent's refusal to accept a nonpublic school placement. Had she done so, Student would have received behavior and other related services as part of his regular school day.

## LEGAL CONCLUSIONS

### *Introduction: Legal Framework under the IDEA<sup>5</sup>*

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1

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<sup>5</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

(2006)<sup>6</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, 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).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. § § 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

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<sup>6</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C) and (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 has the burden of proof on all issues.

#### PROCEDURAL VIOLATIONS

5. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483.) (*Target Range.*) Citing *Rowley, supra*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but determined that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Target Range, supra*, at 1484.) This principle was subsequently codified in the IDEA and Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) The Ninth Circuit Court of Appeals has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3; *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) The Ninth Circuit has also found that IDEA procedural errors may be held harmless. (*M.L. v. Fed. Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 652.)

#### MEANINGFUL PARENTAL PARTICIPATION

6. Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) (*Doug C.*) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP

team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way] (*Fuhrmann*).)

#### *EDUCATIONAL BENEFIT*

7. There is no one test for measuring the adequacy of educational benefit conferred under an IEP. (*Rowley, supra*, 458 U.S. at p. 202.) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities and achieve the goals of his IEP. (*Park, supra*, 464 F.3d at p. 1033.)

#### *Issue 1(a): Comparable Services*

8. Student contends his IEP called for nonpublic agency services provided outside of a school campus, either in the home or in a clinic. Student denies that any of his IEP called for placement in a nonpublic school. Further, Student contends District failed to offer comparable services upon his transfer into District in that District did not collaborate with Parent in selection of nonpublic agency providers, tried to change placement to a nonpublic school setting and did not actually *provide* any of the required nonpublic agency services to Student. District contends it made a comparable offer of nonpublic agency services in a reasonably timely manner, but that Parent insisted on using providers of her choice, which prevented implementation of Student's program.

#### TRANSFER WITHIN SAME SELPA

9. Where a special education student enrolls in a new school, in the same state, within the same school year, the receiving district must provide the child with a FAPE, including services comparable to those described in the IEP previously "in effect," in consultation with parents, until it either adopts the effective IEP or develops, adopts and implements a new IEP that is consistent with federal and state law. (*See*, 20 U.S.C. § 1414(d)(2)(C)(i)(I); 34 C.F.R. § 300.323(e).) The 9th Circuit has interpreted the phrase "in effect" to mean the last implemented IEP. (*A.M. v. Monrovia Unified School District*, 55 IDELR 215 (9th Cir. 2010).)

10. Consistent with 34 C.F.R. section 300.323(e), "the new public agency must take these steps within a reasonable period of time to avoid any undue interruption in the provision of required special education and related services." (*Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11).)

11. For Students transferring between districts within the same academic year, within the same SELPA, California law requires the receiving district to "continue, without

delay, to provide services comparable to those described in the existing approved individualized education program, unless the parent and local educational agency agree to develop, adopt and implement a new individualized education program that is consistent with federal and state law.” (Ed. Code, sec 56325, subd. (a)(2).)

12. Whether services provided by the new local educational agency are “comparable” to those provided by the former district depends on the circumstances. School districts are not required to precisely replicate a child’s prior placement. (*See Sterling A. v. Washoe County School Dist.* (D. Nev. 2008) 51 IDELR 152 (holding that a Nevada district could provide school-based services to a child with a cochlear implant who received home-based services from his former district).)

#### CHOICE OF PROVIDERS AND METHODOLOGY

13. The Supreme Court has noted that, “[t]he core of the [IDEA] ... is the cooperative process that it establishes between parents and schools.” (*Shaffer v Weast, supra*, 456 U.S. 56, 53.) However, a school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student’s needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*See, N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O’Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 503 F.Supp.2d 1206, 1216.) Nor must an IEP conform to a parent’s wishes to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an “education . . . designed according to the parents’ “desires.”], citing *Rowley, supra*, 458 U.S. at p. 207.)

14. 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 p. 209; *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.) The methodology used to implement an IEP is left to the school district's discretion so long as it meets a child’s needs and is reasonably calculated to provide some educational benefit to the child. (*See Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. at p. 208.)

#### LOCATION OF SERVICES

15. Special education and related services provided in the home or hospital are limited to those pupils who have been identified as individuals with exceptional needs... and for whom the IEP team recommends such instruction or services. (Cal. Code Regs., tit. 5, §3051.4, subd. (a).) When recommending placement for home instruction, the IEP team shall have the assessment information, a medical report from the attending physician or the report of the

psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. The report shall include a projected calendar date for the pupil's return to school. (Cal. Code Regs., tit. 5 § 3051.4, subd. (d).)

#### ANALYSIS OF ISSUE 1(A)

16. Parent did not demonstrate a denial of parental participation in terms of the placement and services offered by District upon Student's re-enrollment at Sunny Brae June 1, 2015. The effective IEP was developed while Student attended Learning Center, an independent charter school. Parent testified extensively about her attendance at the IEP team meetings, her input, and the various changes made to the IEP based upon her requests, and the IEP documents and other testimony supported this participation in the IEP development process.

17. Further, the lack of collaboration between Parent and District on service providers did not deny participation. Parents simply do not have the right to unilaterally determine what service providers a school district must put in place. Further, Student did not demonstrate that any of the rebuffed service providers or programs were inappropriate. Rather, District effectively demonstrated that the personnel used to research placement and service options were extensively trained and experienced in identifying special education needs in IEP and aligning those needs to appropriate service providers and an appropriate placement.

18. Parent, though deeply concerned about her son, did not effectively demonstrate that Student required a particular provider, in a particular location, or use of a particular methodology in order to receive educational benefit. Rather, the evidence showed that Student had received related services in a variety of settings while Student was on home/hospital instruction. Student's providers used a variety of behavioral techniques to help him access educational benefit, including applied behavioral analysis.

19. District persuasively demonstrated that it researched, conferred with and confirmed availability of the service providers offered to Student. Parent did not demonstrate that any of the providers were inadequately equipped or unqualified to provide services to Student. Rather, Parent's refusal to accept providers offered by District was based on past experience having no connection to circumstances that existed at the time of District's offer.

20. The weight of the evidence demonstrated that District offered services comparable to those identified in Student's effective IEP. Even Ms. Watts admitted when testifying that the services offered were comparable to those identified in the IEP in effect when Student transferred into District.

21. District's offer of specialized academic instruction through Carlson, a nonpublic school, by a credentialed special education teacher was also entirely appropriate.

Under the IDEA, District could have offered services of an appropriately credentialed District employee. District was not required to adopt Parent's chosen provider or even use a nonpublic school

22. Student's argument that he never consented to a change of the service model of specialized academic instruction from nonpublic agency to a nonpublic school carried no weight. First, the service model used to deliver the specialized academic instruction to Student while he awaited a nonpublic school placement was not Student's choice to make. Second, the weight of the evidence demonstrated that, consistent with California law, the California Department of Education does not allow provision of such services through a nonpublic agency. Ms. Watkins, Parent's preferred provider, was not certified by the Department of Education as either a nonpublic agency, or a nonpublic school.

23. Student did not persuasively demonstrate that his effective IEP only offered ongoing placement consisting of individual services to be received in the home or a clinic. To the contrary, the credible evidence conclusively showed that Student's psychiatric providers recommended nonpublic school placement after home/hospital instruction ended. Parent accepted nonpublic school placement identified in the IEP in effect at the time of his re-enrollment in District. At that time, home/hospital instruction had already ended. Further, Parent sought both special day classes and nonpublic school placement. Almanson, one of the offered nonpublic schools, had accepted Student but Parent, as of the time of hearing, had not agreed to this placement.

24. Based on all of the above, Student did not carry his burden of persuasion that District failed to offer comparable services to those offered by the Learning Center IEP as amended at the time of his transfer into the District.

*Issue 1(b): Prior Written Notice*

25. Parent contends District's failure to implement all services in Student's IEP and District's proposed change of placement required prior written notice. District contends it did not attempt to change placement and, in any event, prior written notice was not required when implementing comparable services to a transfer student.

26. Prior written notice must be given by the public agency to the parents of an individual with exceptional needs "upon initial referral for assessment, and a reasonable time before the public agency proposes to initiate or change, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child." (Ed. Code, § 56500.4, subd. (a); *See also* 20 U.S.C. 1415(b)(3) and (4) and (c)(1); 34 C.F.R. 300.503.)

27. The notice shall include a description of the action the school district proposes or refuses; an explanation of why the school district proposes or refuses to take the action; a description of each evaluation procedure, assessment, record or report used as a basis for the proposed or refused action; a statement that the parents have procedural safeguards; if the

notice is not an initial referral for evaluation, the procedure to obtain a copy of the procedural safeguards; sources the parents may contact to obtain assistance; a description of other options considered by the IEP team and the reason those options were rejected; and a description of the factors relevant to the school district's proposed or refused action. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.)

28. An IEP document can serve as prior written notice as long as the IEP contains the required content of appropriate notice. (71 Fed.Reg. 46691 (Aug. 14, 2006).) The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) When a failure to give proper prior written notice does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

#### ISSUE 1(B)(I): PRIOR WRITTEN NOTICE - IMPLEMENTATION

##### *ANALYSIS OF ISSUE I(B)(I)*

29. Student failed to meet his burden to establish that District did not implement services comparable to those in his IEP that was in effect at the time of his transfer into District. As such, the legal requirement to send prior written notice was not triggered.

#### ISSUE 1(B)(II): PRIOR WRITTEN NOTICE - CHANGE OF PLACEMENT

##### *ANALYSIS OF ISSUE I(B)(II)*

30. At the time of Student's transfer into District, the IEP in effect provided an interim placement of nonpublic agency services pending Parent's agreement to an appropriate nonpublic school placement. Briefly, those services consisted of one-on-one specialized academic instruction and related services in speech and language, vision therapy, occupational therapy, behavior services and counseling. The services were put in place to support Student, who was no longer on home/hospital referral, while an appropriate nonpublic school placement was located. District offered Almansor, Tobinworld, and Five Acres. Parent and Student were required to be interviewed by each placement and go through the application process. It was then up to the nonpublic school to accept Student. Once accepted, the District's IEP team would convene to identify the specific nonpublic school and determine what, if any, services were required to aid in the transition from the interim into the new school. Student had been advised of this process since it began, in December 2013. The process for District was the same as Learning Center.

31. For these reasons, the prior written notice requirement was not triggered, as District did not seek to change Student's placement.

*Issue 1(c)(i)-(iii): Convening IEP Team Meeting Within 30 Days of Written Request*

32. Parent contends District failed to hold an IEP team meeting within 30 days of her written request made in August 2015 and her repeated requests made in September and October 2015. District admits that it did not convene a timely IEP team meeting but contends this did not result in a denial of a FAPE.

33. When a parent requests an IEP team meeting to review an IEP, the meeting must be held within 30 days, “not counting days between the pupil’s regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the written request.” (Ed. Code, § 56343.5.)

34. The regulatory framework of the IDEA places an affirmative duty on agencies to include parents in the IEP process. (*Doug C.*, *supra*, 720 F.3d at p. 1043.) School districts are required to take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded an opportunity to participate, including providing ample notice and scheduling the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322(a).)

35. In *Doug C.*, a school district was faced with the choice of missing a procedural deadline or rescheduling the IEP to a date when parent could attend. Choosing form over substance, the district held the IEP meeting without parent. The district’s failure to reschedule the meeting amounted to the denial of a FAPE. (*See Doug C.*, *supra*, 720 F.3d 1038.) “[T]he IDEA, its implementing regulations, and our case law all emphasize the importance of parental involvement and advocacy, even when the parents’ preferences do not align with those of the educational agency.” (*See Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055.)

36. School districts cannot excuse their failure to satisfy the IDEA’s procedural requirements by blaming the parents. In *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, the school district committed a procedural violation by failing to ensure parental participation in the development of their child’s IEP. (960 F.2d 1479, 1485 (9th Cir. 1992), superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B).) The school district argued that the parents were at fault because “they left the IEP meeting, did not file a dissenting report,” and did not adequately communicate their concerns to the school district. (*Ibid.*) The court rejected the school district’s rationale, concluding that it had an affirmative duty to conduct a “meaningful meeting with the appropriate parties[,]” and that it failed to do so when it did not ensure parental participation in the development of the IEP. (*Ibid.*) It is counter to the IDEA’s purpose to penalize parents and their children for exercising the rights afforded to them under the IDEA. (*See* 20 U.S.C. § 1400(d)(1)(B) (explaining that one of the IDEA’s purposes is “to ensure that the rights of children with disabilities and parents of such children are protected”).

37. Student sent written requests for an IEP team meeting in August, September and November of 2015. The meeting should have occurred by September 18, 2015, 30 days

after District's first day of school. Student successfully demonstrated that District failed to properly respond to his request for an IEP meeting.

38. District's argument that it needed to assess Student before holding an IEP meeting was unpersuasive. Even if further information was needed to develop or revise the effective IEP, this did not excuse holding a meeting upon Student's request. District failed to offer any IEP dates until November 18, 2015.

39. As a practical matter, holding an IEP team meeting before September 18, 2015, would have allowed the parties to discuss placement issues, given Parent's interviews with and rejection of various nonpublic schools and request for information on District's special day classes.

40. For all of the foregoing reasons, Parent effectively demonstrated she was denied the opportunity to participate in a timely meeting with respect to the educational placement of Student, which resulted in a denial of a FAPE.

#### *Issue 2: Implementation*

41. Student contends that District denied him a FAPE because it did not offer *and provide* appropriate instruction and services when he transferred into District. District contends that, with minimal delay, it offered all services previously implemented in Student's operative IEP but that Parent refused services by providers selected by District.

42. Minor discrepancies between services provided by a school district and services called for by the IEP do not give rise to an IDEA violation. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 821.) Only a material failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) "A material failure occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP." (*Ibid.*) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*)

43. School districts have no duty to provide a FAPE to students by implementing a plan, rejected by parents. (*I.R. ex rel E.N. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164; *see also* 34 C.F.R. § 300.300(d)(3).)

#### ISSUE 2(A): FAILURE TO IMPLEMENT FROM JUNE 1, 2015 THROUGH OCTOBER 8, 2015

##### *(1) ONE-ON-ONE INSTRUCTION*

44. On June 18, 2015, District offered Student 10 hours per week of one-on-one specialized academic instruction/resource specialist program, by a credentialed special education teacher. Services were offered through Carlson Home Hospital's program, which provides individual teachers for independent instruction, apart from its provision of home/hospital services. Student did not dispute that this offer was consistent with his

operative IEP. He only argues that a different provider should have been offered. On that basis, Student failed to meet his burden of persuasion.

*(II) SPEECH AND LANGUAGE THERAPY AND (III) SOCIAL SKILLS*

45. On June 16, 2015, District offered 120 minutes of speech and language services through McRory Pediatrics. Because of the brief delay in obtaining a service provider, District also offered compensatory education of 120 minutes of speech and language services and 120 minutes of social skills services. Student does not deny that this offer comports with the IEP, only that another service provider should have been offered. Therefore District credibly demonstrated that it implemented the speech and language portion of Student's IEP.

*(IV) OCCUPATIONAL THERAPY AND (V) EDUCATIONALLY RELATED INTENSIVE COUNSELING*

46. In correspondence dated June 17, 2015, District offered occupational therapy for 60 minutes per week and educationally related intensive counseling services for 120 minutes per week through a nonpublic agency, Total Education Solutions. District also offered 120 minutes of occupational therapy and 240 minutes of counseling for compensatory education due to the minor "delay" in offering services.

47. Student's IEP does not specify particular providers are required to offer Student a FAPE. Student did not persuasively demonstrate that District failed to implement the occupational therapy and counseling services identified in his IEP. Parent's actions and unjustified refusal to accept District's proffered service providers resulted in significant delay in provision of services to Student.

**ISSUE 2(B)(I) AND (II): FAILURE TO IMPLEMENT BEHAVIOR SERVICES FROM AUGUST 1, 2015 THROUGH OCTOBER 8, 2015**

48. Student contends District failed to offer appropriate behavior services after the summer. District contends Parent would not accept any provider it offered.

49. The evidence showed a gap in service from August 28, 2015, through January 8, 2016, as Child Development Institute would not continue to provide behavior services in the home. District contacted several other agencies, which also declined to provide services in the home. Each of the providers indicated that services were meant to supplement a school program, in a structured environment. When District was finally able to contract, with California Psyche care, District offered compensatory education to make up for the lapse of services.

50. District's complete failure to offer behavior services over the course of several months constituted a material failure to implement the IEP. Behavior services were demonstrated to be an integral component of Student's IEP, especially in light of Student's

pending transfer into a nonpublic school setting. As such, Student successfully demonstrated that District materially failed to implement the IEP regarding provision of behavior services.

*Issue 3: Offer of a FAPE from June 1, 2015 through October 8, 2015*

51. Student contends, in his closing brief, that the allegations that he was substantively denied a FAPE in Issue 3 relate solely to the previously analyzed procedural claims in Issues 1 and 2. Since the ALJ previously considered alleged procedural denials for all of the services designated in Issue 3, in Issues 1 and 2, they will not be repeated here. The evidence established that District offered services in all areas designated in Issue 3, up to the time of the filing of the complaint, and even after that time, with the exception of behavioral services. To the extent Parent accepted those services, they were provided. However, as noted immediately above, District did not offer or provide Student with behavioral services from August 28, 2015 through October 8, 2015, and this constituted a substantive denial of a FAPE in this area. Student did not establish a substantive denial of a FAPE in any other areas.

## REMEDIES

1. A school district may be ordered to provide compensatory education to a pupil who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497 (*Puyallup*)). Compensatory education is an equitable remedy designed to “ensure that the student is appropriately educated within the meaning of the IDEA.” (*Ibid.*) There is no obligation to provide day-for-day compensation for time missed. The remedy of compensatory education depends on a “fact-specific analysis” of the individual circumstances of the case. (*Ibid.*) The court is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*Burlington, supra*, 471 U.S. at p. 369.) An award of reimbursement may be reduced if warranted by an analysis of the equities of the case. The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d at pp. 1496-1498.)

2. Student failed to establish by a preponderance of the evidence that District did not offer services comparable to his IEP in effect upon his transfer into District. The evidence demonstrated that Student refused offers of many services, thereby delaying implementation of his IEP. Further, there is no legal requirement that District reimburse Student for privately obtained services when he chose not to avail himself of services offered by District.

3. Student established by a preponderance of the evidence that District failed to hold a timely IEP meeting after Parent’s written request and that District materially failed to implement the IEP regarding provision of behavior services from August 28, 2015 through January 8, 2016, excluding Thanksgiving and winter breaks.

4. Student agreed that District's offer of 560 hours of behavior implementation intervention and 30 hours of behavior intervention development services would provide Student with a "substantial portion of the compensatory education hours that he is owed in the area of behavior." Parent believed the behavior services ceased the week before August 28, 2015. But District was not notified of the cessation of services immediately, and this must be considered in fashioning a fair and equitable remedy.

5. Student withdrew requests for reimbursement of privately obtained services, which had been recompensed through a different entity. In his case in chief, Student did proffer evidence of the billing rates of various private providers, who might be able to provide compensatory education services, if ordered. However, Student did not submit evidence of the need for these services in addition to the services District was continuing to offer, nor did he produce evidence of the number of hours he contends are needed to compensate him for District's violations. Student did submit argument on this subject in his closing brief, but argument is not evidence.

6. No evidence was presented regarding the compensatory services Petitioner needs in order to make up for the failure of District to hold an IEP meeting within 30 days after Parent's request. Petitioner has the burden of providing evidence as to an appropriate remedy. (*Parents of Student W v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489.)

7. Student argues that a prospective placement should be fashioned, using Student's current providers, to prepare Student as he may eventually transition to a nonpublic school placement. However, Student has not been in a school setting of any kind since December 20, 2013. Any argument that Student still needs individual services to transition to a nonpublic school setting has reached its expiration date.

8. Further, Student did not persuasively demonstrate his current educational needs. While he did demonstrate the need for a small, structured setting, outside of the home and in a school environment, he did not establish whether his needs could be met in a special day class or nonpublic school. The IEP team, therefore, must make this determination.

9. District sought consent for comprehensive assessments, and Parent eventually consented, which should provide a current base of knowledge of present levels of performance and areas of need in order to fashion appropriate goals; the type, frequency and duration of needed related services; behavior supports; accommodations; modifications and placement. With this information, the IEP team can meet to consider Student's placement and any transition services needed to aid in implementation of that placement. Without this kind of current information, development of any prospective placement would be akin to playing darts in the dark.

10. Further, Student claims additional compensatory hours are needed, which Student calculates through March 24, 2016, to account for time to implement the instant decision. These arguments fail on many fronts. Parent has not accepted most of the services District has offered, simply because she does not like the providers. She has not accepted a

nonpublic school placement, though she was provided with many referrals to nonpublic schools where Student could be placed since December 20, 2013. Neither has Parent located any other small, structured setting that can address Students significant behavior needs since that time, and continues to resist any placement other than home/hospital instruction. However, Student has not submitted the appropriate documentation for such a placement.

11. District continued to offer services to Student, comparable to his IEP, through the time of hearing. District persuasively demonstrated that its offers of compensatory education, made with its placement and services offers, remained open through the time of hearing. Any issues regarding the December 8, 2015 IEP offer were not made part of this hearing and are not considered here. Since Parent did not consent to the IEP, its contents are irrelevant to the determination of remedies.

12. The IDEA does not require compensatory education services to be awarded directly to a student, so staff training can be an appropriate remedy. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid.*) (*Student v. Reed Union School District* (Cal. SEA 2008) 52 IDELR 240 [109 LRP 22923; Cal.Ofc.Admin.Hrngs. Case No. 2008080580] [requiring training on predetermination and parental participation in IEP]; *Student v. San Diego Unified Sch. Dist.* (Cal. SEA 2005) 42 IDELR 249 [105 LRP 5069] [requiring training regarding pupil's medical condition and unique needs].)

## ORDER

1. District shall fund the following services through nonpublic agencies of its choosing:
  - a. 560 hours of behavior implementation intervention services;
  - b. 30 hours of behavior intervention development services;
  - c. Student must use these services by the end of the 2016 – 2017 school year, or the services will be deemed forfeited. District will provide make up services by this same end date, only for those services missed due to provider absence or Student illness, if such illness is reflected by a doctor's note.
  - d. These services shall not be provided if duplicative of any services already offered by District and accepted by Student.

2. District shall provide two hours of training to the special education staff at Sunny Brae regarding (1) the requirements for setting IEP team meetings upon parental request, whether verbal or written, and (2) interpreting IEP's for students who transfer into the district. The training shall focus on legal requirements, seeking input from District administration, and strategies for encouraging meaningful parent participation. The training shall be provided by District providers, or outside providers of District's choosing, and must be completed within 90 days of the date of this Decision. District shall send a copy of the sign in sheet from the training and a list of training topics covered to Student within 15 days after the training is completed.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issues 1(c) and 2(b); District prevailed on Issues 1(a), and (b); and 2(a); neither party prevailed on Issue 3(a) through (f).

#### RIGHT TO APPEAL

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

DATED: March 21, 2016

\_\_\_\_\_/s/  
COLE DALTON  
Administrative Law Judge  
Office of Administrative Hearings