

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SACRAMENTO CITY UNIFIED  
SCHOOL DISTRICT.

OAH Case No. 2015100577

**DECISION**

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 9, 2015, naming Sacramento City Unified School District.

Administrative Law Judge B. Andrea Miles heard this matter in Sacramento, California, on February 10, 17, 18, 22, 24, and 25, 2016.

Darlene Anderson, advocate, represented Student. Student's mother attended the hearing. Student attended the hearing on the day he testified.

Jessica T. Gasbarro, Attorney at Law, represented Sacramento City. Rebecca Bryant, Sacramento City's Special Education Director and Special Education Local Area Plan (SELPA) Director, attended the hearing on behalf of Sacramento City.

At their request, a continuance was granted on February 25, 2016 for the parties to file written closing arguments and the record remained open until March 14, 2016. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

**PROCEDURAL MATTERS**

On February 2, 2016, Administrative Law Judge Lisa Lunsford convened the first day of hearing in this matter. That same day, Ms. Bryant sent OAH Division Presiding

Administrative Law Judge Bob Varma, a prohibited ex parte communication regarding ALJ Lunsford's rulings during the hearing. On February 3, 2016, with ALJ Lunsford unaware of the ex parte communication, the hearing resumed. OAH served a Notice of Ex Parte Communication and a copy of the ex parte communication on the parties.

On the morning of February 4, 2016, prior to the commencement of the hearing, ALJ Lunsford was informed that there was a communication in the case that needed her attention. The matter was continued on the record until February 9, 2016. After reviewing the ex parte communication, ALJ Lunsford disqualified herself from hearing this matter. On February 5, 2016, the matter was reassigned to the undersigned ALJ.

On February 9, 2016, OAH provided the parties the opportunity to be heard concerning the ex parte communication. Subsequently, OAH held a hearing to allow Sacramento City to show cause as to why expenses should not be shifted from Student and OAH to Sacramento City, and why the facts should not be certified to Sacramento Superior Court for contempt proceedings.

On February 17, 2016, OAH ordered the shifting of costs from OAH to Sacramento City based on Ms. Bryant's prohibited ex parte communication. The order declined to certify the matter to Sacramento Superior Court for contempt proceedings.

The ALJ granted Student's request to strike the evidence, testimony, and rulings regarding evidence and testimony, which occurred on February 2, 3, and 4, 2016, from the record. On February 10, 2016, the evidentiary portion of the hearing started anew.

On the last day of the hearing, Mother appeared as a rebuttal witness. At the close of Sacramento City's cross-examination of Mother, Sacramento City made a motion to have the ALJ review Mother's testimony from February 2, 2016, which had been previously stricken from the record, for impeachment purposes. Sacramento City based its request on the belief that during rebuttal, Mother had provided contradictory testimony regarding when she rescinded consent for a functional behavior assessment of Student. The ALJ took the motion under submission. Sacramento City's motion is denied. Since the testimony from February 2, 3, and 4, 2016 was stricken from the record, it is no longer a part of the record and therefore cannot be used to impeach a witness.

## ISSUES<sup>1</sup>

*Issue One:* Did Sacramento City deny Student a free appropriate public education during the 2013-2014 school year beginning October 9, 2013, the 2014-2015 school year, and the 2015-2016 school year through the date of hearing, by failing to allow Student to attend his neighborhood school, which resulted in Student experiencing transportation issues that caused Student to be truant and tardy?

*Issue Two:* Did Sacramento City deny Student a FAPE during the 2014-2015 and 2015-2016 school years through the date of hearing by:

- a. failing to allow Student access to the general education curriculum in all core content areas;
- b. failing to develop and implement a behavior plan, thus preventing Student from participating in classroom activities and resulting in staff removing Student from class or in Student leaving class;
- c. failing to ensure the timely completion of agreed-upon independent psycho-educational and speech and language educational evaluations<sup>2</sup>;
- d. setting guidelines for the independent assessors which compromised the independence of the December 2015 independent psycho-educational and speech and language evaluations;
- e. failing to change Student's placement from a learning disabled classroom to a special day class with language emphasis during the 2015-2016 school year until January 1, 2016;<sup>3</sup>

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<sup>1</sup> The ALJ has reframed the issues for clarity. The issues as outlined in this Decision are the only issues heard and decided. The ALJ has the authority to redefine a party's issues providing no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

<sup>2</sup> An "assessment" in California law is the same as an "evaluation" in federal law. (Ed. Code, § 56303.) This decision will use the term "assessment" since that is the common usage in California, except when referring to a federal statute or independent educational evaluations.

<sup>3</sup> Although the Prehearing Conference Order used the term "communication-based classroom" in Issue 2 (e), it was evident during the hearing that this terminology was incorrect. Student was not referencing a communication-based classroom, but a special day class with language emphasis. Throughout the hearing, both parties presented evidence that focused on placement in a special day class with language emphasis, not on a communication-based classroom. Additionally, in its closing brief, Sacramento City focused

- f. fostering a hostile environment in Student's classroom; and
- g. implementing the computer programs iLearn and System 44, which was not part of Student's operative individualized education program?<sup>4</sup>

*Issue Three:* During the 2014-2015 and 2015-2016 school years through the date of hearing, did Sacramento City deny Student a FAPE by failing to implement his operative IEP?

### SUMMARY OF DECISION

The primary issue in this case revolves around whether Student's behavior in class impeded his ability to learn during the 2014-2015 and 2015-2016 school years through the date of hearing. This Decision holds that Sacramento City denied Student a FAPE during the 2014-2015 school year beginning in late November 2014, and the 2015-2016 school year through the date of because it failed to develop and implement a behavior support plan for Student. This failure caused Student's maladaptive behaviors to impede his learning thus causing him to miss specialized academic instruction. In this case, Sacramento City's failure to provide Student with all of the specialized academic instruction his IEP required constituted a material failure to implement Student's operative IEP and resulted in a denial of a FAPE during the 2014-2015 school year beginning in late November 2014, and the 2015-2016 school year until January 4, 2016.

As a result of those violations, this Decision orders Sacramento City to provide Student with a functional behavior assessment from a Board Certified Behavior Analyst of Parent's choice who is not employed by Sacramento City. In addition to the assessment, if the assessor determines Student requires behavior supports, the assessor will develop a behavior support plan or behavior intervention plan and recommend appropriate behavior

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its argument on placement in a special day class with language emphasis. Therefore, this Decision decides the issue of whether Sacramento city denied Student a FAPE during the 2015-2016 school year until January 1, 2016 by failing to change Student's placement from a learning disabled special day class to a special day class with language emphasis.

<sup>4</sup> Although Issue 2 (g), as outlined in the Order Following Prehearing Conference, did not specify the computer program System 44 as part of the methodology Student was challenging, it was evident during the hearing that Ms. Anderson and Mother were confused on the names of the computer based programs that Sacramento City implemented in Student's special day class at Sam Brannan. In her complaint, Mother did not specify the names of the computer programs that she believed to be at issue. Both Student and District elicited testimony about the computer programs iLearn and System 44 as methods of instruction during the hearing and included argument regarding them in their closing briefs. Thus, this Decision analyzes the use of System 44 as a form of instructional methodology.

services for Student going forward. Sacramento City is ordered to hold an IEP team meeting when the assessment is completed.

This Decision does not award Student compensatory educational services as a remedy. Student failed to present any evidence supporting the type, amount and frequency of any compensatory remedies, despite being ordered to do so prior to the hearing, Additionally, California Department of Education (CDE) previously ordered Sacramento City to provide Student with 100 hours of academic tutoring services based on its own findings. CDE based its findings on an investigation into Student's allegations of a failure to provide Student with a behavior plan and failure to implement Student's operative IEP.

Student did not meet his burden on all other allegations in this case, so Sacramento City prevailed on the remaining issues.

## FACTUAL FINDINGS

### *Jurisdiction*

1. Student is a 14-year-old boy who resided with his mother and four siblings within the geographical boundaries of Sacramento City Unified School District at all times relevant to this case. Since 2009, Student has continuously lived at the same home address.

2. Student qualified for special education services under the eligibility categories of specific learning disability and speech and language impairment. Sacramento City originally found Student eligible for special education in November 2007.

### *2013-2014 School Year*

#### SCHOOL OF RESIDENCE

3. During the 2013-2014 school year, Student attended sixth grade at Martin Luther King Jr. Elementary School. Martin Luther King Jr. was Student's designated school of residence.<sup>5</sup> Student's April 19, 2013 IEP did not provide Student with transportation to and from school. Usually Mother walked Student to and from school, since Student lived within walking distance of Martin Luther King.

4. At times during the school year, Student was several minutes late to school. It is unclear how many times Student was late to school, all of the reasons Student was late to

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<sup>5</sup> During the hearing, the terms "home school" and "neighborhood school" were used to describe Student's school of residence.

school, and whether Student missed any class time as a result. At least some of the time, Student was late because Mother experienced difficulties getting Student and his siblings ready for school on time.

#### PLACEMENT, SERVICES, AND ACADEMICS

5. During the 2013-2014 school year, Student attended a learning disabled special day class, where he received 360 minutes of specialized academic instruction per day. Student also received 30 minutes of speech and language services 10 times a year both in in the special day class and in a separate classroom.

6. During the 2013-2014 school year, Student performed academically below grade level, which was part of the reason Sacramento City placed Student in a special day class. The special day class's curriculum was designed to help Student work towards grade level standards. That school year, Student made progress working towards the sixth grade standards. However, at the end of the year, Student was performing academically at a 2nd or 3rd grade level.

#### BEHAVIOR

7. Student did not exhibit negative or aggressive behaviors towards his sixth grade special day class teacher, Kristen Van Tuyl, nor did Student exhibit maladaptive behaviors while in Ms. Van Tuyl's class. Ms. Van Tuyl used a weekly written behavior chart to track Student's behavior<sup>6</sup>, which she sent home weekly for Mother's review. Student did not have a behavior intervention plan as part of his IEP.

#### *April 10, 2014 IEP*

8. On April 10, 2014, Sacramento City held an IEP team meeting to discuss Student's continued eligibility for special education. At the meeting, the IEP team determined that Student continued to qualify for special education under the primary category of specific learning disability and the secondary category of speech and language impairment. Student had severe deficits in oral expression, reading comprehension, written expression, listening comprehension, and mathematics reasoning, which directly related to Student's auditory and visual processing disorders and cognitive abilities.

#### PLACEMENT

9. During the meeting, the IEP team discussed Student's transition to middle school for the 2014-2015 school year. After reviewing the classroom data regarding Student's progress, the recent assessments, and Student's progress on IEP goals, the IEP

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<sup>6</sup> The evidence was unclear as to whether Ms. Van Tuyl maintained behavior charts for other student in the case.

team, including Mother, determined that a learning disabled special day class continued to be the appropriate setting for Student because he required a highly structured setting due to his disabilities and inability to access the general education core curriculum successfully.

10. The IEP stated that Student would not participate in the general education academic core curriculum because Student required a highly structured setting due to his disabilities. The IEP designated that Student would spend 80 percent of his time outside general education and 20 percent of his time in general education, including extracurricular and non-academic activities. The evidence at hearing supported this determination, as Student was functioning at least three to four years below grade level at the time.

#### ACADEMIC AND SPEECH AND LANGUAGE GOALS

11. The IEP offered Student three new academic goals in the areas of writing, reading comprehension, and comprehension of words. Additionally, the IEP offered Student a speech and language goal in the area of expressive language. Student demonstrated difficulty accurately producing sentences. The IEP speech and language goal required Student to use simple and compound sentences to express complete thoughts with 80 percent accuracy in four out of five trials when given a topic selected by Student or his teacher.<sup>7</sup>

#### ACCOMMODATIONS AND MODIFICATIONS

12. The IEP provided accommodations and modification to support Student's access to core curriculum in general education classes. The IEP specified that grade level assignments were to be scaffolded and shortened. Student was to be provided with highlighted textbooks as needed, textbooks on compact disc as needed, manipulatives for math and science, and adult support.

13. The IEP contained strategies related to organization and behavior in the form of preferential seating, short breaks between assignments, and use of an assignment notebook planner. However, the IEP did not contain a positive behavior support plan.

14. The IEP contained strategies related to instruction and grading. The instructor was to repeat and rephrase instructions, check for Student's understanding, provide Student with extended time to completed assignments, grade based on essential standards, and consider Student's speech patterns for oral fluency. The IEP provided accommodations for Student during testing situations. During in-class tests, the instructor was to read classroom math tests aloud for Student.

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<sup>7</sup> This Decision does not address the appropriateness of the June 10, 2014 IEP's goal as that was not pled as an issue in this case.

15. Additionally, the IEP contained the modification of the use of “out of grade” intervention curriculum for remediation materials for instruction purposes. Modifications alter or lower the standards and expectations of course standards and testing.

#### SERVICES

16. The IEP offered Student 360 minutes of specialized academic instruction daily in a learning disabled classroom. The IEP also offered Student 27, 30 minute sessions of individual and group speech and language services in either Student’s special day class or in a separate classroom.

17. The IEP offered Student academic services for the 2014 extended school year during the summer break. During the extended school year, Student was to receive 240 minutes of specialized academic instruction four times a week and 30 minutes of speech and language services each week.

18. On April 29, 2014, the April 10, 2014 IEP was amended to include the service of transportation to and from school for Student. The IEP was amended to include transportation because Mother was concerned about Student’s safety walking to and from school. Mother consented the April 10, 2014 IEP, as amended on April 29, 2014. That IEP remained the operative IEP throughout the periods relevant to this case.

#### *2014-2015 School Year*

#### IMPLEMENTATION OF STUDENT’S IEP

##### *ACADEMICS*

19. During the 2014-2015 school year, Student attended the seventh grade at Sam Brannan Middle School, where Student was placed in a learning disabled special day class. Sam Brannan was his school of residence for middle school. Jonathan Andrew, a credentialed special education teacher, taught the special day class. Michael Trotter, an instructional assistant, assisted Mr. Andrew in the instruction of the class.

20. Student’s class schedule was composed of a special education math class, a special education math intervention class, a special education English Skills class, a special education reading intervention class, a general education physical education, and a general education elective. Student received the support of either Mr. Andrew or Mr. Trotter in his general education classes.

21. At the beginning of the year, Mr. Andrew conducted a diagnostic assessment of Student’s math and English skills using the computer programs, iPass and System 44. The assessments were designed to help Mr. Andrew determine Student’s skill level and help him determine the level of intervention Student needed. The results of the assessments indicated that Student was at the beginning level for both subjects.

22. Student required remediation instruction in both math and English language arts. Student was unable to participate in general education math and English language arts due to being unable to access the general education core curriculum successfully. As such, remedial instruction needed to be provided in those areas so that Student could access the core curriculum and work towards meeting grade level standards.

23. Mr. Andrew also utilized the computer program, System 44, as part of Student's English language arts instruction throughout the school year. The program was in alignment with California state standards and approved by California Department of Education for remedial English language arts instruction. System 44 helped Student work towards grade level standards in English language arts while continuously monitoring his progress. Student worked both independently and with assistance with System 44. Mr. Andrew also used the English Composition textbook, Globe Fearon, as part of Student's instruction in English.

24. Mr. Andrew and Mr. Trotter used iPass,<sup>8</sup> an online math course, which was in alignment with California state standards and approved by California Department of Education as a form of remedial instruction as part of Student's mathematic instruction. The program continually assessed Student's math skills and helped Student work towards meeting grade level standards. As part of Student's instruction in math, Mr. Andrew used the skills remediation kit that was part of general education math series. For math, Student received whole group and individualized instruction. Student received assistance from both Mr. Andrew and Mr. Trotter while working individually.

25. Sacramento City did not provide Student with instruction in the area of social science, which was a part of the 7th grade core curriculum. However, Student's IEP, as indicated above, stated that he would not participate in the general education academic core curriculum because Student required a highly structured setting due to his disabilities.

26. The evidence shows that Sacramento City implemented the academic goals, accommodations, modifications, services, and placement from Student's operative IEP in both Student's special day classes and general education classes.

#### *SPEECH AND LANGUAGE*

27. The June 10, 2014 IEP called for Student to receive 27, 30 minute sessions of individual and group speech and language services to be provided both in the special education day class and in a separate classroom. The evidence shows that Sacramento City provided Student with speech and language services as specified per his operative IEP.

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<sup>8</sup> The iPass program is part of the iLearn program. The two terms were used interchangeably during the hearing.

28. During Student's weekly speech and language sessions, Philip Dea, a speech and language pathologist with Sacramento City, worked with Student on achieving his speech and language IEP goals. Student successfully met his speech and language IEP goal during the school year.

#### *TRANSPORTATION*

29. Student did not present any evidence that Student was truant from school during the 2014-2015 school year due to transportation issues. At times, Student was late to school by several minutes due to the school bus's delayed arrival. However, it is unclear how many times this occurred and whether Student missed any instructional time because of the delayed school bus. At no point was Student subjected to disciplinary measures for being late to school due to the bus's late arrival.

#### STUDENT'S BEHAVIORAL NEEDS

30. Throughout the 2014-2015 school year, Student exhibited maladaptive behaviors in his special day class. For example, Student refused to follow directions, talked during instruction time, used profanity in class, left the classroom without permission, and argued with instructional staff and other Students. He used his maladaptive behaviors to avoid undesirable tasks and as an attempt to gain standing with his fellow students.

31. After Student returned from Thanksgiving break, his maladaptive behaviors escalated. As Student's maladaptive behaviors escalated, the instructors would send him out of class or Student would choose to take time-outs outside of the classroom. Student received 21 behavioral referrals during the school year. Each time Student was sent to the office due to a behavioral incident, a Detailed Behavioral Incident Report was recorded in the school's computer system.

32. Mother began coming to the classroom to assist in dealing with Student's maladaptive behaviors when notified of them. She visited Student's class at least 20 times during the school year. When Mother or other adults who were not part of the classroom's instructional staff were present in the classroom, Student's behavior would improve and he would stay on task.

33. Mr. Andrew tried various behavioral intervention techniques to curtail Student's off-task behaviors, such as, redirecting him, remaining in the proximity of Student, seating him away from distractions, praising him for positive behavior, letting him take breaks, giving him warnings, taking away preferred activities, and lunch detention. However, none of the behavioral interventions Mr. Andrew tried had a positive effect on Student's maladaptive behaviors. According to Mr. Andrew, even when Student was present in class he was exhibiting off-task behaviors.

34. Neither party presented any evidence as to whether Student experienced behavioral problems in his general education classes. It can be inferred from the evidence that Student did not, as none Student's behavioral referrals were from Student's general education classes.

35. Student missed instructional time by being absent from class, failing to pay attention, and engaging in arguments with classmates and instructional staff. The evidence did not quantify this missed time, but it did show that Student missed considerable amounts of valuable specialized academic instructional minutes regularly when he was absent from class and off-task in class.

#### IEP TEAM MEETINGS

##### *JANUARY 28, 2015 IEP TEAM MEETING*

36. On January 28, 2015, Sacramento City held an IEP team meeting. Although Sacramento City asserts in its closing brief that the meeting was held to address Student's behaviors, the record is unclear as to the purpose of the meeting. While testifying, Mr. Andrew could not remember the reason Student's annual IEP team meeting, which was not due to be completed until April 9, 2015, was held at the end of January. Additionally, the IEP team meeting notes from the January 28, 2015 meeting only state that the purpose of the meeting was have the annual review of Student's IEP.

37. During the meeting, Mother addressed her concerns that the instructional staff was not treating Student fairly in his special day class. The IEP team discussed Student's academic performance. Student performed academically at a lower level, except in the areas of math calculation and basic reading. The IEP team did not conduct a complete IEP team meeting because the IEP team adjourned the meeting at Mother's request.

##### *MARCH 11, 2015 IEP TEAM MEETING*

38. On March 11, 2015, the IEP team met to continue Student's annual IEP team meeting. During the meeting, Mother expressed her dissatisfaction over the quality of instruction and supervision in Student's special day class. During the meeting, Mr. Andrew, became frustrated because he felt Mother was attacking him. The school principal, Dr. Al Rogers decided that it was not productive or "healthy" to have Mr. Andrew remain at the meeting, so he excused Mr. Andrew from the remainder of the meeting.

39. Dr. Rogers facilitated the remainder of the meeting in Mr. Andrew's absence. Mother expressed her concerns that Student was experiencing difficulty maintaining his attention level in class and that it was negatively impacting Student's academic performance. Dr. Rogers informed Mother that Sacramento City would provide her with a proposed assessment plan to address her concerns about Student's potential attentional issues. The IEP team adjourned the meeting again, without completing the IEP.

40. At some point after the IEP team meeting, Mr. Andrew contacted Jackie Glasper, one of Sacramento City's special education program specialists, to ask for her assistance at the next IEP team meeting. Ms. Glasper agreed to provide her assistance. At that point, she became Mother's point of contact and the facilitator of Student's IEP team meetings.

#### ASSESSMENT PLANS

##### *APRIL 9, 2015 ASSESSMENT PLAN*

41. Attentional problems can result in a student not staying on task and not following directions. Because of the concerns Mother shared with the IEP team, Sacramento City determined that an assessment would be conducted to assess Student's psychological processing in regards to attention.

42. On April 9, 2015, Ms. Glasper provided Mother with the above referenced assessment plan. The assessments were to be completed by one of Sacramento City's school psychologists. Mother signed the assessment plan the same day, however, this assessment was never completed.

##### *MAY 11, 2015 ASSESSMENT PLAN*

43. At some point in May 2015, Mr. Andrew recommended to Sacramento City that a positive behavior support plan be developed to address Student's maladaptive behaviors in class. Mother had notified Sacramento City that she believed that Student needed a one-to-one aide in class to support him with academics and behavior. Although no evidence was presented as to when that notification occurred. As such, on May 11, 2015, Ms. Glasper generated a second assessment plan for Student. The assessment plan proposed conducting a functional behavior assessment of Student and an assessment to determine whether Student required one-to-one aide support in class. Mother consented to the assessment plan on May 29, 2015.

##### *JUNE 4, 2015 ASSESSMENT PLAN*

44. On June 4, 2015, Rebecca Bryant, Sacramento City's special education director and SELPA director, met with Mother and Ms. Anderson to gain clarity about the assessments that Mother was requesting. Mother has five children, including Student, who receive special education services from Sacramento City. Mother had submitted written assessment requests to Sacramento City that addressed several of her children in the same request and used confusing terminology.<sup>9</sup> In at least one of her requests, Mother expressed her disagreement with the results of the psychoeducational assessment, academic assessment,

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<sup>9</sup> Neither party presented any evidence regarding the content of those written assessment requests or the dates of those requests.

and speech and language assessment of Student that Sacramento City had previously conducted and requested independent education evaluations in those areas.

45. Prior to the meeting, Ms. Bryant created a third assessment plan for Student that contained the assessments that she believed Mother was requesting. The proposed assessment plan included a functional behavior assessment<sup>10</sup> and an Educationally Related Mental Health Services assessment to be conducted by Sacramento City; and a speech and language assessment, an academic assessment and a psychoeducational assessment,<sup>11</sup> to be conducted by independent assessors.

46. Upon meeting with Mother and Ms. Anderson, Ms. Bryant realized that Mother was not requesting an Educationally Related Mental Health Services Assessment for Student. As such, Ms. Bryant indicated on the assessment plan form that Mother was rescinding her request for the Educationally Related Mental Health Assessment. Mother consented to the rest of the assessment plan. During the meeting, Mother withdrew her consent to the attentional assessment from the April 9, 2015 assessment plan, which she had previously given.

47. As part of the third assessment plan, Sacramento City agreed to fund independent psychoeducational and educational evaluations within the SELPA's independent evaluation guidelines.<sup>12</sup> The SELPA guidelines contained information on the criteria for conducting such evaluations, including cost, qualifications, and geographic location. Ms. Bryant provided Mother with the guidelines and the list of qualified assessors who satisfied the guideline's criteria, along with the assessors' contact information.

48. Mother picked Dr. Mary Gwaltney, a licensed educational psychologist, to conduct the psychoeducational and academic assessments and the agency, Jabbergym, to conduct the speech and language assessment.<sup>13</sup> Subsequent to the June 4, 2015 meeting,

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<sup>10</sup> Ms. Bryant included the functional behavior assessment in the third assessment plan even though Mother had already consented to that assessment as part of the May 11, 2015 assessment plan.

<sup>11</sup> The assessment plan indicates that Student's "psycho-motor development" would be assessed. A psychoeducational assessment encompasses a psycho-motor assessment.

<sup>12</sup> SELPAs are consortiums of school districts and county offices that are located within geographical regions of sufficient size and scope to provide for all special education service needs of children residing within the region boundaries. Sacramento City is a single district SELPA. Each SELPA is reasonable for developing a local plan describing how it would provide special education services, including funding independent education evaluations.

<sup>13</sup> Throughout the remainder of this Decision the academic and psychoeducational assessment are referred to collectively as the psychoeducational assessment.

Ms. Bryant learned that Dr. Gwaltney was not assessing children during the summer break. Ms. Bryant informed Mother that Dr. Gwaltney would not be available during the summer break<sup>14</sup> and that she knew another psychologist who would be available sooner. However, Mother elected not to change assessors because Dr. Gwaltney's office was located in Sacramento. The available psychologist's office was located in another city and Mother was concerned about being able to transport Student to the assessment.

49. In August 2015, Sacramento City contracted with Dr. Gwaltney to conduct Student's independent psychoeducational assessment. During the hearing, Ms. Bryant had difficulty remembering whether she formed a contract with Jabbergym during the summer break or when school resumed in August 2015. Ms. Bryant did not provide Dr. Gwaltney or Jabbergym with any guidelines or restrictions regarding the manner in which to conduct the assessments or the conclusions to reach.

#### FUNCTIONAL BEHAVIOR ASSESSMENT

50. Based on the May 11, 2015 assessment plan, Sacramento City assigned Jason Burke, a behavioral intervention specialist with Sacramento City, to conduct the functional behavior assessment. Before the conclusion of the 2014-2015 school year, Sacramento City began observing Student to collect data regarding Student's behavior in class. Mr. Burke, Selicia Fletcher, another of Sacramento City's behaviorists, and a behavior aide worked together to collect the behavioral data on Student.

51. A functional behavior assessment is an analytical process based on observations, review of records, interviews, and data analysis to determine the function the maladaptive behavior serves for the student, how that function can be met more appropriately, and how the environment can be altered to better support general positive behaviors from the student.

52. Part of the reason for conducting the functional behavior assessment was to use the findings to create a behavior intervention plan for Student. A behavior intervention plan describes the behaviors impeding a student's learning and the environmental factors influencing those behaviors, and provides interventions or supports to avoid or modify the behaviors. A functional behavior assessment is not required to create a behavior intervention plan, but it can assist a behaviorist in creating one. Once the IEP team approves a behavior intervention plan for a student, and the parent consents to the behavior intervention plan, it becomes a part of Student's IEP.

53. Behaviorists use behavioral data to determine the antecedent to a maladaptive behavior, the function of the maladaptive behavior, and the consequence to the behavior.

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<sup>14</sup> Sacramento City's summer break began June 11, 2015 and continued through September 3, 2015.

After analyzing the data, the behaviorist can then develop a plan to help avoid the maladaptive behaviors and to develop replacement behaviors that allow the student properly to communicate his needs.

54. Sacramento City had not collected enough behavioral data by the end of the 2014-2015 school year to be able to complete a functional behavior assessment. Mr. Burke intended to complete his assessment during the following school year. However, Sacramento City did not complete the functional behavior assessment because Mother withdrew her consent to the assessment.

55. The testimony regarding the period in which Mother withdrew her consent the IEP is in conflict. Mother first testified that she withdrew her consent to the functional behavioral assessment prior to the September 18, 2015 IEP team meeting. Subsequently, Mr. Burke testified that Mother withdrew her consent to the functional behavior assessment during the September 18, 2015 IEP team meeting because Mother and Ms. Anderson felt they already knew the antecedents to Student's maladaptive behaviors.

56. After Mr. Burke testified, Mother changed her testimony to conform to Mr. Burke's testimony. This is not to say that Mother was attempting to mislead anyone, far more likely Mother was simply confused about the timeline, and was mistaken about her memory of events. Throughout the hearing, Mother experienced difficulty remembering the timeline of various events and understanding the difference between the various types of assessments that were being offered for Student.

57. Ms. Glasper testified that Mother withdrew her consent to the functional behavior assessment prior to September 18, 2015. The IEP team notes from the September 18, 2015 IEP team meeting support Ms. Glasper's testimony. Ms. Glasper authored the IEP notes contemporaneous in time to the IEP team meeting. As such, with the support of Ms. Glasper's testimony, those notes provide a more accurate depiction of the events. Thus, the evidence shows that Mother withdrew her consent to the functional behavior prior to the September 18, 2015 IEP meeting. However, the evidence is unclear as to exact date on which Mother withdrew her consent.

### *First Half of 2015-2016 School Year at Sam Brannan*

#### IMPLEMENTATION OF STUDENT'S IEP

##### *ACADEMICS*

58. On September 3, 2015, the beginning of the 2015-2016 school year, Student was placed in a learning disabled special day class at Sam Brannan under the operative IEP. Sam Brannan continued to be Student's school of residence during that school year.

59. Mr. Andrew and Mr. Trotter continued to provide instruction to the special day class students. There, Student received instruction in the areas of English language arts,

mathematics, social science, and study skills. Student was mainstreamed into a general education class for Spanish and physical education, where he received support from either Mr. Andrew or Mr. Trotter according to his IEP.

60. During the first half of the 2015-2016 school year, the special day class provided Student with individualized and group instruction to help Student work towards the goals listed in his operative IEP. Mr. Andrew continued to utilize the iPass and System 44 on-line programs as remedial aids for instruction Student in the areas of mathematics and English language arts.

61. During the first half of the 2015-2016 school year, Sacramento City failed to provide Student with the all the minutes of specialized academic instruction designated in Student's operative IEP due to Student's behavioral issues. Student's behavioral issues caused him to be absent from the classroom or disengaged from the instruction, thus preventing Student from receiving the requisite specialized academic instruction minutes. However, Student did not present any evidence that Student's academic goals were not implemented during that time period.

62. As with the previous school year, Student did not present any evidence to show that Sacramento City did not implement the accommodations and modifications listed in Student's operative IEP. The evidence shows that Sacramento City continued to implement the accommodations and modifications from Student's IEP in Student's special day class and general education classes.

#### *SPEECH AND LANGUAGE SERVICES*

63. Mr. Dea continued to provide Student with speech and language therapy one time a week for 30 minutes, per the operative IEP and continued to work with Student on his expressive language skills. However, Student had met his speech and language goal from the operative IEP. Based on concerns shared during IEP meetings, prior testing of Student, and Mr. Dea's observations of Student, Mr. Dea created new speech and language goals for Student, which he proposed at the IEP team meeting on September 18, 2015.

64. Mr. Dea felt new goals in the areas of auditory processing and social skills would benefit Student. Mr. Dea believed that Student needed a behavior mapping goal to help Student improve his social skills. Although Mother never provided consent to implement the goal, Mr. Dea began working with Student on the new goal he had designed.

#### *TRANSPORTATION*

65. The operative IEP provided Student with transportation to and from school. However, during the first week of the 2015-2016 school year, Sacramento City did not provide Student with transportation due to an administrative error. On Student's behalf, Ms. Anderson notified Sacramento City regarding the problem. Sacramento City rectified the issue and provided Student with transportation for the remainder of the 2015-2016 school

year. During the first week of school, Student utilized the services of public transportation and his aunt to get to and from school. Neither party presented evidence that Student missed any instructional time due to lack of transportation during that first week.

#### STUDENT'S BEHAVIORAL NEEDS

66. During the 2015-2016 school year Student continued to experience the same types of maladaptive behaviors as during the previous school year, although to a lesser degree. Student's maladaptive behaviors disrupted the class and impeded Student's learning. At the beginning of the school year, Mr. Andrew and Mr. Trotter repeatedly sent Student out of class when he exhibited disruptive behaviors. However, at some unknown date, Sam Brannan's new principal, Enrique Flores, stopped that practice. He took the position that Student should remain in the classroom rather than being removed when he misbehaved. Instead, Mr. Flores would go to the classroom and sit in on the class. When Mr. Flores was present in the classroom, Student's maladaptive behaviors stopped.

67. Besides exhibiting disruptive behaviors, Student would "zone-out" during instruction and delay in completing his work. Mr. Andrew and Mr. Trotter would prompt Student to begin his work. Generally, in those instances, Student would respond to prompting and redirecting, but at times he would continue his task avoidance.

68. Although Student had fewer documented behavioral incidents during the first half of the 2014-2015 school year than in the same period of the previous year, he still exhibited maladaptive behaviors that impeded his ability to learn. Mr. Andrew continued to use the same types of behavioral interventions he had employed during the previous school year, but the interventions were not effective and did not meet Student's behavioral needs.

69. Neither party presented any evidence or argument that Student exhibited maladaptive behaviors in his general education classes. Student's behavioral issues were confined to the special day class.

#### SEPTEMBER 18, 2015 IEP TEAM MEETING

70. On September 18, 2015, Sacramento City again reconvened Student's annual IEP team meeting, which had been pending since January 2015. In response to Mother's revocation of consent for the functional behavior assessment, Mr. Burke suggested that he conduct what he termed a behavior intervention plan assessment. That assessment would have been similar to a functional behavior assessment, but instead of focusing on determining the antecedent behavior, the assessment would focus on looking at effective replacement behaviors for Student's avoidant behaviors. Mother declined the offered assessment, but asked that Mr. Burke observe Student in the special day class.

71. The IEP team did not complete the meeting because Mother and Ms. Anderson indicated that they wanted to wait to complete the IEP meeting until the independent psychoeducational, speech and language assessments were completed, and the IEP team could review it.

#### OCTOBER 28, 2015 IEP TEAM MEETING

72. Student's IEP team met on October 28, 2015 to review the one-to-one aide assessment, which Sacramento City conducted. Lauren Anderberg and Kathleen Augusta, inclusion specialists with Sacramento City, conducted the assessment.

73. As part of the assessment, the assessors observed Student in his special day class and general education classes on four separate days, starting in May 2015. Student completed most tasks as directed with minimal additional prompting. The assessors did observe that Student became easily distracted and at time "zoned-out" during instruction. Mr. Andrew reported to the assessors that Student was able to follow directions during instructional time and follow school rules unless he was in a "negative" mood.

74. Although, the assessors did not find that Student required additional adult support during the school day, Ms. Anderberg strongly recommended to the IEP team that the IEP team create and implement a "functional behavior plan." Ms. Anderson expressed her belief that a behavior plan could not be successfully implemented in the special day class because of Mr. Andrew's negative relationship with Student. The IEP team, including Mr. Andrew, talked about strategies for better implementing the supports that were already a part of Student's operative IEP.

75. Mr. Burke told the IEP team that he believed that Student required additional behavior supports in the classroom. Mr. Burke again recommended that a behavior intervention plan assessment be conducted. Although he had permission to observe Student in class, he was unable to collect the data necessary for an assessment because Mother had not consented to the assessment.

76. Mr. Burke recommended the use of a token economy as a positive behavior support for Student. In a token economy, Student would earn privileges or items for exhibiting positive, on-task behavior. The use of a token economy is not limited to special education, it can also be utilized with general education students. Mother expressed her concerns that Student would not be receiving enough behavioral support prior to the completion of the assessment and the creating of the behavior intervention plan. Mr. Burke agreed to work with Mr. Andrew and the principal on implementing positive behavior supports for the entire special day class. Subsequently, Mr. Burke provided Mr. Andrew with some suggestions for generalized positive behavior supports for the entire class. Mother consented to the behavior intervention plan assessment.

77. The IEP team did not complete the meeting because Mother and Ms. Anderson maintained the position that the independent assessments needed to be completed and

reviewed by the IEP team before goals were developed and placement and services were determined. At the time of the meeting, Dr. Gwaltney had not yet completed Student's independent psychoeducational assessment.

#### JABBERGYM'S SPEECH AND LANGUAGE ASSESSMENT

78. Lisa Bohrer, a speech and language pathologist with Jabbergy, conducted the assessment of Student in September and October 2015. The assessment materials Ms. Bohrer used for the assessment were validated for the specific purpose for which they were used and the assessor considered the results of the testing valid. Student did not present any evidence that Sacramento City influenced Ms. Bohrer's test results or recommendations in any way.

79. The results of the testing indicated that Student's receptive and expressive language skills were below average. The testing also showed that Student had a severe deficit in language memory. Language memory is a student's ability to recall and follow spoken direction, generate a sentence given one or two target words, and interpret sentences that make comparisons or describe location, time, or ordinal relationships.

80. Ms. Bohrer recommended that Student continue receiving speech and language services addressing both receptive and expressive tasks. She recommended that Student receive a minimum of 30 minutes weekly of speech and language therapy to address his receptive and expressive deficits and 20 minutes six times a year for Student's speech and language therapist to consult with Student's teacher regarding Student's needs in the classroom. Ms. Bohrer also proposed two speech and language goals to address Student's speech and language deficits.

#### DR. GWALTNEY'S PSYCHOEDUCATIONAL ASSESSMENT

81. Dr. Gwaltney's assessment consisted of interviews of Mother and Mr. Andrew, standardized testing, records review, and observation of Student. Dr. Gwaltney evaluated Student's adaptive behavior, cognitive ability, educational achievement, emotional and behavioral functioning, psychological processing, and social functioning. As part of the assessment, Mother asked Dr. Gwaltney to determine whether Student may be eligible for special education services under the category of autism.

82. Dr. Gwaltney detailed her finding and recommendations in an extremely thorough and compelling psychoeducational written report. She finished her report in mid-December 2015, prior to the December 14, 2015 IEP team meeting.

83. As current special education law prohibits school districts from conducting IQ testing of African-American students, Dr. Gwaltney used other measures to determine Student's cognitive functioning. Previous cognitive testing from 2008, 2011, and 2014

indicated that Student's overall learning ability was well below average. The 2014 cognitive testing indicated that Student's test scores placed him in the borderline or mild intellectual disability range.

84. During the course of four testing session, Dr. Gwaltney found that Student demonstrated significant difficulties understanding test questions and standardized instructions. Based on the information available to Dr. Gwaltney, including the testing that she conducted, Dr. Gwaltney concluded that Student had been demonstrating delays in his problem solving and cognitive reasoning skills for "many years." Dr. Gwaltney determined that Student's cognitive reasoning skills were similar to that of a 10 or 11-year-old student. She noted that during the testing, Student used a "tough image" to "save face" when he had difficulty with the testing.

85. Dr. Gwaltney assessed Student's ability to process information. The testing measured Student's processing speed including automaticity, rapid decision making, rapid naming, and written output. Student demonstrated average speed for processing information when the additional skills of reasoning and judgment were not required.

86. Since 2007, Student has been diagnosed with expressive and receptive language processing deficits. As part of her assessment, Dr. Gwaltney reviewed the recent independent speech and language evaluation conducted by Jabbergym. The speech and language assessment found that Student had "severed deficits in language memory." These deficits increased Student's difficulty in understanding instructions and academic information. Student's test scores in that area suggest that Student comprehends incoming information at the level of a seven or eight-year-old child.

87. Dr. Gwaltney assessed Student's visual processing and memory. Visual processing is a skill that allows us to take information in through our eyes, retain and organize the information, and make sense of that visual information. This includes the perception of visual-spatial or three-dimensional information that may require visualization skills. Since 2008, Student has been identified as having a visual processing deficit. Dr. Gwaltney found that Student's visual perceptual skills were in the average range, but that he had significant difficulty using his visual working memory. The testing showed that Student was experiencing significant challenges with memory storage and retrieval.

88. Dr. Gwaltney assessed Student's sensorimotor functioning. Often in school, the visual and auditory information students perceive must be translated into a written product. An integration of a student's cognitive and perceptual skills must be integrated in order to complete that function. Dr. Gwaltney asked Student to write about a favorite game and to provide three reasons for liking the game. Although Student completed the required task, he had difficulty. Student's handwriting, although legible was immature for his age. Additionally, his writing was not grammatically correct and was confusing to read.

89. During the assessment, Dr. Gwaltney assessed Student's memory processing skills through her own testing of Student and through her review of Sacramento City's prior

testing of Student. Memory processing refers to a student's ability to store and retrieve information efficiently. Student demonstrated significant delays in his visual and verbal memory in both short and long-term situations.

90. In order to assess Student's social-emotional functioning and to assess the possibility that Student has autism spectrum disorder, Dr. Gwaltney utilized the Behavior Assessment System for Children (BASC). The BASC is designed to identify emotional and behavioral problems in children that are significantly different from the average population of children. As part of the BASC, Mother and Mr. Andrew completed questionnaires. Dr. Gwaltney then interpreted their answers within the BASC's rating scales to assess Student's social and emotional functioning. Mother identified a significant number of developmental differences in Student's early childhood that are indicative of Student having autism spectrum disorder.

91. Mother's and Mr. Andrew's responses regarding Student's social skills were generally consistent with each other. Both filled out the Autism Probability questionnaire, which is part of the BASC. Mother's responses did not place Student in the elevated range while Mr. Andrew's responses placed Student in the at risk category for Autism. However, Mother's responses indicated that Student had problems in the areas of social recognition, social communication, and social motivation. The results of the BASC indicated that Student has social skill deficits.

92. Student's test results in the areas of perspective taking and theory of the mind were lower than those of an average seven-year-old child. Testing indicated that although Student appeared to understand other people's feelings, he struggles to read facial expressions and understand his contribution to social relationships. Ultimately, Dr. Gwaltney reached the conclusion that Student presented primarily with social and pragmatic deficits and that his deficits required remediation, but that Student did not meet the eligibility criteria for special education under the category of autism.

93. Dr. Gwaltney assessed Student's attention and executive functioning. Attention is a person's ability to attend to perceptual information in a systematic or intentional manner. Student has a previous medical diagnosis of Attention Deficit Hyperactivity Disorder from his doctor. That diagnosis is consistent with Dr. Gwaltney's findings. The testing revealed that Student was able to direct his attention, but demonstrated significant and severe sustained attention deficits. Student struggles to shift his attention from one thing to another.

94. Executive function is the ability to keep behaviors in line with goals, sustaining attention, inhibiting irrelevant actions, maintaining information in memory for action, organizing thinking, using strategies when learning, and knowing when to use learning strategies. The assessment showed that Student's executive function was low for his age.

95. As part of the psychoeducational assessment, Dr. Gwaltney assessed Student's academic achievement using a standardized test, the Wechsler Individual Achievement Test, 3rd Edition. The Wechsler measured Student's performance in the areas of reading, writing, and math compared to children of his same age or intellectual ability. The test showed that basic math calculation was one of Student's strengths. However, Student's math word problem solving skills were at the level of a 2nd grader due to his language and abstract reasoning skill deficits.

96. Student's overall score for writing placed him in the 2nd percentile or at the level of a 2nd grade student. When asked to write a multiple paragraph essay on a preferred subject, Student wrote a single paragraph composed of one run-on sentence. Student's paragraph contained simple vocabulary, poor grammar, and capitalization mid-sentence. Dr. Gwaltney found that Student's written expression skills mirrored his oral expression skills.

97. In the area of reading and decoding speed, Student tested far below his grade level. Student tested at a 1st grade level in the areas of decoding single words and reading comprehension. Student tested at a 3rd grade level for decoding of sight words. When asked to read a passage aloud, Student read quickly and inaccurately. Student's reading of language was low for his age. Student's performance on the Wechsler in the area of reading was consistent with Mr. Andrew's reporting of Student's performance in class.

98. Although Student was nearly 14 years old at the time of the assessment, the assessment showed that the majority of his cognitive processing and academic skills were at the level of child between the ages of seven to 10 years. Dr. Gwaltney found that Student requires more help and support than he is comfortable requesting and that some of his behavioral refusals and off-task behaviors were an effort to "save face" when he was having difficulty understanding. This adaptive behavior combined with his extreme difficulty reading facial expressions and interpreting social messages causes Student to react defensively.

99. Based on review of Student's prior assessments, available medical records, observations, testing, and interviews, Dr. Gwaltney reached the conclusion that Student fit the special education eligibility categories of intellectual disability and other health impairment. Dr. Gwaltney did not believe that Student fit the eligibility category of specific learning disability. Although Student demonstrated difficulty in most areas of processing and academics, Dr. Gwaltney believed Student's processing difficulties were the primary result of his intellectual disability. Additionally, a severe discrepancy between Student's ability and academic performance did not exist.

100. Dr. Gwaltney found that Student met the special education criteria for other health impairment on the basis that Student's Attention Deficit Hyperactivity Disorder adversely affected Student's educational performance. Student's prior medical diagnosis, testing scores, and behavior in class supports Dr. Gwaltney's conclusion.

101. Dr. Gwaltney found that academic instruction in the areas of English language arts, science, and history need to be provided to Student at a 1st or 2nd grade level and that instruction in the area of mathematics need to be provided to Student at a 3rd grade level. Dr. Gwaltney's opinion that Student should be placed in a special day class was supported by the results of her assessment. She believed that if Student was mainstreamed into non-core general education classes that he required modified grading, positive behavior supports, and potentially a one-to-one aide.

102. Dr. Gwaltney also indicated in her report that Student required an effective behavior support plan to address his refusal behaviors in special day class. She also opined that in order to address Student's needs that he may require direct instruction in social skills social communication, and behavior problem solving may be required for Student.

#### DECEMBER 14, 2015 IEP TEAM MEETING

103. On December 14, 2015, Sacramento City held an IEP team meeting. The purpose of the meeting was to review the independent psychoeducational and speech and language assessments, the proposed behavior plan, and to complete the annual review of Student's IEP.

104. Ms. Bohrer reviewed the findings of her speech and language assessment. She recommended that Student continue receiving speech and language therapy to address both his receptive and expressive language deficits. She recommended a minimum of 30 minutes per week of speech and language therapy and six, 20 minute consultations between the speech and language therapist and Student's classroom teachers.

105. Due to Student's difficulty processing verbal instructions, Student benefits from repetition of material and visual cues when given directions. Ms. Bohrer recommended the use of a visual organizer for note taking and daily assignments, receiving class notes prior to instruction on a subject, handouts containing new vocabulary for lessons, the use of visual aids, and the use of written directions.

106. Dr. Gwaltney presented her comprehensive psychoeducational assessment of Student to the IEP team. Dr. Gwaltney stressed to the IEP team that Student was cognitively functioning at the level of a nine or 10 year old with the processing abilities of a seven or eight-year-old child and Student's academic skills were that of a 1st or 2nd grader. As such, Student would have difficulty accessing and participating in the general education curriculum, even with modifications and accommodations.

107. Due to Student's below average cognitive abilities and limited academic skills, Dr. Gwaltney thought that Student's IEP goals should not focus on preparing Student for college, but instead on developing his functional living skills. Dr. Gwaltney thought that the goals in the operative IEP were written to grade level standards and that Student functions at a much lower level. She believed that Student's eligibility category needed to be addressed and that Student's entire IEP needed to be revamped to better address Student's needs.

Dr. Gwaltney expressed her opinion that the IEP team should find Student eligible under the category of intellectual disability and not under the category of specific learning disability.

108. Mother and Ms. Anderson expressed their concerns about the IEP team changing Student special education eligibility category of intellectually disabled. Even after Dr. Gwaltney repeatedly explained that her testing did not support a finding of autism, Mother continued to believe that Student was autistic. Ultimately, Mother did not agree to the IEP, so Student's primary eligibility category remained as specific learning disability.

109. Dr. Gwaltney's opinion, which is compelling and supported by the evidence, was that Student should not receive grade level instruction because that level of instruction was too difficult for Student. Student's academic IEP goals should focus on no higher than a 3rd grade level of instruction.

110. The team discussed potential IEP goals for Student. The IEP team agreed that Student should have goals in the area of executive functioning, functional math, decoding and reading at a third grade level, and writing with a focus on grammar conventions. The IEP team also discussed adding a goal in the area of reciprocal communication, which addressed proper eye contact and appropriate communication. However, the IEP team did not form the goals during the meeting, based on Dr. Gwaltney's recommendation. After a discussion of Student's needs, the IEP team agreed that Student's placement needed to be changed. Dr. Gwaltney recommended and the IEP team, including Mother, agreed that an IEP team meeting should be convened after Student's change in placement, so that the staff members at Student's new placement could participate in the discussion regarding goals.

111. The IEP team discussed several placement options for Student. The IEP team discussed the benefits and deficits in placing Student in a moderate to severe, intellectually disabled, special day class. Ms. Anderson expressed her opinion that Student would not want to be placed in an intellectually disabled special day class because of his negative feelings towards special education. She believed that Student should be placed in a mild to moderate special day class with additional adult support. The team discussed this concern and determined that Student's needs could be met in the less restrictive environment of a mild to moderate, special day class with a language emphasis.

112. The IEP team chose to offer placement of Student in a special day class with a language emphasis at Sutter Middle School, which would provide him a language enriched environment and would address his executive processing deficits. Although the academics in the class still focused on grade level standards, the curriculum could be modified to meet Student's needs. Dr. Gwaltney suggested that Sacramento City continue to mainstream Student into a general education elective due to Student's reluctance to be a part of special education.

113. The IEP team decided to provide Student with a one-to-one aide to assist Student in his transition into his new placement at Sutter, which was scheduled to begin on January 4, 2016, after the winter break. After Student was in his new placement, Sacramento

City would conduct an assessment to determine whether Student required a permanent one-to-one aide. The IEP team agreed to revisit the subject of one-to-one aide support after Sacramento City completed its assessment.

114. Although Dr. Gwaltney found that the Student did not meet the eligibility criteria for specific learning disability, Student has auditory, visual, and language processing deficits. Those types of deficits were addressed in Student's learning disabled special day class. Dr. Gwaltney's concern was that the learning disabled special day class's curriculum focused on grade level standards and Student needed to be placed in a class with a curriculum that focused on functional skills. However, Dr. Gwaltney did not disagree with the other members of the IEP team in placing Student in the special day class with a language emphasis, a class that also focused on grade level standards.

115. The special day class with language emphasis provided students with a language-rich environment. Student would benefit from that type of environment due to his language deficits. However, Student did not provide evidence that his previous placement in the learning disabled special day class did not provide him with some educational benefit. Student did not establish that he did not make some academic progress in that class.

116. During the IEP team meeting, Mr. Burke presented the proposed behavior intervention plan that he had created for Student. Mr. Burke found that Student's verbal aggression, non-compliance, and off-task behaviors were impeding Student's learning and that the need for a behavior intervention plan was moderate to serious. He found that the time spent on discipline limited Student's access to the core curriculum.

117. Mr. Burke and his team were unable to identify the predictors for Student's maladapted behaviors. However, Mr. Burke and his team believed that the purpose of the maladaptive behaviors was to gain attention from Student's peers and escaping lesser preferred academic tasks and social situations. Nothing contained in the behavior intervention assessment provided any new information regarding Student's behaviors for the IEP team to consider. Most of the behavioral supports contained in the behavior intervention plan were very general and could have been used with any student.

118. The IEP team did not complete Student's IEP during the meeting and the IEP team continued the meeting to a later date. In an email subsequent to the meeting, Mother consented to the change in placement to the mild to moderate, special day class with a language emphasis at Sutter. Mother never provided consent to the behavior plan Sacramento City proposed.

*Second Half of the 2015-2016 School Year at Sutter Middle School*

119. On January 4, 2016, Student began attending the special day class with a language emphasis at Sutter Middle School. At Sutter, Student was mainstreamed into a

general education elective and general education physical education. From January 4, 2016, through the time of the hearing, Student received one-to-one aide support in both his special day class and his general education classes.

120. Sutter is not Student's school of residence, however, Sacramento City provides Student transportation to and from school. Student did not present any evidence that Student has been tardy to or absent from school at Sutter due to experiencing transportation issues.

121. Aaron Fajardo, Student's special day class teacher at Sutter, uses a modified 8th grade curriculum to teach Student. The special day class focuses on teaching students vocabulary at the beginning of each lesson in order to assist those student's with receptive language deficits. The class's slower pace assists students with receptive processing delays.

122. Student has not exhibited any maladaptive behavioral since beginning at Sutter. At the time of the hearing, the IEP team had not reconvened to complete Student's IEP nor had Mother consented to the proposed behavioral intervention plan. However, Mr. Fajardo and the classroom aides use positive behavioral supports with the entire class, including Student. Students receive praise and incentive for exhibiting positive behaviors in class. Mr. Fajardo and Student have established a positive relationship, which has had a positive effect on Student's behavior.

#### *California Department of Education Complaint*

123. Mother filed a complaint with the CDE in June 2015. The complaint contained four allegations against Sacramento City. Two of the CDE complaint's allegations are similar to the issues Student pleads in this case. CDE found Sacramento City out of compliance based on those two allegations and a third unrelated allegation and ordered that Sacramento City provide Student with 100 hours of tutoring to compensate Student. Prior to the start of the hearing, Sacramento City began providing Student with the tutoring ordered by CDE.

124. Student's first allegation alleged that Sacramento City failed to ensure that the IEP team considered the use of positive behavioral interventions, supports, and other strategies to address Student's behavior that impeded his learning and the learning of others. CDE found Sacramento City out of compliance based on its investigation of this allegation.

125. Student's second allegation alleged a failure to implement Student's operative IEP during the 2014-2015 school year based on the theory that Student was out of the classroom due to Student exhibiting behavioral issues. CDE found Sacramento failed to implement Student's operative IEP for all services during the 2014-2015 school year. However, CDE's investigation report failed to provide the reasoning for reaching this finding and merely referred back to the findings of fact that were listed for the first allegation. Those findings of fact focused on the failure to complete an IEP meeting and failing to establish behavioral supports.

126. Although the CDE investigation report was received into evidence, little weight has been given to CDE's findings, as the extent of the CDE investigation is unknown.<sup>15</sup> Student chose not to call the CDE investigator, who investigated the case, to testify regarding the investigation. The report itself does not provide a detailed analysis as to how the investigator reached the conclusions nor the source points of the evidence used to reach the factual findings.

## LEGAL CONCLUSIONS

### *Introduction: Legal Framework Under the IDEA*<sup>16</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>17</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called

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<sup>15</sup> This investigation report is administrative hearsay that supplements and explains Mother's and Ms. Anderson's testimony. CDE's findings are not binding on OAH, although they may be entitled to some weight. (See, *People v. Sims* (1982) 32 Cal.3d 468, 479; *Student v. Los Angeles Unified School Dist.* (2009) Cal.Offc.Admin.Hrngs. Case No. 2009010712 (Order Granting Motion to Dismiss); *Student v. Bellflower Unified School Dist.* (2007) Cal.Offc.Admin.Hrngs Case No. 2005110764; *Student v. San Diego Unified School Dist.* (2004) Special Education Hearing Office Case No. 2739.)

<sup>16</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>17</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

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

*Issue 1: Did Sacramento City Deny Student a FAPE by Failing to Allow Student to Attend His Neighborhood School?*

5. Student contends that Sacramento City denied him a FAPE during the 2013-2014 school year beginning October 9, 2013, the 2014-2015 school year, and the 2015-2016 school year through the date of hearing, by failing to allow Student to attend his neighborhood school, which caused Student to be truant and tardy. However, Student has not argued or provided any proof that, during the time periods in question, Mother requested that Sacramento City place Student at a school located closer to Student's home or that there was another school closer to Student's home.

6. Sacramento City contends that during the 2013-2014 school year, the 2014-2015 school year, and the first half of the 2015-2016 school year that Student attended his school of residence. Sacramento City also argues that Student did not provide proof that he was tardy or truant to school once Student's placement was changed to Sutter Middle School, which is not Student's neighborhood school. The evidence supports Sacramento City's contentions.

7. California Education Code section 35160.5, subdivision (b), permits parents to indicate a preference for the school which their child will attend, without regard to the child's place of residence within the district, and requires the district to honor this parental preference if the school has sufficient capacity without displacing other currently enrolled students. In determining the educational placement for a child with a disability, a school district is charged with ensuring that the placement is as close as possible to the child's home. Unless the child's IEP requires another arrangement, the child is to be educated in the school that he or she would attend if non-disabled. (34 C.F.R. § 300.116(b)(3), (c).)

8. As referenced above, in providing a FAPE a school district must determine whether a student requires related services in order to receive a FAPE. Transportation services are a form of related services. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].)

9. A district must provide transportation only if a student with a disability requires it to benefit from special education. (20 U.S.C § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, §§ 56342, subd. (a) & 56363, subd. (a).) The IDEA requires transportation of a special education student only to address a student's educational needs, not to accommodate a parent's convenience or preference.

10. The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) transportation in and around school buildings; and (iii) specialized equipment (such as adapted buses, lifts, and ramps), if required to provide transportation for a student with a disability. (34 C.F.R. § 300.34(c)(16).) The IDEA does not explicitly define transportation as door-to-door services. Decisions regarding such services are left to the discretion of the IEP team. (71 Fed. Reg. 46576 (August 14, 2006).)

#### 2013-2014 SCHOOL YEAR

11. Student attended sixth grade, during the 2013-2014 school year, at Martin Luther King Jr. Elementary School, which was Student's neighborhood school and within walking distance to Student's home. Student failed to present any evidence that he required transportation to Martin Luther King Jr. in order to avoid being truant or tardy. Additionally, Student did not present any evidence showing that another elementary school was closer to Student's home. Thus, Sacramento City did not deny Student a FAPE during the 2013-2014 school year by failing to allow Student to attend his neighborhood school.

#### 2014-2015 SCHOOL YEAR

12. Student attended the seventh grade, during the 2014-2014 school year, at Sam Brannan Middle School. Despite the fact that Sam Brannan was Student's neighborhood school for middle school, Student's April 10, 2014 IEP was amended on April 29, 2014 to provide Student transportation to and from school. Student did not present any evidence that he experienced transportation issues that caused to him to be truant. Student presented some evidence that he was tardy to school at times because the school bus was late to arrive to school, but did not prove how many times this happened or that there were any adverse consequences of the tardiness, such as discipline. Nor did Student present any evidence indicating that Student's tardiness caused him to miss instructional time. For all of these reasons, Student failed to prove that Sacramento City denied Student a FAPE by failing to allow Student to attend his neighborhood school during this period.

#### 2015-2016 SCHOOL YEAR

13. During the 2015-2016 school year, Student attended the first half of eighth grade at Sam Brannan. As in the prior school year, Sam Brannan was Student's neighborhood school. Therefore, Sacramento City did not deny Student a FAPE from the beginning of the 2015-2016 school year until January 4, 2016, by failing to allow Student to attend his neighborhood school.

14. On January 4, 2016, with Mother's consent, Sacramento City placed Student at Sutter Middle School. Sutter Middle School was not Student's neighborhood school, so Sacramento City provided Student with transportation to and from Sutter. Student did not provide any evidence that Student was ever tardy or absent due to transportation issues while attending Sutter. Therefore, Student has failed to meet his burden of proving that during the 2015-2016 school year, beginning January 4, 2016 through the date of the hearing, that Sacramento City denied Student a FAPE by failing to allow Student to attend his neighborhood school.

*Issue 2: Did Sacramento City Deny Student a FAPE During the 2014-2015 School Year and the 2015-2016 School Year Through the Date of Hearing?*

A. ALLOWING STUDENT ACCESS TO THE GENERAL EDUCATION CURRICULUM

15. Student contends that Sacramento City denied him a FAPE by not allowing him access to the general curriculum in all core content areas during the 2014-2015 and 2015-2016 school years. Student bases his contention on the theory that the instructional materials used in his classes at Sam Brannan were not the same as those used to teach Student's typically developing peers in the general education classes. Student never made any such argument regarding the instructional materials used at Sutter. Sacramento City contends that it provided Student access to the general education curriculum in all core areas because his IEP goals were tied to the general education state standards and Student's classroom instruction was a modified general education curriculum.

16. Student's operative IEP specified that Student could not participate in the general education core curriculum due to his disabilities and that he was unable to access the general education core curriculum successfully. Student's special day class at Sam Brannan utilized remediation and intervention instructional materials to help Student work towards grade level standards in English language arts and mathematics. The curriculum presented to Student in the areas of English language arts and mathematics was not at grade level because Student's academic skills were below grade level and he would not have been able to access grade level curriculum. Dr. Gwaltney's testimony supports the finding that Student's cognitive functioning level prevented him from accessing the grade level general education curriculum in all core areas. Her testimony established that Student needed to be taught at a much lower grade level due to his cognitive deficits.

17. Although Sacramento City did not present evidence to address directly the reason Student was not provided access the core subject of social science during his 7th grade year, Student did not prove that Student would have been able to successfully access the general education curriculum in all core areas including social science. Student failed to meet his burden of proving by a preponderance of the evidence that Sacramento City denied Student a FAPE during the 2014-2015 school year and the 2015-2016 school year through the date of hearing by failing to allow Student access to the general education curriculum in all core content areas.

B. DEVELOPING AND IMPLEMENTING A BEHAVIOR PLAN

18. Student argues that Sacramento City denied Student a FAPE during the 2014-2015 school year beginning October 9, 2015, and the 2015-2016 school year through January 4, 2016 by failing to develop and implement a behavior plan. Student further argues that this failure prevented Student from participating in classroom instruction and resulted in his removal from class by staff or voluntarily. Student's argument only focused on the regular

school year when Student attended Sam Brannan. Sacramento City argues that it attempted to develop and implement a behavior plan for Student, but Mother's failure to consent to the necessary assessments prevented Sacramento City from doing so.

19. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) & (b); Ed. Code, § 56341.1, subd. (b)(1).) It is the intent of the Legislature that children with serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions. (Ed. Code, § 56520, subd. (b)(1).) An IEP that does not appropriately address behaviors that impede a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029 (*Neosha R-V*); *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.)

#### 2014-2015 SCHOOL YEAR

20. The evidence clearly shows that Student's behavior deteriorated and began impeding his learning after the 2014 Thanksgiving break. Student's teacher attempted to implement his own informal behavior plan for Student, which included allowing Student to take a break outside of the classroom. However, Student's teacher's attempts were unsuccessful and Student's maladaptive behaviors continued to impede his learning.

21. Generally, when Student became disruptive during class by arguing with peers and instructional staff, or interpreting during instruction, the day class instructional staff attempted to rectify the problem by sending Student out of class. Student's repeated absences from class cause him to miss valuable instructional minutes. Although it is not clear exactly how many times Student was absent from class due to behavioral issues, it is known that he was absent at least 21 times during the 2014-2015 school year. Additionally, even while Student was present in class, his maladaptive behaviors caused him to fail to attend to the classroom instruction.

22. Student's maladaptive behaviors were a form of task avoidance. More specifically, Student was acting out in order to prevent others from becoming aware of his difficulties with the class work due to his processing and cognitive deficits. Sacramento City argues that it was not responsible for providing Student with a behavior plan because it was prevented from providing Student with a behavior plan because Mother refused to consent to the assessments necessary to create such a plan. Sacramento City's argument is not compelling. Sacramento City waited over five months to offer Student a behavior assessment. During those five months, Student's behavior continued to impede his learning.

23. Once Sacramento City became aware that Student's behavior was impeding his learning, it was obligated to convene an IEP meeting to consider strategies, including positive behavioral interventions, and support to address Student's maladaptive behaviors.

Nothing prevented Sacramento City from convening an IEP team meeting and including some interim behavioral supports in Student's IEP, to address Student's behavior issues until Sacramento City could complete a functional behavior assessment.

24. Sacramento City argues that Mother's failure to consent to behavior assessments prevented Sacramento City from providing Student with a behavior plan. This argument is not persuasive. If Sacramento City truly believed that it could not create an appropriate behavior plan for Student without completing some form of behavior assessment, Sacramento City could have filed a complaint with OAH to compel Mother to allow Sacramento City to assess Student. In the meantime, nothing prevented Sacramento City from proposing a behavior plan in an IEP and then seeking an order allowing it to implement the plan without parental consent. (See *I.L. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) \_\_ F.3d \_\_, \_\_.)

25. Student needed behavioral supports in his IEP in order for the IEP to provide a FAPE. Accordingly, Sacramento City denied Student a FAPE during the 2014-2015 school year, beginning in late November 2015, by failing to develop and implement a behavior plan for Student.

*2015-2016 SCHOOL YEAR THROUGH DATE OF HEARING*

26. Although Student had fewer documented behavioral incidents during the first half of the 2015-2016 school year, he still exhibited maladaptive behaviors that impeded his learning. Mr. Andrew continued to use the same types of informal behavioral interventions he had employed during the previous school year, but the interventions were not very effective and did not meet Student's behavioral needs. Mr. Burke, Sacramento City's behaviorist, established that Student needed a behavior plan as part of his IEP to address his maladaptive behaviors during the 2015-2016 school year.

27. Sacramento City argues that Mother's revocation of her consent to the functional behavior assessment and her delay in consenting to the behavior intervention plan assessment, prevented Sacramento City from providing Student with a behavior plan. As discussed above, nothing prevented Sacramento City from filing for hearing to seek permission to do the functional behavioral assessment without parental consent nor did Sacramento City file for a due process hearing to ask to be allowed to implement a behavioral plan absent parental consent.

28. Although Student has not exhibited any maladaptive behaviors in his new placement, this is most likely due to Mr. Fajardo's implementation of his own classroom positive behavior support plan. However, removal of those behavior supports could cause Student to resume exhibiting maladaptive behaviors. Many events could occur which could result in Mr. Fajardo no longer acting as Student's teacher, or in a loss of the current rapport between the two. Student's IEP should therefore contain a behavior support plan. Mr. Burke's testimony supported this finding, as he was clear that Student requires a

behavior support plan as part of his IEP. For this reason and those stated above, Sacramento City denied Student a FAPE during the 2015-2016 school year through the date of hearing, by failing to develop and implement a behavior support plan for Student.

### C. ENSURING TIMELY COMPLETION OF INDEPENDENT EDUCATIONAL EVALUATIONS

29. Student argues that the delay in completing the independent psychoeducational and speech and language assessments constituted an unnecessary delay thereby denying Student a FAPE. Sacramento City contends that the delay in the completion of the independent psychoeducational and speech and language assessments did not constitute an unnecessary delay, as the delay was not the fault of Sacramento City.

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

31. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent education evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

32. The term “unnecessary delay” as used in 34 C.F.R. § 300.502(b)(2) is not defined in the regulations. Whether a district’s delay is unnecessary within the meaning of the regulation is a fact-specific inquiry. Many decisions have found delays shorter than the delay in this matter unnecessary. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289, p. 3, for example, the court determined that the school district unnecessarily delayed filing its due process request because it waited almost three months to do so. (See also *Taylor v. District of Columbia* (D.D.C. 2011) 770 F.Supp.2d 105, 107-108, 111 [four month delay unnecessary]; *Student v. Temecula Valley Unified School Dist.* (OAH, Jan. 14, 2013, No. 2012020458 [four- and-one-half month delay unnecessary]; *Student v. Los Angeles Unified School Dist.* (OAH, Dec. 14, 2012, No. 2012090139 [70 day delay unnecessary]; *Student v. Los Angeles Unified School Dist.* (OAH, July 7, 2011, No. 2011020188) [90-day delay unnecessary]; *Lafayette School Dist. v. Student* (OAH, July 1, 2009, No. 2008120161) [74-day delay unnecessary]; *Fremont Unified School Dist. v. Student* (OAH, June 1, 2009, No. 2009040633) [four month delay unnecessary];

*Student v. Los Angeles Unified School Dist.* (OAH, June 20, 2007, No. 2006120420 [64-day delay unnecessary]; cf. *H.S. v. San Jose Unified School Dist.* (N.D.Cal. May 6, 2013, No. C 12-06358 SI) 2013 WL 1891398, pp. 2-4 [seven month delay unnecessary].)

33. At some point in the late spring of 2015, Mother requested independent evaluations. However, Sacramento City was uncertain as to what assessments Mother was requesting. Only after meeting with Mother on June 4, 2015, approximately one week before the end of the 2014-2015 school year, did Sacramento City have notice that Mother was requesting a psychoeducational and speech and language assessment. Sacramento City immediately agreed to fund the requested independent evaluations.

34. Mother independently chose the assessors for both evaluations. Jabbergym completed Student's speech and language evaluation at some point during October 2015. Dr. Gwaltney completed Student's comprehensive independent psychoeducational assessment (including its academic component) in mid-December 2015. As soon as Dr. Gwaltney's independent evaluation was completed, Sacramento City convened an IEP team reviewed both assessments. Although, the IEP team could have reviewed the speech and language assessment prior to December 14, 2015, Mother requested to wait until the psychoeducational assessment was complete to reconvene the annual IEP team meeting and complete Student's IEP.

35. The delay in completing the independent psychoeducational assessment was due to the unavailability of Student's requested assessor. Mother and Ms. Anderson were aware that Dr. Gwaltney was not available during the summer break to assess Student, however, they elected to wait for Dr. Gwaltney to become available. Once the 2015-2016 school year started, Dr. Gwaltney began her assessment of Student, which took several months to complete due to the comprehensive and thorough nature of Dr. Gwaltney's assessment and written report. Sacramento City was not responsible for unnecessarily delaying the completion of the independent evaluations, because the delay was not unnecessary. Accordingly, Sacramento City did not deny Student a FAPE during the 2014-2015 school year and the 2015-2016 school year through the date of hearing by failing to ensure the timely completion of the agreed-upon independent psychoeducational and speech and language evaluations.

#### D. INTERFERING WITH THE INDEPENDENT EDUCATIONAL EVALUATIONS

36. Student contends that Sacramento City denied Student a FAPE by setting guidelines for the independent assessors, which compromised the independence of the independent psychoeducational and speech and language assessments. The sole basis for Student's argument is that Sacramento City must have interfered with the independence of Jabbergym's speech and language assessment because Jabbergym provided a recommendation for the same amount of services already being provided to Student on the operative IEP. That fact does not prove interference; it could easily result from a similarity of professional views. Student never presented any evidence that Sacramento City interfered with either independent assessment.

37. If an independent evaluation is at public expense, the criteria under which the assessment is obtained, including location of the evaluation and qualifications of the examiner, must be the same as the criteria that the school district uses when it initiates an assessment, to the extent those criteria are consistent with the parent's right to an independent evaluation. (34 C.F.R. § 300.502(e)(1).) A district's criteria may not be so narrow as to interfere with a parent's right to obtain an independent evaluation. (*Letter to Petska*, 35 IDELR 191 (OSEP 2001).)

38. School districts must provide parents with information about where the independent evaluation may be obtained, as well as the school district criteria applicable for independent evaluations. (34 C.F.R. § 300.502(a)(2).) A district may provide parent with a list of pre-approved assessors, but there is no requirement that the parent select an evaluator from the district-created list. (*Letter to Parker, supra*, 41 IDELR 155 (OSEP 2004).) When enforcing independent evaluation criteria, the district must allow parents the opportunity to select a qualified evaluator who is not on the list but who meets the criteria set by the public agency. (*Id.*)

39. In this case, Ms. Bryant provided Mother with a list of independent assessors who met the SELPA's guidelines. There was no evidence that Sacramento City forced Mother to choose from that list. Mother and Ms. Anderson freely chose both the independent evaluators for the speech and language and psychoeducational assessments. Nor did Student present any evidence that the SELPA criteria were so narrow as to interfere with Mother's right to obtain an independent evaluation. Therefore, Student failed to prove that Sacramento City denied Student a FAPE during the 2014-2015 school year and the 2015-2016 school year, through the date of hearing, by setting guidelines for the independent assessors.

#### E. CHANGING STUDENT'S PLACEMENT

40. Student contends that Sacramento City denied Student a FAPE during the 2015-2016 school year until January 1, 2016, by failing to change Student's placement from a learning disabled special day class to a special day class with language emphasis. Sacramento City argues that while the special day class with language emphasis may also be appropriate for Student so too was the learning disabled special day class.

41. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit. (*Ibid.*) However, the methodology to be used to implement an IEP is left up to the school district's discretion so long as it meets a

student's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.)

42. Student's IEP team did not reach the decision to offer to change Student's placement until the December 14, 2015 IEP team meeting. It was only at that meeting that the IEP team had the opportunity to review the independent psychoeducational and speech and language assessments and Sacramento City's behavior intervention plan assessment. The IEP team decided to place Student in a special day class with language emphasis based on those assessment results. That placement offer was primarily based on Dr. Gwaltney's recommendation to change Student's primary eligibility category from specific learning disabled to intellectually disabled.

43. Both learning disabled special day classes and special day classes with language emphasis are considered mild to moderate special day classes. The level of instruction and the level of assistance that students require in the classes are at approximately the same level. The difference in the placements is in the method of instruction. Student's contention that Sacramento City denied Student a FAPE because it did not place Student in the special day class with language emphasis until January 2016 is unsupported by the evidence. As *Gregory K.* established, a school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. Student did not establish that he did not receive educational benefit from placement in the learning disabled special day class. The evidence shows that placement in the learning disabled special day class was reasonably calculated to provide some educational benefit to Student. Therefore, Student did not meet his burden of proving that Sacramento City denied Student a FAPE during the 2015-2016 school year until January 1, 2016 by failing to change Student's placement from a learning disabled classroom to a special day class with language emphasis.

#### F. FOSTERING A HOSTILE ENVIRONMENT IN STUDENT'S CLASSROOM

44. Student argues that Sacramento City denied Student a FAPE by fostering a hostile environment in Student's classroom. Sacramento City argues unpersuasively that this allegation is beyond OAH's jurisdiction. Although claims of harassment per se may fall outside OAH's jurisdiction, in this case Student has asserted the claim specifically as a violation of FAPE, thus providing OAH with jurisdiction to hear decide the issue. (Ed. Code, § 56501, subd. (a).)

45. Student contends that making detailed reports of Student's behavioral incidents at Sam Brannan constituted the fostering of a hostile environment. Student argues that in the event Student was prosecuted for a crime, the detailed behavior reports could be provided to the trying court and used as a ground to provide Student with a harsher sentence. Even if this theory is correct, which Student did not establish, Student failed to establish how that could constitute fostering a hostile environment in the classroom itself. Additionally,

Ms. Anderson's theory presupposes that Student will be arrested and prosecuted for some unknown crime in the future. Moreover, the taking and retention of behavioral data is essential to the proper drafting of the behavioral plan that Mother agrees Student needs. Accordingly, Student failed to prove that Sacramento denied Student a FAPE during the 2014-2015 school year and the 2015-2016 school year, through the date of hearing, by fostering a hostile environment in Student's classroom.

#### G. IMPLEMENTING ILEARN AND SYSTEM 44 COMPUTER PROGRAMS

46. Student argues that Sacramento City denied Student a FAPE during the 2014-2015 school year and the 2015-2016 school year through the date of the hearing by implementing the on-line computer programs iLearn and System 44 as a forms of instruction without including it in Student's IEP. Sacramento City argues it was not under a legal requirement to include the use of the iLearn and System 44 programs in Student's IEP as methods of instruction. Sacramento City further argues that the use of the iLearn and System 44 programs were appropriate forms of instruction for Student.

47. 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).)

48. 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 in an IEP. 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. 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.*)

49. The parties agree that Mr. Andrew used the on-line computer program iLearn and System 44 as a method of instruction in Student's special day class at Sam Brannan. Student's special day class teacher at Sutter did not use those on-line computer programs as forms of instruction for Student. Although Student contends that the implementation of the computer based programs as a form of instruction was not appropriate, he provides no proof

to support that the iLearn and System 44 program were not appropriate forms of instruction for Student. The programs were in alignment with California state standards and were approved a form of remedial instruction by California Department of Education.

50. Additionally, Student contends that Sacramento City was prohibited from using the iLearn and System 44 on-line programs because their use was not specified as methods of instruction in Student's operative IEP. However, the law does not support Student's contention. The Ninth Circuit has recognized that school districts need the flexibility to use various methodologies to teach students and that those methodologies generally do not have to be stated in IEP's. Therefore, Student did not meet his burden of proving that Sacramento City denied him a FAPE during the 2014-2015 school year and the 2015-2016 school year through the date of hearing by implementing iLearn and System 44.

*Issue Three: Did Sacramento City Deny Student a FAPE by Failing to Implement His Operative IEP?*

51. Student contends that Sacramento City denied Student a FAPE during the 2014-2015 school year and the 2015-2016 school year through the date of hearing by failing to implement Student's operative IEP. Although Student is not specific as to portions of Student's IEP that Sacramento City did not implement, he seems to base his argument primarily on CDE's findings. Sacramento City argues that it implemented Student's operative IEP during the years in question.

52. A failure to implement an IEP may deny a child a FAPE and thereby give rise to a claim under the IDEA. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811, 820-822.) Minor implementation failures are not actionable given that special education and related services need only "conform" to the IEP. (20 U.S.C. § 1401(9).) When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs "when there is more than a minor discrepancy between the service a school provides to a disabled child and the service required by the child's IEP." (*Id.* at pp. 815, 821-822.) *Van Duyn* specifically rejected a "per se" standard whereby any failure to implement the IEP as written gave rise to an automatic IDEA violation. Instead, when implementation failures occur, it requires analysis of the nature, extent, and impact of the failure. (*Id.* at pp. 824-825.)

#### *2014-2015 SCHOOL YEAR*

53. Student's April 10, 2014 IEP was Student's operative IEP during the entirety of the 2014-2015 school year. Student did not present any evidence that Sacramento City failed to implement the placement, goals, accommodations, modification, transportation services, and speech and language services from Student's operative IEP during the 2014-2015 school year. However, an implementation failure occurred when Sacramento City failed to provide Student with all of the 360 minutes of specialized academic instruction daily as specified in Student's operative IEP. As detailed above, Student was regularly

absent from his special day class during class during the 2014-2015 school year beginning in late November 2015 due to his behavioral issues. Additionally, even when Student was present in class he often failed to attend to the specialized academic instruction due to his maladaptive behaviors. Sacramento City's failure to provide Student with proper behavior supports prevented Student from receiving all of the specialized academic instruction minutes specified in his IEP.

54. Student did not present evidence as to the specific number of minutes of specialized academic instruction that Student missed during each school day during the 2014-2015 school year due to behavioral issues. However, the evidence is clear that Sacramento City's failure to implement Student's IEP was more than a minor discrepancy, as Student missed a significant number of specialized academic instructional minutes after Student's maladaptive behaviors began escalating in late November 2015. Under *Van Duyn*, Sacramento City's failure to provide Student with the designated number of specialized academic instructional minutes in Student's IEP constituted a denial of FAPE because it was a material implementation failure. Therefore, during the 2014-2015 school year, beginning in late November 2015, Sacramento City denied Student a FAPE by failing to implement the specialized academic instruction service from Student's operative IEP.

*2015-2016 SCHOOL YEAR THROUGH DATE OF HEARING*

55. Student did not present any evidence that Sacramento City failed to implement the placement, academic goals, speech and language services, accommodations, and modifications from Student's operative IEP during the 2015-2016 school year. However, during the first half of the 2015-2016 school year, Student continued to miss a portion of the specialized academic instructional minutes being provided to Student in his special day class due to experiencing maladaptive behaviors. At some point during the fall of 2015, Sam Brannan's new principal directed the special day class instruction staff to stop having Student leave the classroom when he was experiencing behavioral issues. Instead, the principal would go to the special day class and sit in on the class. While the principal was present, Student's maladaptive behaviors stopped.

56. Despite this new tactic, Student continued to miss some of the specialized academic instruction, although the evidence is unclear as to how much time Student missed. The failure to provide Student with the required amount of specialized academic instruction from Student's operative IEP resulted in a failure to implement Student's IEP. For the reasons above, that failure to implement was material and resulted in a denial of FAPE to Student.

57. During the fall of 2015, Sacramento City's speech pathologist implemented a new speech goal to which Mother had not consented. He also stopped working on the speech goal from Student's operative IEP because Student had met that goal. The goal that the speech and language pathologist implemented addressed Student's language needs as later identified by the independent speech and language assessment. Although a failure to implement an IEP goal could be a material failure, in this case because Student had already

met the goal and because the new goal that the speech and language pathologist implemented met Student's needs, the failure to implement was not material and did not result in denial of a FAPE.

58. At the beginning of the 2015-2016 school year, Sacramento City failed to provide Student with transportation services for the first week of school due to an administrative error. Nonetheless, Student did not miss any school as a result of Sacramento City's failure to provide Student transportation services during that week. Thus, the failure to implement was not material and Student was not denied a FAPE.

59. Student did not present any evidence that Sacramento City failed to implement the placement, services, goals, accommodations, and modifications from Student's operative IEP once Sacramento City placed Student at Sutter. Thus, Sacramento City only denied Student a FAPE during the 2015-2016 school year until January 4, 2016.

## REMEDIES

1. Student prevailed on Issue 2(b) and Issue 3. As a remedy, Student requests compensatory education along with development and implementation of an appropriate IEP.

2. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of Burlington v. Department of Educ.* (1985) 471 U.S. 359 at pp. 370, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)). In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d at p. 1497.)

3. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Id.* at 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 v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) An independent educational evaluation at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-23.)

4. An award of compensatory education need not provide a "day-for-day compensation." (*Student W. v. Puyallup School Dist., supra*, 31 F.3d 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.*)

5. In this case, the denials of FAPE for failing to implement Student’s operative IEP and for failing to offer and provide Student with a behavior support plan caused Student to miss specialized academic instructional minutes beginning in late November 2014 and ending January 4, 2016. Therefore, Student is entitled to compensatory education.

6. Student, however, failed to present any evidence supporting the type, amount, and frequency of any compensatory remedies, despite being ordered to do so prior to the hearing. CDE ordered Sacramento City to provide Student with 100 hours of tutoring to compensate Student for arguably the same denials of FAPE as found in this case. Student has also moved to a new school, where he reportedly has not been experiencing behavioral issues and has not been missing specialized academic instructional minutes due to behavioral issues. Taking all of this into account, some remedy is required to compensate Student for the denial of FAPE.

7. To compensate for the denial of FAPE, Sacramento City shall fund a behavior assessment by a provider selected by Parent who meets Sacramento City’s standards and is a Board Certified Behavior Analyst. Within five days of this order, Sacramento City shall provide Parent with a list of Sacramento City’s guidelines and a list of independent Board Certified Behavior Analysts. Within 10 days of receiving the guidelines, Parent shall provide Sacramento City the name of the assessor she has chosen. Parent does not have to choose the assessor from Sacramento City’s list of assessors, but the assessor must meet Sacramento City’s guidelines and be a Board Certified Behavior Analyst. Sacramento City must contract with the chosen assessor without undue delay.

8. This behavior assessment shall include observations of Student in the classroom and in the home. The independent assessor shall also determine whether Student currently needs a behavior support plan or behavior intervention plan, and if so, shall develop a draft plan. The assessor should consider documenting in the behavior plan any successful behavior interventions currently being used for Student in his new placement.

9. Provided that the chosen provider is located within a 50-mile radius of Sacramento, Sacramento City either shall provide transportation for Student and Mother to attend the assessment at the chosen assessor’s office or shall reimburse Mother for the cost of transportation by private vehicle to attend the assessment.

10. Sacramento City will hold an IEP team meeting within 30 days of the completion of the assessment and draft behavior plan to go over the assessment and shall pay the assessor to attend the IEP team meeting. The IEP team shall consider the assessment and draft plan. Nothing in this decision shall require Sacramento City to adopt any

recommendations from the assessment or adopt the draft plan. Nothing in this decision shall be construed to abrogate any right Parent and Student may have to challenge the IEP team's decision regarding the assessment and draft plan.

## ORDER

1. Sacramento City shall fund a behavior assessment by a provider selected by Parent who meets Sacramento City's guidelines and is a Board Certified Behavior Analyst. This assessment shall include observations of Student in the classroom and in the home. The independent assessor shall also determine whether Student currently needs a behavior support plan or behavior intervention plan, and if so, shall develop a draft plan. The assessor should consider documenting in the plan any successful behavior interventions currently being used for Student in his new placement.

2. Within five days of this order, Sacramento City shall provide Parent with a list of Sacramento City's guidelines and a list of independent Board Certified Behavior Analysts.

3. Within 10 days of receiving the guidelines, Parent shall provide Sacramento City the name of the assessor she has chosen. Parent is not required to select a provider from Sacramento City's list, but the provider must meet be a Board Certified Behavior Analyst and meet Sacramento City's guidelines. Sacramento City must contract with the chosen assessor without undue delay.

4. Provided that the chosen provider is located within a 50-mile radius of Sacramento, Sacramento City either shall provide transportation for Student and Mother to and from the chosen assessor's location, or shall reimburse Mother for the cost of transportation by private vehicle to and from the chosen assessor's location. If Mother chooses the option of reimbursement for the use of a private vehicle, the mileage reimbursement rate shall be calculated using the Internal Revenue Service's current rate.

5. Sacramento City shall hold an IEP team meeting within 30 days of the completion of the assessment and draft behavior plan to go over the assessment and shall pay the assessor to attend the IEP team meeting. The IEP team shall consider the assessment and draft plan. Nothing in this decision shall require Sacramento City to adopt any recommendations from the assessment or adopt the draft plan. Nothing in this decision shall be construed to abrogate any right Parent and Student may have to challenge the IEP team's decision regarding the assessment and draft plan.

6. All other requests for relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issue 2(b) and Issue 3. Sacramento City prevailed on all other issues presented.

## RIGHT TO APPEAL

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

DATED: April 18, 2016

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/s/  
B. ANDREA MILES  
Administrative Law Judge  
Office of Administrative Hearings