

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

LEGAL GUARDIANS ON BEHALF OF  
STUDENT,

v.

TEHACHAPI UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2015120889

**DECISION**

Student, by and through his Legal Guardians, filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on December 23, 2015, naming the Tehachapi Unified School District. On January 20, 2016, the parties jointly requested a continuance, and a continuance of the hearing was granted that same date.

Administrative Law Judge Ted Mann heard this matter in Bakersfield, California, on May 16, 18, 19, 23, 24, and 25, 2016.

Attorneys Andrea Marcus and Kelly Kaesar appeared on behalf of Student. Attorney Lyndsey Gallagher, Esq. attended one day of hearing on behalf of Student. Student's grandmother<sup>1</sup> attended the hearing on Monday, May 23, 2016 only. Student did not attend the hearing. Attorneys Darren Bogie and Kelley Lazerson represented District. District Program Coordinator Dennis Ferrell attended on behalf of District.

On the last day of hearing, a continuance was granted for the parties to file written closing arguments. Upon timely receipt of written closing arguments, the record was closed and the matter submitted for decision on June 27, 2016.

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<sup>1</sup> Grandmother and Grandfather have legal custody of Student, and both retain educational rights. They are hereinafter referred to collectively as Grandparents, and individually as Grandmother and Grandfather.

## ISSUES<sup>2</sup>

- 1) Did District deny Student a free appropriate public education in the May 14, 2013 individualized educational program by failing to:
  - a. Make an appropriate offer of placement;
  - b. Make an appropriate offer of services in the areas of occupational therapy and behavior support; and/or
  - c. Develop appropriate goals?
  
- 2) Did District deny Student a FAPE in the May 12, 2014 IEP by failing to:
  - a. Make an appropriate offer of placement;
  - b. Make an appropriate offer of services in the areas of occupational therapy and behavior support; and/or
  - c. Develop appropriate goals?
  
- 3) Did District deny Student a FAPE in the January 12, 2015 IEP by failing to:
  - a. Make an appropriate offer of placement;
  - b. Make an appropriate offer of services in the areas of occupational therapy and behavior support; and/or
  - c. Develop appropriate goals?
  
- 4) Did District deny Student a FAPE by failing to appropriately assess in all areas of suspected disability during the two years prior to the filing of the complaint, specifically in the areas of:
  - a. Occupational therapy,
  - b. Psychoeducational functioning, including social-emotional and behavior?
  
- 5) Did District deny Student a FAPE in the June 1, 2015 IEP by failing to:
  - a. Hold the IEP meeting;
  - b. Make an appropriate offer of placement;
  - c. Make an appropriate offer of services in the areas of occupational therapy and behavior support; and/or
  - d. Develop appropriate goals?

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<sup>2</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) At the beginning of the hearing, and on the record, Student withdrew all claims regarding speech and language assessments, offers or services.

- 6) Did District deny Student a free appropriate public education by failing to address his need for appropriate behavioral support during the two years prior to the filing of the complaint?
- 7) Did District fail to administer behavior interventions to Student in a manner that respects human dignity and personal privacy so as to violate the requirements of the Individuals with Disabilities Education Act or the California Education Code during the two years prior to the filing of the complaint?
- 8) Did District deny Student a FAPE from May 12, 2014 to December 23, 2015, by failing to initiate a due process hearing within a reasonable time after Grandparents failed to provide consent to the May 12, 2014 IEP?

Proposed Resolutions:

- 1) An order that District fund Student's independent educational evaluations of Student according to proof at hearing;
- 2) An order that District fund a behavioral aide from a non-public agency to provide behavioral training and supervision to District staff working with Student;
- 3) An order that the District fund parent training on positive behavior support; and
- 4) An order that the District fund compensatory education for Student in an amount to be proven at hearing.

### SUMMARY OF DECISION

Student did not meet his burden of proof in his claims that District had denied him a FAPE in District's IEP offers of May 14, 2013(Issue 1)<sup>3</sup>, May 12, 2014(Issue 2), and January 12, 2015(Issue 3). Student did prevail on his claim that District denied him a FAPE in the June 1, 2015 IEP, as District failed to hold an IEP meeting or make a FAPE offer to Student on or after June 1, 2015. (Issue 5.)

Student also failed to meet his burden of proof that District denied him a FAPE by failing to adequately assess him for occupational therapy or psychoeducational issues (Issue 4).

Student further failed to meet his burden of proof that District denied him a FAPE by District's not filing for due process on the unsigned May 12, 2014 IEP (Issue 8), District's administration of behavioral interventions in a manner that respected Student's human dignity and personal privacy (Issue 7), or District's failure to provide appropriate behavioral support (Issue 6).

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<sup>3</sup> The May 14, 2013 IEP falls outside the applicable statute of limitations, and as discussed below, is not within the jurisdiction of the OAH

## FACTUAL FINDINGS

### *Jurisdiction*

1. At the time of the hearing, Student was a five year-old boy eligible for special education under the primary category of speech language impairment. Student resided within District's boundaries at all relevant times.

### *Background*

2. Student's mother was a poly-substance abuser during Student's first trimester. The two remaining trimesters were supervised by law enforcement. Student experienced developmental delays since infancy. Student was referred to District by the Kern Regional Center for assessment prior to his third birthday. Student participated in Early Start services.

### *Initial District Assessment of Student – Spring 2013*

3. In April and May of 2013, District conducted assessments of Student and prepared reports as to Student's psycho-educational functioning, academic performance, and speech and language functioning in preparation for an initial individualized educational program. At that time, during the 2012-2013 school year, Student's placement was at home. In order to assess Student, he attended the Tompkins Elementary School pre-school special day class on several different occasions in the spring of 2013. Assessments indicated that Student had low average to average cognition, a very short attention span, and significant delays in expressive and receptive communication and intelligibility.

4. Student was assessed by school psychologist Sharon Owen on April 10, 2013. Ms. Owen administered the Beery Developmental Test of Visual –Motor Integration – Fifth Edition, the Vineland Adaptive Behavioral Scales – II, conducted classroom observations, teacher interview, parent interview, and a review of records in preparing the assessment.

5. Ms. Owen assessed Student's intellectual ability and cognitive functioning to be in the low average to average range based upon the Vineland Scales, her observations of Student, and the parent interview. Student's adaptive behavior composite score was 90 which placed him in the 25th percentile. Student had average scores in the socialization and motor skills domains, and low average scores in the communication and daily living skills domains.

6. On the Beery Developmental Test, Student performed in the below average range with a standard score of 89 which placed him in the 23rd percentile. The test involved Student being asked to reproduce a series of figures ranging from simple to complex.

7. Ms. Owen reviewed the academic skills assessment performed by District special education teacher Amandina Vidal. Ms. Vidal found that Student was in the below average range for both literacy skills and math skills compared to other children his age.

Ms. Vidal also noted that Student was extremely active with a limited attention span, and had difficulty with transitions, non-compliant behavior, and outbursts. Ms. Vidal found that Student's behavior was an impediment to his following directions.

8. Ms. Owen also assessed Student's classroom behavior and performance in Ms. Vidal's pre-school SDC classroom, during her observation of him on April 10, 2013. Her observations were generally consistent with those of Ms. Vidal, noting Student's near constant movement and short attention span.

9. Student was also assessed for speech and language. A speech and language assessment report was prepared by District speech language pathologist Christina Salazar, M.S., CCC-SLP. Ms. Salazar evaluated Student on three dates in April and May of 2013. Ms. Salazar found that Student had significantly delayed expressive and receptive language skills. Student was in single digits in percentile scores for those areas. Student also had overall intelligibility of approximately 40 percent to an unfamiliar listener. Ms. Salazar found that Student appeared to meet the eligibility criteria for a language disorder.

#### *May 14, 2013 IEP*

10. At an initial IEP meeting on May 14, 2013, Student was found eligible for special education under the category of speech/language impairment. District offered Student a placement for the 2013-14 school year in a special education pre-school class at Tompkins Elementary School, with speech and language services twice weekly for 20 minutes per session. Student had six goals, including two communication goals, two social-emotional goals, and two academic goals in math and writing skills, respectively. The goals included Student following two-step directions, joining a group game, and joining a small group activity. The Student also had strategies and adaptations as part of his program, including warning before transitions, one at a time directions, multiple direction modalities, and assistance with toileting. Grandparents attended the IEP meeting, and Grandmother agreed to and signed the IEP.

#### *2013-2014 School Year*

11. Student's special education pre-school teacher for the 2013-2014 school year was Amandina Vidal. She had attended the May 14, 2013 IEP meeting, and had observed Student in her classroom in preparation for the IEP meeting. She was aware of Grandparent's report that Student exhibited non-compliance and aggression at home.

12. Ms. Vidal held a clear credential as a special education teacher. She was also credentialed in early childhood development and early childhood special education. She estimated that she had attended over three hundred IEP meetings while teaching for District. She was originally from Colombia where she held a Colombian teaching credential and had taught a general education classroom for approximately nine years.

13. Ms. Vidal found Student to be average behaviorally as many pre-school students arrived at pre-school with behavioral issues. Her classroom was designed with embedded behavioral supports to address students in a school setting for the first time, and included a classroom support staff trained to implement the embedded behavioral supports. She did not see any need for a behavioral referral for Student as he was just starting at school.

14. Ms. Vidal also found that Student's IEP goals were designed to work on Student's behavior. Student's second IEP goal was learn to follow two-step directions. This goal supported Student's following directions and his learning how to learn. Student's third IEP goal was to join a group game. This goal helped Student listen and learn and operate in a structured environment. Student's fourth IEP goal was to join a small group. This goal also helped Student to follow routines and follow classroom structure.

15. At the beginning of the 2013-2014 school year, Student's behavior was very challenging and posed an impediment to Student accessing his education. His initial behaviors included non-compliance, tantrums, and high activity levels. Over the course of the school year, Student's behavior improved markedly, and his behaviors lessened to the degree that he could access his education in the classroom. By the end of the school year, Student was much more compliant, participatory, and inclined to follow directions. Student continued to have issues with non-preferred behavior. Overall, Student's behavioral issues had declined by 50 percent by year's end, and Student was able both to extend his time on task and to be redirected to complete a task.

*April 23, 2014 Occupational Therapy Screening*

16. In correspondence of April 9, 2014, Grandmother requested Student receive an occupational therapy evaluation. Subsequently, District's occupational therapist, Tracy Doue, had a telephone discussion with Grandmother, and it was agreed that Grandmother would waive a formal assessment in lieu of a District OT screening. The OT screening was conducted by Ms. Doue on April 23, 2014, and she prepared a report of the screening observations and related recommendations, and forwarded it to Grandmother. Student was observed by Ms. Doue to have made significant progress over the 2013-2014 school year, particularly in his sensory/motor skills group. In that group his behavior improved and he was able to complete all activities, including fine motor and gross motor tasks. During that year he received embedded OT services for fine and gross motor skills in the special education classroom, as well as a weekly sensory/motor skills group facilitated by an occupational therapist. Ms. Doue did not recommend a formal OT assessment due to Student's progress and Student's pre-school setting providing adequately for his OT needs.

17. On December 12, 2014, Grandparents filed a complaint with the California Department of Education that District had not responded correctly to their request for Student to be assessed for OT. CDE found that District failed to comply with 34 CFR Section 300.503(a)(2) in its failure to provide prior written notice of the refusal of the request for an OT assessment. CDE ordered District to inform its staff of the requirements of 34

CFR Section 300.503(a), and submit proof to CDE of such notice to staff. District submitted the requested materials, along with providing prior written notice to Grandparents on March 5, 2015. The matter was thereafter concluded by CDE.

*May 12, 2014 IEP*

18. An annual IEP meeting was held for Student on May 12, 2014. District administrator Shirden Price, school psychologist Sharon Owen, speech/language pathologist Susan Weber, Student's special education teacher Ms. Vidal, general education teacher Shelly Marks, Grandmother, and Student's advocate Timaree Torres attended. Ms. Torres left the meeting approximately 20 minutes early. Student was approximately three years and 11 months old at the time of the IEP meeting.

19. The IEP team reviewed Student's present levels of performance. Student had met each of his six goals from the May 14, 2013 IEP. Student's behavior at school had improved significantly over the course of the 2013-2014 school year, and Student had made academic progress with pre-academic skills consistent with his same aged peers. Student had also made significant progress with receptive and expressive language and was able to follow- two-step directions and use complete, intelligible five word sentences. Student had a relative strength in fine/motor areas. Grandmother expressed her concern at Student's behavior at home, including aggressive behavior, tantruming, and throwing objects.

20. The IEP team discussed a range of placement options and determined that the least restrictive environment was in the pre-school special day class at Tompkins Elementary School. The IEP plan included 164 minutes of pre-school per day over the pre-school schedule. Student was to receive 140 minutes of direct speech and language services and 20 minutes of speech and language consultation per month. District's occupational therapist was to be available for consultation regarding Student. The services began on May 13, 2014 and ended on May 30, 2015.

21. Student also had strategies and adaptations as part of his program, including warning before transitions, one-at-a-time directions, multiple direction modalities, assistance with toileting, and opportunities for climbing and vestibular input (rocking/swinging). The classroom also included embedded behavioral supports and a low student to adult ratio. Student was also offered mainstreaming opportunities through participation in selected general education kindergarten activities for 15 to 30 minutes at a time with the assistance of a paraprofessional. Student was offered both extended school year for the summer of 2014 and school transportation.

22. Student was given five goals as part of his IEP. The goals included three measurable progress objectives in October, January, and March of the 2014-2015 school year. Each annual goal was to be completed by May of 2015.

23. Student's first goal was in the area of functional academics and was predicated on Student's continuing challenges with following directions and compliance with

instructions. The goal focused on underlying behaviors needed to achieve academic success. The goal provided that Student would, when given a verbal prompt, comply with school rules within 30 seconds for four out of five trials during four consecutive school days.

24. Student's second goal was in the area of academic/reading, and was predicated on Student's then present written letter recognition levels. The goal provided that Student would, when given visual prompts, recognize and name written upper case letters of the alphabet with 60 percent proficiency in four out of five opportunities.

25. Student's third goal was in the area of academic/writing, and was predicated on Student's then present inability to write recognizable letters of the alphabet. The goal provided that Student would, when given visual prompts, trace/copy his first name with 60 percent proficiency in four out of five opportunities.

26. Student's fourth goal was in the area of academic/math, and was predicated on Student's then inability to consistently recognize numbers one to ten. The goal provided that Student would, given a visual/verbal prompt, identify numbers one to 10 with 80 percent proficiency in four out of five trials.

27. Student's fifth goal was in the area of communication, and was predicated on Student's continuing need for prompting to follow verbal directions. The goal provided that during classroom activities Student would follow three-step directions, with prompting, in four out of five opportunities, as measured through data collected by the speech pathologist across three consecutive sessions.

28. Grandmother indicated agreement with the IEP, but did not sign the IEP at that time on the advice of Student's advocate, Timaree Torres, who had instructed Grandmother not to sign the IEP at the meeting, but to wait until they had a chance to review the IEP.

#### *The Incident of May 14, 2014*

29. Student's last day at school was May 14, 2014. On the afternoon of that day an incident occurred with Student at the bus transportation waiting area at Tompkins Elementary School.

30. Students in Ms. Vidal's class waited for the homebound bus by sitting on the flowerbed/planter wall approximately five feet from the bus driveway. It was important for the students to stay seated as there was car and bus traffic nearby. Student sought to get up and move towards another student he knew, leaving his seat to do so. Student was non-compliant with verbal requests to return to his seat. He was then told to sit back down. An aide sat next to him, placed an arm around Student, and told him he had to sit with the class and that to get up and move around was potentially dangerous. Student was not restrained, and could have gotten up despite the aide's arm on him. Student remained non-compliant and continued yelling "no" in protest of the instructions from the aide. Student then grabbed a small, pencil-sized stick and hit the aide with the stick.

31. Once Student had acted physically aggressive with the aide, Ms. Vidal intervened. Ms. Vidal squatted in front of Student so as to be at eye level with him, and instructed Student not to be physically aggressive, and that he needed to apologize to the aide. Student was crying, but proceeded to apologize to the aide. Student's behavior was de-escalated and he seemed fine and did not appear to be in any obvious distress. As Ms. Vidal escorted him to the bus, she and Student exchanged "I love you's" and hugged. Ms. Vidal did not prepare an incident report of any kind regarding the incident of May 14, 2014, as it was unexceptional and not out of the ordinary. Student was not verbally or physically abused during the incident, and Ms. Vidal's response was reasonable, and proportional to Student's behavior.

32. Ms. Vidal has never seen a child abused by an aide in her special day classroom. She herself has not abused any children in her SDC classroom. She defined restraint of a child as physically and forcefully preventing a child from moving or taking an action. She has not restrained children in her SDC classroom. On one occasion she used some level of restraint to prevent a child from harming himself.<sup>4</sup>

#### *Aftermath of the Incident*

33. On May 14, 2014, following the incident, a report was made by a parent, on social media (Facebook) that a child had been observed being verbally abused as a result of being aggressively yelled at by a teacher or teachers at the bus transportation waiting area on the afternoon of May 14, 2014. Grandmother became aware of the Facebook posting later that same day. Prior to learning of the other parent's account of the May 14, 2014 incident, Grandmother noticed bruising on Student's ear.

34. Grandparents removed student from District's program the following day, May 15, 2014, and refused thereafter to return him to school. That same day, Grandmother filed a written complaint with the school's principal, Shirden Price, regarding the incident.

35. On May 16, 2014, the parent who had authored the Facebook posting sent an email to Student's advocate, Timaree Torres, elaborating on what the parent had witnessed.

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<sup>4</sup> Student's attorney, over objection, introduced the entire transcript of the hearing in OAH Case. Nos. 2015060035 and 2015061178 (consolidated) in which Ms. Vidal testified, along with the ALJ's decision in the consolidated cases, as collateral impeachment of Ms. Vidal on the question of whether she had ever restrained or abused a child in her SDC classroom. A thorough review of the transcript and the ALJ's decision in that case, indicates that there were no findings by the ALJ in the consolidated cases that Ms. Vidal had restrained or abused another child. Ms. Vidal was not impeached in her testimony in the instant case either by her own testimony or by the testimony of other witnesses in the consolidated cases. Absent such impeachment, Ms. Vidal's testimony is found to be credible, believable, and reliable as to the incident of May 14, 2014, and as to her interactions, observations, and opinions of Student in the instant matter.

Grandmother never spoke to the parent who witnessed the incident, nor to the best of her knowledge did Ms. Torres.<sup>5</sup>

36. Student was evaluated by physician's assistant Ryan Drury on May 28, 2014, with Mr. Drury finding evidence of an ear contusion that he reported was likely secondary to trauma to the ear.

37. On June 2, 2014, Grandmother filed a written civil right discrimination complaint with the Office for Civil Rights for the Department of Health and Human Services.<sup>6</sup> She also filed a police report regarding the incident.

38. District attempted to convene an IEP team meeting to discuss the incident and arrange Student's return to the classroom. Grandparents were both unavailable and unwilling to meet with District despite repeated efforts by District to arrange an IEP team meeting. Grandparents ultimately refused District's attempts regarding an IEP by the end of the 2013-2014 school year. In correspondence to District, dated June 2, 2014, Grandparents indicated that they were pursuing "other options".

39. After Student had been removed from school in May of 2014, he ultimately was returned to his previous daycare program by his Grandparents.

#### *Request for Home Hospital*

40. In e-mail correspondence, dated August 28, 2014, from Grandmother to District's then special education coordinator, Kathleen Siciliani, Grandparents sought to have Student placed on home hospital instruction. A home hospital program allows a physician to recommend a temporary period of instruction at home for a student in the event of a medical

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<sup>5</sup> Neither the other parent who authored the Facebook posting, nor Ms. Torres testified at the hearing.

<sup>6</sup> OCR opened an investigation into the incident delegating the investigation to District. OCR initially disagreed with District's investigation of the incident as not complying with OCR investigation requirements. District entered into a resolution agreement, without admitting fault, and agreed to redo the investigation. The reopened and completed investigation was reviewed by OCR and found to both comply with OCR's investigation requirements and to lack evidence of any discrimination against Student by District personnel. OCR agreed with the finding by District that the accounts of District's personnel were internally consistent, consistent among the accounts, and logical and coherent in the account of the events of the incident. OCR also agreed with District's criticism of the other parent's account as internally inconsistent, inaccurate, and bearing indicia of unreliability. OCR accepted the conclusion that Ms. Vidal and her aides were found to have acted appropriately in their actions towards Student on the afternoon of May 14, 2014, and that there was a lack of reliable evidence of Student's allegations. OCR subsequently ended its investigation. Grandparents chose not to appeal the OCR decision.

reason a student cannot attend school. Ms. Siciliani forwarded a home hospital application to Grandparents, and indicated that such a change of placement would require an IEP team meeting, and she attempted to arrange such an IEP meeting with Grandparents and school personnel. Grandparents were unable to make themselves available for such an IEP team meeting, ultimately writing to Ms. Siciliani on October 20, 2014, and indicating that a combination of Grandfather's surgery, a medical appointment, and Student's assessments at Children's Hospital - Los Angeles made them unavailable. Grandparents indicated at that time that they were not officially withdrawing Student from school, and that they would contact Ms. Siciliani after consulting with their own attorney.

41. On December 12, 2014, Grandparents filed a complaint with the California Department of Education that District had not responded correctly to their request for a change of placement for Student to home hospital. CDE found that District had complied with the requirements of 34 CFR Section 300.503(a)(2), and was in compliance on this issue, noting District's continuing efforts to address Grandparents' concerns about schooling for Student, and to convene an IEP team meeting to address those concerns.

*Student's Assessment by Children's Hospital – Fall 2014*

42. Grandparents were referred to Children's Hospital – Los Angeles by Student's treating doctor who was concerned about possible autistic behaviors in Student, along with aggressive behavior, temper tantrums, speech delay, and problems following directions. Grandparents brought Student to Children's Hospital in October and November of 2014 to be assessed. The assessment team consisted of a nurse case manager, a developmental-behavioral pediatrician, a licensed speech-language pathologist, a licensed psychologist, and a licensed occupational therapist. Children's Hospital issued a Diagnostic and Clinical Assessment report on November 25, 2014.

43. The assessment included observations of interaction/play; interviews; a physical exam; review of records; the Autism Diagnostic Observation Schedule, Second Edition; Behavior Checklists ; the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition; the Expressive Vocabulary Test, Second Edition; the Clinical Evaluation of Language Fundamentals-Preschool, Second Edition; a Language and Communication Sample Analysis; the Miller Function and Participation Scales; Sensory Profile Questionnaire; and the Vineland Adaptive Behavior Scales, Second Edition. The observations and assessments occurred over two days on October 28, 2014 and November 4, 2014, and totaled five hours. A third session of consultation with Grandparents on November 18, 2014 lasted two hours.

44. Grandmother reported that Student began to exhibit increased defiance, reactive temper tantrums, and physical aggression at home around age three shortly after he began preschool. Grandparents reported negative changes in Student's emotional coping since the spring of 2014 with increased nightmares, fear of the dark, and attachment to the grandmother.

45. The Children's Hospital assessment team found that Student's hyperactivity, distractibility, impulsivity, and non-compliance likely resulted in Student underperforming across a range of assessments including cognitive functioning and communication. Student achieved a full scale IQ of 62 on the Wechsler Scale of Intelligence, but the result was not considered reliable by the assessors. Student did achieve higher scores on some composite scores, suggesting higher cognitive functioning levels than demonstrated by the full scale score. Student also appeared to show delays in expressive and receptive language, although Student was unable to complete assessments in these areas rendering the results difficult to analyze. Student's adaptive function was also found to be low and impacted by his difficulty with behavioral regulation and oppositional behavior.

46. Children's Hospital found that Student exhibited a sensory profile and behavior that was consistent with children with attention deficit hyperactivity disorder. Additionally, Children's Hospital found that Student was at increased risk for impulse control disorders such as ADHD due to family history of such disorders accompanied by prenatal substance exposure. Despite the assessment team's concerns, they indicated that a formal diagnosis of ADHD should be deferred given Student's age, delays in language, and suspected trauma. The team's diagnostic summary included four items: attention and concentration deficit, mixed receptive-expressive language disorder, possible history of trauma, and prenatal substance exposure.

47. The Children's Hospital team recommended that Student continue or resume speech and language therapy, undertake behavioral therapy, obtain increased family support, and request occupational therapy. The team recommended an educational placement for Student featuring a structured preschool setting in a small classroom with a low teacher to student ratio and classroom aide support. The team emphasized that Student should have a predictable, consistent, structured routine each day with ample opportunities for physical play in a safe setting.

*January 12, 2015 IEP*

48. Following the completion of the Children's Hospital assessment, Grandmother sent an email to Ms. Siciliani on December 9, 2014, requesting an IEP team meeting to discuss a change in placement and a full-time aide for Student. Ms. Siciliani responded the same day indicating that she would get a meeting scheduled following the winter break, and she ultimately scheduled an IEP team meeting for January 12, 2015.

49. District administrators Cheri Belcoe and Kathleen Siciliani, school psychologist Sharon Owen, speech/language pathologist Diane Cole, special education teacher Amandina Vidal, general education teacher Jami Butler, and Grandparents attended the January 1, 2015 IEP team meeting.

50. Grandparents had prepared a letter to District, dated January 5, 2015, requesting a different classroom for Student due to their concerns about Ms. Vidal, an aide due to safety reasons, assessments in OT and psycho-educational areas, a behavioral support

plan, and a daily or weekly report sent home. They presented both the January 5, 2015 letter and the Children's Hospital report to District at the January 12, 2015 IEP team meeting. The Children's Hospital report was discussed by the IEP team.

51. Grandparents advised the rest of the IEP team that they did not want Student back in a classroom with Ms. Vidal as they were concerned about the incident of May 14, 2014, and Student had been having nightmares and did not want to return to school.

52. Ms. Siciliani indicated that District would recommend a functional behavior assessment, an OT evaluation, a speech and language evaluation, and a psycho-educational assessment, including an academic assessment. Ms. Siciliani also indicated that Student would need to return to a school placement for six weeks before the assessments and the functional behavior analysis assessment could be initiated.

53. Regarding placement, Ms. Siciliani indicated that District did not have any other preschool placement than Ms. Vidal's SDC classroom. She suggested that a placement in the County's Richardson Center was the only other placement available, and that District would investigate that possibility based on Student's low cognitive functioning scores and behavioral issues. Grandparents agreed with pursuing the Richardson placement option.

54. Grandparents indicated that they were opposed to the recommended placement in the May 12, 2014 IEP, but the specific objection was Ms. Vidal, not the SDC classroom itself. They were otherwise in agreement with the other aspects of the IEP. Grandparents signed the May 12, 2014 IEP, and agreed to the offered placement, but also denied permission for Student to receive the offered placement as constituted with Ms. Vidal as the special education teacher. Grandparents also signed the meeting summary. The end dates for placement and services remained unchanged, as did the completion date for the goals.

#### *Consent for Spring 2015 Assessment*

55. District prepared an assessment plan on February 4, 2015. The assessment plan called for assessments of Student in the following: academic performance, self-help, social and emotional status, motor ability, language and speech, general ability, health, development, vision, hearing, and other. Other was meant to include a functional behavior analysis.<sup>7</sup> District sent the assessment plan to Grandparents on February 4, 2015.

56. Thereafter, discussions ensued among district special education coordinator Ms. Siciliani, Kern County Consortium SELPA Coordinator Troy Tickle, and Grandmother regarding the location and circumstances of the spring 2015 assessments. District and SELPA insisted that the FBA had to be based upon classroom observation of Student to provide useful data and to be a valid FBA. Grandmother did not want Student in Ms. Vidal's

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<sup>7</sup> The only assessments at issue in this matter are the OT and psycho-educational assessments. The parties put on no evidence of the speech and language assessment which is not summarized here.

SDC classroom. Other assessments were moved from the Tompkins campus to District's offices in order to accommodate Grandmother's concerns about Student's fear of the Tompkins campus.

57. Grandparents signed and returned the assessment plan to District on March 10, 2015. Grandparents agreed to all aspects of the assessment plan except the FBA. As the FBA required observation of Student in a classroom setting, they did not want Student returned to Ms. Vidal's classroom for the FBA, so they did not agree to the FBA.

#### *Spring 2015 OT Initial Evaluation Report*

58. An OT assessment of Student was conducted by District occupational therapist Tracy Doue. She assessed Student on April 15, 2015, and thereafter prepared an Initial Evaluation report. Student was approximately four years and 10 months old at the time of the assessment and he had not attended school for approximately 11 months.

59. Ms. Doue conducted a teacher interview, performed a clinical observation of Student, and used the Hawaiian Learning Profile to approximate functional age level. She also attempted to use the Bruininks-Oseretsky motor skills assessment, but Student would not sit to participate in any formal testing. Student's behavior greatly affected Ms. Doue's ability to conduct the assessment. Student was unable to self-regulate, running around the OT room unable to attend to task and largely non-compliant with assessment attempts. Student would not engage in structured plan or testing with the exception of stringing various sized beads. At the conclusion of the assessment, Student did not want to leave the school site and began to cry. Grandmother was forced to pick Student up and put him in a car seat as he refused to leave the school grounds.

60. Ms. Doue concluded that Student had good gross and fine motor strength and coordination, but that his attention deficits fully impacted every area of the assessment. She did not recommend educational OT services for Student. She did recommend a structured placement, opportunities for movement and heavy work activities on a regular basis, and continuing efforts to encourage Student to participate in table top fine motor skills.

#### *Spring 2015 Academic Assessment Report*

61. An academic assessment was conducted by District special education resource teacher Eileen Pryor. She assessed Student on April 10, 2015, April 15, 2015, and May 1, 2015. She used the Test of Early Reading, Test of Early Mathematics, and Test of Early Written Language to assess Student.

62. Student scored an 81 on the early reading test which placed him in the 10th percentile or below average range. Student scored a 68 on the basic writing portion of the early written language test which placed him in the first percentile or very poor range. He was unwilling or unable to complete the basic writing section. Student was also unable to complete the contextual writing portion of the early writing test as he was below the age cut-

off of five years old. Student scored a 72 on the early mathematics test which placed him in the third percentile or poor range. Student was unable to obtain a basal score on several early reading subtests and on the early mathematics test, resulting in his scores not being standardized, and not being considered an accurate measure of Student's achievement, but merely an estimate.

63. On the three days Ms. Pryor attempted to perform the academic assessment, Student was only able to be assessed on two of the days due to his non-compliance, inattention and lack of focus. During the three days, Student crawled under a table, looked under blankets, generally explored the environment, and made several attempts to elope. Overall, Student's inattention and lack of focus negatively affected his ability to be successfully assessed by Ms. Pryor, resulting in estimates of ability only.

#### *Spring 2015 Psychoeducational Assessment*

64. District school psychologist Dawn Roach had been with District as a school psychologist since August of 2011. She had a bachelor's degree in psychology, and a master's degree in school psychology. Her master's degree was from National University, and was conferred in June of 2011. She also held a pupil personnel services credential. She had completed the coursework for an applied behavioral analysis certificate, but had yet to take the BCBA test as of the time of the hearing. She estimated that she had undertaken 75-100 psychoeducational assessments as a school psychologist.

65. Ms. Roach conducted Student's triennial and transition assessment from pre-school to kindergarten on April 10, 2015 and May 1, 2015, and issued her report on May 14, 2015. She used the following information to prepare her report: the Beery Developmental Test of Visual-Motor Integration-Sixth Edition; Motor-Free Visual Perception Test-Third Edition; Behavior Assessment System for Children-Second Edition; Vineland-Second Edition; Parent Questionnaire; Clinical Interview; Teacher Interview; Records Review; and Student Observation. Her records review included a review of Ms. Owen's psychoeducational report from the Spring of 2013, and the report prepared by Children's Hospital in late 2014, along with other assessment reports (speech language, OT, and academic achievement) from the spring of 2015.

66. Ms. Roach obtained information from the Grandmother regarding Student. She interviewed her on April 9, 2016, and also spoke to the Grandmother following the assessment regarding the draft of the report. The Grandmother reported that Student was curious and loving, but had needs in all areas of academics and with his behavior. The Grandmother reported that Student currently participates in a playgroup, and his peer relationships varied from good to problematic with unkindness and thrown objects. Ms. Roach's report does not mention the incident of May 14, 2014, only indicating that Student was removed from the pre-school SDC class in May of 2014.

67. Ms. Roach observed Student's behavior during her two assessment sessions with him. Student was brought to the assessment location by his Grandmother who, in turn,

stayed for the duration of the assessment. Student willingly walked with Ms. Roach to the assessment room, and easily established rapport with her. Student was fun and very active. His activity level was accompanied by an inability to attend to task for very long, and resulted in problems in obtaining sufficient task compliance to allow meaningful assessment of Student. Ms. Roach did not observe any violent behavior by Student during her assessment of him, nor did she observe any negative emotionality such as sadness, withdrawal, or anger. Student did not cry or have tantrums, but was task avoidant and attempted to elope from the assessment room on several occasions.

68. Ms. Roach administered the Beery visual-motor integration test to Student. The test is designed to provide an estimate of Student's visual-motor processing ability and is linked to Student's fine motor control, handwriting, and ability to copy information from a book or blackboard. Student achieved a standard score of 69 which placed him in the second percentile with a score described as "very low". Ms. Roach did not characterize or analyze the effect of Student's inattention or hyperactivity on his test performance.

69. Ms. Roach attempted to administer the motor-free visual perception test to Student on May 1, 2015. This is a norm-referenced test designed to measure visual perceptual ability in individuals between the ages of 4 and 70 years of age. Student was unable to attend to the stimuli that were part of the test, and despite attempts by Ms. Roach to address the attentional issues, the test could not be conducted and the use of the test was terminated.

70. Ms. Roach used the Vineland Adaptive Behavior Scales assessment to assess Student's personal and social capabilities. The test covers the areas of communication, daily living skills, socialization, and motor skills, and included an adaptive behavior composite score as a summary score. Standard scores between 86 and 114 are considered adequate or average. Grandmother completed the rating scales and Ms. Roach scored the ratings. The rating scales were not given to a teacher because Student had been out of school for approximately one year, and did not have a current teacher. Student scored a 67 composite score which was in the first percentile and considered "low". Student obtained subscores of 69 (second percentile) in communication, 62 (first percentile) in daily living skills, 75 (fifth percentile) in socialization, and 75 (fifth percentile) in motor skills. Ms. Roach did not characterize or analyze the effect of Student's inattention or hyperactivity on his test performance.

71. Ms. Roach used the Behavior Assessment System rating system to assess Student's behavior and self-perception. Grandmother completed the rating scales and Ms. Roach scored the ratings. The rating scales were not given to a teacher because Student had been out of school for approximately one year, and did not have a current teacher. The average score on the test is 50 with a standard deviation of 10. Scores above 70 are considered very high and clinically significant, while scores above 80 are three standard deviations above the mean. Scores below 30 are considered very low and clinically significant, while scores below 20 are three standard deviations above the mean.

72. Grandmother's behavior assessment rating scale scores placed Student in the very high or very low range for a wide range of subscales including: hyperactivity (92), aggression (77), externalizing problems (88), depression (73), atypicality (70), attention problems (74), behavioral symptoms index (82), adaptability (27), social skills (29), functional communication (26), and adaptive skills (23). Student also scored in the "at risk" and low category on the activities of daily living subscale with a score of 33. Student did score in the average range on a number of subtests, including: internalizing problems (54), anxiety (42), somatization (45), and withdrawal (57). Compared with a similar behavioral rating scale completed by Grandmother for the Children's Hospital assessment, Student's scores in somatization and internalizing problems decreased, while scores in attention problems, aggressive behaviors, and externalizing behaviors were consistently high.

73. Ms. Roach identified both behavioral and environmental factors relevant to Student's progress in a general education program. Behavioral factors included Student's difficulties in maintaining attention and difficulty in engaging in non-preferred activities. School environmental factors included pace of lessons in general education, work requiring sustained attention, work beyond Student's current instructional level, procedures and compliance necessary for classroom management, and large class size.

74. Ms. Roach did not analyze the nature of the May 14, 2014 incident, nor its potential impact on Student.

#### *June 1, 2015 IEP Meeting*

75. Following the assessments in the spring of 2015, District and Grandparents arranged a triennial and transition IEP team meeting for June 1, 2015. The IEP meeting was attended by District administrator Kathleen Siciliani, District school psychologist Dawn Roach, District speech/language pathologist Diane Cole, District occupational therapist Tracy Doue, District resource specialist Eileen Pryor, Grandmother, and Student's advocate Vickie Rice. Ms. Rice's appearance at the IEP team meeting caused District to postpone the meeting as at least some of District's representatives believed that Ms. Rice was associated with an attorney then in due process with District. District wanted the opportunity to have its own legal counsel at the IEP meeting. Grandparents had not retained legal counsel as of the June 1, 2015 IEP meeting. The meeting adjourned after approximately five minutes, over Grandparents' and Ms. Rice's objections.

76. After canceling the June 1, 2015 meeting, District made no attempt to reconvene the meeting during the remainder of the school year, during the summer break, during summer school, and during the first few weeks of the 2015-2016 school year. The existing IEP from May 12, 2014, as signed by Grandparents on January 12, 2015, ended on May 30, 2015.

77. Grandmother wrote to Heather Richter, District's new special education director, on September 12, 2015, approximately one month into the 2015-2016 school year, requesting that the June 1, 2015 IEP be rescheduled. Ms. Richter responded to Grandmother

on September 14, 2015, and requested information in order to schedule the IEP meeting. On September 16, 2015, Ms. Richter wrote to Grandmother, and indicated that the first available IEP team meeting date was October 1, 2015, due to the prospective meeting participants' calendars. Grandmother requested the IEP be rescheduled for the end of October of 2015 in correspondence to Ms. Richter dated October 9, 2015. District proposed possible dates in correspondence to Grandmother in mid-October, but did not hear back. District wrote to Grandmother on November 4, 2015, requesting proposed dates for the IEP team meeting from Grandmother. The IEP team meeting was not held before the filing of the instant due process request on December 23, 2015.

*Independent Educational Evaluation by Dr. Gilbertson*

78. Grandparents retained David Gilbertson, Phd. as an educational expert and a psychologist. Dr. Gilbertson conducted a psychoeducational assessment of Student, and prepared a report of his findings dated November 30, 2015. Dr. Gilbertson assessed Student over six days beginning July 11, 2015, and concluding December 2, 2015 at both his office and Student's home.

79. Dr. Gilbertson was a school psychologist and school district administrator from approximately 1984 to 2010. Thereafter, he was in private practice as a therapist and expert consultant. He earned a PhD. from Berkeley in educational psychology. He served as a special education local plan area director from 1992 to 1997. He estimated that he had performed between 1,000 and 2,000 psychoeducational evaluations in his career.

80. In assessing Student, Dr. Gilbertson administered the following assessment tools: the Wechler Individual Achievement Test-Third Edition; Adaptive Behavior Assessment Scales-Third Edition; Alternative Cognitive Review; Childhood Autism Rating Scale-Second Edition-High Functioning Version; Childhood Autism Rating Scale-Second Edition-Standard Version; Behavior Rating Inventory of Executive Functioning-Parent Form; Achenbach Behavior Rating Scale-Parent Form; Beery-Buktenica Developmental Test of Visual-Motor Integration-Sixth Edition; Beery-Buktenica Developmental Test of Visual Perception-Sixth Edition; Beery-Buktenica Developmental Test of Motor Coordination-Sixth Edition; and Test of Auditory Processing Skills-Third Edition. Dr. Gilbertson also conducted a behavioral observation of Student, interviewed Grandparents, prepared a developmental history of Student, and reviewed Student's educational records.

81. Dr. Gilbertson noted in his report that Student was then currently under the care of a Psychiatrist, Dr. Robert Imani, for apparent psychiatric problems, including working diagnoses of pervasive developmental delay, ADHD, mood disorder, and possibly bipolar disorder. He did not indicate in his report when treatment with Dr. Imani began. Student was hospitalized at the UCLA Medical Center psychiatric unit on November 24, 2015, due to a behavioral and emotional meltdown. Prior to his hospitalization, Student was taking Adderall, Risperdal, and Tenex.

82. Dr. Gilbertson also conducted detailed interviews with Grandmother. She indicated to him that Student had behavioral problems that became more severe and pronounced following the incident of May 14, 2014. Grandmother reported that Student started having nightmares, fear of school, and fear of his SDC classroom teacher after the incident.

83. Dr. Gilbertson found that Student was in the low average to average range in cognitive functioning, and specifically concurred with the findings of previous assessors including District's assessors and those of Children's Hospital. Dr. Gilbertson found that Student was significantly delayed in academic achievement compared to same age peers. He also found Student to have significant delays in processing skills including both visual and auditory processing. He also found that all of the assessments were negatively affected by Student's inattention, hyperactivity, and general behavior.

84. Dr. Gilbertson assessed Student's behavior and social functioning through three assessments: the Inventory of Executive Functioning, the Achenbach Rating Scale, the Adaptive Behavior scales, and the Autism Rating scales. Each of the assessments relied on Grandmother's opinions only, and did not include a clinical component or any other individual's observations or completed scales. In each instance Dr. Gilbertson found that Student had very elevated scores indicating significant behavioral and emotional problems clinically consistent with ADHD, autism, and/or severe emotional disturbance.

85. The report offered extensive criticism of District's education and assessments. Dr. Gilbertson was critical of District for not conducting an FBA of Student during the 2013-2014 school year. He was also critical of District for not preparing a behavior support plan for Student during the same time frame.

86. Dr. Gilbertson's testimony on this issue was not as persuasive as that offered by District's witnesses, including Ms. Vidal and Mr. Shapiro. Ms. Vidal testified persuasively that Student's classroom behavior improved over time and he was making educational progress. Mr. Shapiro also persuasively discounted the severity of Student's behavior during that year. Thus, Dr. Gilbertson's testimony is not given significant weight on this issue. His report failed to mention that Student had met all of his IEP goals for the 2013-2014 school year, and that his behavior had improved in the classroom. His opinion was predicated on reports of aggressive and/or atypical behavior during that school year as a trigger for behavioral assessment and a behavior plan. Yet, he was unaware of what behavioral supports were embedded in Ms. Vidal's pre-school SDC classroom and program. Dr. Gilbertson conceded on cross-examination that not every behavioral issue in a student requires a behavior intervention plan and that such a plan is only necessary in the event of severe behaviors or those affecting a student's education.

87. Similarly, Dr. Gilbertson's testimony on Student's eligibility for special education under the eligibility of severe emotional distress is not found to be persuasive. Dr. Gilbertson did not observe Student in a classroom setting, instead drawing his conclusions from Grandparents reports of Student's behavior and office observations.

Dr. Gilbertson administered the Achenbach test to assess Student's behavior and social-emotional functioning, but then analyzed the scores using reference scores for boys aged six to eleven, despite Student being approximately five years and five months old at the time.

88. Additionally, Dr. Gilbertson did not analyze eligibility for special education under the California Education Code. As such, there was no credible evidence offered to link Student's behavior at home to behavior in the classroom, and, more importantly, there was no analysis of how such behavior might lead to Student's eligibility under emotional disturbance. Dr. Gilbertson's testimony is not found to be persuasive on this issue.

#### *Testimony of Dr. Imani*

89. Dr. Robert Imani, M.D. testified by telephone on behalf of Student. He was a medical doctor with a specialty in psychiatry. He was in private practice. He was not licensed as a school psychologist. He first saw Student as a patient on May 13, 2015, and had seen him approximately 10 times as of the hearing, with the most recent consultation having been on May 5, 2016.

90. He observed Student to have severe hyperactivity and agitation. He had not observed student in a school setting. He had only limited knowledge of the facilities or services available from District in its special education classrooms.

91. Dr. Imani was of the opinion that Student needed to be placed in a residential treatment facility, an inpatient facility, because he could not treat Student as an outpatient at present following Student's latest psychiatric hospitalization at UCLA.

92. As with Dr. Gilbertson, Dr. Imani is not found to be persuasive on this issue. Dr. Imani offered no educational reason for placing Student in a residential treatment facility. Instead, he opined that Student needed to be in such a facility for medical reasons. Absent, any connection to Student's educational needs, Dr. Imani's testimony is simply not persuasive here.

#### *Testimony of Steven Shapiro*

93. Steven D. Shapiro testified on behalf of District. He had been a school psychologist since 1979. He had worked for the Kern County Superintendent of Schools for approximately 16 years performing assessments through that office. He had taught graduate students in the psychology program at National University in Bakersfield.

94. He reviewed the four psychoeducational assessments of Student in preparation for his testimony, including those of Ms. Owen, Children's Hospital, Ms. Roach, and Dr. Gilbertson. He testified as to his opinion of the competency, thoroughness, and adequacy of each of the reports. He also testified regarding his opinions on whether Student was potentially eligible for special education under the eligibility category of emotional disturbance.

95. In Mr. Shapiro's opinion, if a child is scolded by a teacher, such scolding should not be classified as trauma or trauma inducing as it is a reasonable part of a child's school experience, and not outside the norm. He was of the opinion that Student was not a candidate for a general education classroom as Student had too many challenges requiring special education intervention. He was also of the opinion that an FBA was not appropriate for Student until such time as Student was back in a classroom/school setting, and his behavior could be viewed in that context. His testimony on these issues was persuasive and convincing both as to the reasoning underlying the opinions and the professional and reasoned approach taken by the witness.

## LEGAL CONCLUSIONS

### *Introduction - Legal Framework under the IDEA*<sup>8</sup>

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education

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

<sup>9</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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. 950, fn. 10.)

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

5. 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. (*Gregory K. v. Longview School Dist.* (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 must be designed to meet the student’s unique needs, comport with the student’s IEP, and be

reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

*Issue 1: District's May 14, 2013 IEP Offer*

6. Student contends that District's offer in Student's May 14, 2013 individualized education program denied him a FAPE in the least restrictive environment as to placement, occupational therapy services, behavioral support services, and appropriate goals. District disputes Student's contentions.

7. 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. (1).) There are two exceptions which may require an extension of the time for filing a complaint. One is a misrepresentation by a school district which led the complaining party to believe disputed issues had been resolved. (20 U.S.C. § 1415(f)(3)(D)(i); Ed. Code § 56505, subd. (1)(1).) The second exception is withholding information from the parent, or student if student holds educational rights, that the district was required to provide. (20 U.S.C. § 1415(f)(3)(D)(ii); Ed. Code § 56505, subd. (1)(2).)

8. Student filed his complaint on December 23, 2015. Student did not allege any exceptions to the two-year statute of limitations, nor present evidence at hearing as to any exception. Therefore, Student is barred from alleging any FAPE claims that accrued before December 23, 2013, which includes any claims relating to District's FAPE offer in Student's May 14, 2013 IEP.

*Issue 2: District's May 12, 2014 IEP Offer*

9. Student contends that District's offer in Student's May 12, 2014 IEP denied him a FAPE in the least restrictive environment as to placement, occupational therapy services, behavioral support services, and appropriate goals. District disputes Student's contentions.

10. An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) When appropriate, the IEP should include short-term objectives that are based on the child's present levels of academic

achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(iii); Ed. Code, § 56345, subd. (a)(3).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

11. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

12. Federal and state laws require school districts to provide a program in the least restrictive environment to each special education student. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction

in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

13. Here, the IEP team appropriately considered Student's strengths and weaknesses, Grandparents' concerns, Student's present levels of performance, and the Student's unique academic, developmental, and functional needs.

14. The IEP document itself consisted of the statutorily appropriate items including, but not limited to: present levels of academic achievement and functional performance for Student; an analysis of how Student's disability affects his involvement and progress in the general education curriculum; a statement of five measurable annual goals designed to meet Student's unique needs arising from his disability and make progress in his education; a statement of how Student's performance on his goals will be measured and reported to Grandparents; a statement of special education and services to be provided to Student, along with projected start dates and duration, frequency, and location of services, supports, and accommodations.

15. District's offer of placement, program, and services in Student's May 12, 2014 individualized education program met the applicable substantive requirements and constituted an offer of a FAPE in the least restrictive environment.

16. The offer of placement in the pre-school special day class addressed Student's need for a smaller classroom with lower student-adult ratio and additional behavioral support embedded in the program. Student was offered speech and language services calculated to address his speech/language disability. Accommodations were similarly tailored to Student's unique needs as they allowed for Student's warning before transitions, one-at-a-time directions, multiple direction modalities, assistance with toileting, and opportunities for climbing and vestibular input (rocking/swinging). The goals included in the IEP were tailored to Student's unique needs and focused on his issues with following directions, learning classroom routines, and controlling his behavior.

17. The IEP offer was also calculated to constitute the least restrictive environment for Student by having him in a special education classroom that provided adequate adult support and embedded behavioral support, while allowing Student mainstreaming opportunities through participation in selected general education kindergarten activities for 15 to 30 minutes at a time with the assistance of a paraprofessional. Significantly, Student was, at the time, beginning to develop routines and behaviors that would allow him to access his education, as evidenced by his progress during the 2013-2014 school year, as well as his continuing behavioral challenges. Those continuing behavioral challenges made his participation in a general education classroom untenable for both Student and his prospective general education peers, diminishing both the educational benefits of placement full-time in a regular class and the non-academic benefits of such placement. Multiple witnesses offered credible testimony that Student was not yet ready for the core curriculum in a general education setting because of the pace and complexity of the curriculum, combined with Student's lack of fundamental learning skills. Additionally,

multiple witnesses testified credibly that Student's attentional issues and distractibility would render his participation in a full-sized general education classroom unworkable. Student would require a one-to-one behavioral aide, at best, to participate in a general education classroom, minimizing any benefit he might gain from such proximity to his normal peers. The third Rachel H. factor is the effect of Student's presence on the general education classroom. Given his behavior issues and distractibility, it was evident that Student would negatively impact the general education classroom.

18. No evidence was proffered as to the respective costs of Student being mainstreamed versus providing him with specialized academic instruction in a mild/moderate special day class.

19. In sum, Student failed to present evidence that Student could have been mainstreamed to any extent greater than offered by District.

20. The services offered by District were consistent with District's assessments of Student, and the observations and opinions of his classroom teachers and service providers. Consistent, persuasive testimony was provided by District witnesses that Student did not, at that time, need additional behavior supports, as his behavior was improving.

21. The goals offered by District were reasonable, continued Student's learning process, and offered measureable data on his progress. Student did not offer persuasive testimony that the offered goals were insufficient in light of his then present levels of performance.

22. As such, it is found by a preponderance of the evidence that District's IEP offer in the May 12, 2014 IEP provided Student a FAPE with regard to placement, services, and goals.

*Issue 3: District's January 12, 2015 IEP Offer*

23. Student contends that District's offer in Student's January 12, 2015 IEP denied him a FAPE in the least restrictive environment as to placement, occupational therapy services, behavioral support services, and appropriate goals as Grandparents did not want Student in Ms. Vidal's classroom. District disputes Student's contentions.

24. Here, the IEP team appropriately considered Student's strengths and weaknesses, Grandparents' concerns, Student's present levels of performance, and Student's unique academic, developmental, and functional needs.

25. District's offer of placement, program, and services in Student's January 1, 2015 IEP met the applicable substantive requirements and constituted an offer of a FAPE in the least restrictive environment.

26. The offer of placement in the pre-school special day class addressed Student's need for a smaller classroom with lower student-adult ratio and additional behavioral support embedded in the program. Student was offered speech and language services calculated to address his speech/language disability. Accommodations were similarly tailored to Student's unique needs as they allowed for Student's warning before transitions, one-at-a-time directions, multiple direction modalities, assistance with toileting, and opportunities for climbing and vestibular input (rocking/swinging). The goals included in the IEP were tailored to Student's unique needs and focused on his issues with following directions, learning classroom routines, and controlling his behavior.

27. As with the IEP offer of May 12, 2014, the January 12, 2015 IEP offer was also calculated to constitute the least restrictive environment for Student by having him in a special education classroom that provided adequate adult support and embedded behavioral support, while allowing Student mainstreaming opportunities through participation in selected general education kindergarten activities for 15 to 30 minutes at a time with the assistance of a paraprofessional. Simply put, the same reasoning regarding the *Rachel H.* factors applies here as it did to the May 12, 2014 IEP offer regarding Student's behavior, ability to access material, and likely impact on a general education setting.

28. Children's Hospital documented Student's escalating behavioral issues at home, but offered no insight into how those behaviors might translate into the classroom, if at all. Children's Hospital's assessment also painted a picture of Student largely consistent with the 2013-2014 school year. Student's performance, as reported by Children's Hospital was largely consistent with his prior District assessments as to cognition, speech and language, and occupational therapy. Children's Hospital offered a medical diagnosis of ADHD, but was unable to offer any insight as to how that might affect Student in the classroom. In light of Children's Hospital's findings, it was reasonable for District to offer a program that picked up where Student had been when he left school in May of 2014. Significantly, District and Grandparents formulated an assessment plan to assess Student once he returned to school, in order to see the extent to which his needs may have changed. As such, the offer made by District on January 12, 2015 provided Student with a FAPE in the least restrictive environment as to the offered program, services, and goals.

29. Student failed to present evidence that Student could have been mainstreamed to any extent greater than that offered by District. In sum, the IEP offer of January 12, 2015 was sufficient to meet Student's needs and provide him with a FAPE in the least restrictive environment.

#### *Issue 4: Failure to Assess in All Areas of Suspected Disability*

30. Student contends that District failed to appropriately assess Student in occupational therapy and psychoeducational functioning, including social-emotional and behavior. Student contends that District failed to consider emotional disturbance as a potential eligibility, and that District should have undertaken a full OT assessment earlier, than it did. District disputes Student's contention.

31. A child eligible for special education may be reassessed if warranted by the child's educational needs or need for related services, or if reassessment is requested by a child's parent or teacher. (Ed. Code, § 56381, subd. (a)(1); 34 C.F.R. 300.303(a).) Unless the parents and the child's district of residence agree to the contrary, reassessments must not occur more than once a year, or more than three years apart. (Ed. Code, § 56381, subd. (a)(2); 34 C.F.R. 300.303(b).)

32. A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the local educational agency." (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).)

33. Tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

34. The assessment must be sufficiently comprehensive to identify all of the student's special education and related service's needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304(c)(6).)

35. A district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether he is eligible for special education, and what the content of his program should be. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) An assessment tool must "provide relevant information that directly assists persons in determining the educational needs of the child." (34 C.F.R. § 300.304(c)(7).)

36. In selecting assessment tools, the assessor must do more than pick a generally valid instrument. Tests and other assessment materials must be used "for purposes for which the assessments or measures are valid and reliable." (20 U.S.C. § 1414(a)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessment tools must be "tailored to assess specific areas of educational need . . ." (Ed. Code, § 56320, subd. (c).) "Special attention shall be given to the [child's] unique educational needs . . ." (*Id.*, subd. (g).)

37. Assessors must use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) "Technically sound instruments" generally refers to assessments that have been shown through research to be valid and reliable." (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46642 (Aug.14, 2006).)

38. A district must ensure that the child is observed in his learning environment (including the regular classroom setting) to document his academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310(a).)

39. It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(iii)(A); 300.306(a)(1).) To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subs. (a), (b).) The report must be given to the parent or guardian, though that duty has no fixed time limit. (Ed. Code, § 56329, subd. (c).) Normally, an assessment must be completed within 60 days of the receipt of parental consent for it. (34 C.F.R. § 300.301(c)(1)(i), (ii); see Educ. Code, § 56302.1(a).)

*Issue 4(a) Occupational Therapy Assessments – Failure to Adequately Assess*

40. Student contends that District failed to appropriately assess Student in occupational therapy by performing an OT screening in 2014, rather than a full OT assessment, and that the eventual OT assessment in 2015 was insufficient. District disputes Student's contention.

41. Here, Student failed to meet his burden of proof that District's occupational therapy assessments of Student were legally insufficient or failed to include all areas of suspected disability within the area of occupational therapy.

42. Grandparents wrote to District on April 9, 2014, requesting an OT assessment if one had not already been done. Tracy Doue, District's occupational therapist, spoke to Grandmother by phone and it was agreed that Student would be screened for OT needs, rather than be fully assessed. The OT screening was conducted by Ms. Doue on April 23, 2014, and she prepared a report and forwarded it to Grandmother. In the screening report, Student was observed by Ms. Doue to have made significant progress over the 2013-2014 school year, particularly in his sensory/motor skills group. In that group his behavior improved and he was able to complete all activities, including fine motor and gross motor tasks. A formal OT assessment was not recommended due to Student's progress and Student's pre-school setting providing adequately for his OT needs. Thus, at this point in time, Student's educational needs and his need for services, did not warrant a fuller assessment, as OT was not an area of suspected disability. Additionally, Grandmother withdrew her request for an assessment in her phone call with Ms. Doue.

43. On April 15, 2015, pursuant to the February 4, 2015 assessment plan, Student was assessed for OT by Ms. Doue. In performing the assessment, Ms. Doue conducted a teacher interview, performed a clinical observation of Student, and used the Hawaiian Learning Profile to approximate functional age level. She also attempted to use the Bruininks-Oseretsky motor skills assessment, but Student would not sit to participate in any

formal testing. Student's behavior greatly affected Ms. Doue's ability to conduct the assessment, as it had for numerous other assessors.

44. Ms. Doue concluded that Student had good gross and fine motor strength and coordination, but that his attention deficits fully impacted every area of the assessment. She did not recommend educational OT services for Student. She did recommend a structured placement, opportunities for movement and heavy work activities on a regular basis, and continuing efforts to encourage Student to participate in table top fine motor skills.

45. Student argues that the earlier results in November 25, 2014 Children's Hospital OT medical assessment indicates that Student required OT services, and that therefore District's assessment was inadequate. However, Children's Hospital's OT assessment was not directed to the educational setting, and does not render Ms. Doue's assessment inadequate. The best available evidence from a classroom setting indicated that Student was making progress with the embedded OT services in his SDC classroom.

46. The assessment was sufficiently comprehensive to identify all of the student's special education and related service's needs. District used appropriate assessment tools and strategies to gather relevant functional, developmental, and academic information and gathered the relevant information to determine the educational needs of Student, who was observed in his learning environment to document his areas of difficulty. As such, it is found that Student failed to prove by a preponderance of the evidence that District's OT screening and assessment of Student fell below the standards necessary for it to constitute a legally acceptable assessment.

*Issue 4(b) Psychoeducational Assessment – Failure to Adequately Assess*

47. Student contends that District failed to appropriately assess Student in psychoeducational functioning over the two year time period beginning in December 2013 through December 2015, including social-emotional functioning and behavior, because District did not consider emotional disturbance as a potential eligibility for Student. District disputes Student's contention.

48. Here, Student failed to meet his burden of proof that District's psychoeducational assessments of Student were legally insufficient or failed to include all areas of suspected disability within the area of psychoeducational functioning, including social-emotional functioning and behavior.

49. District initially assessed Student in the spring of 2013 regarding his psychoeducational functioning. The assessment was sufficiently comprehensive to identify all of Student's special education and related service's needs. District used appropriate assessment tools and strategies to gather relevant functional, developmental, and academic information and gathered the relevant information to determine the educational needs of Student, who was observed in his learning environment to document his areas of difficulty. District school psychologist Sharon Owen issued a report of Student's psychoeducational

functioning on April 10, 2013. Based in part upon that report, the IEP team made an IEP offer on May 14, 2013, which was agreed to by Grandmother in writing. The May 14, 2013 IEP was implemented by District, and Student met his six IEP goals and made educational progress during the operational period of the IEP.

50. Student was not reassessed in the area of psychoeducational functioning in the spring of 2014, prior to his next IEP, as he was not demonstrating issues with the area of psychoeducational functioning, including social-emotional functioning and behavior at school, beyond what had already been identified in the earlier psychoeducational assessment by Ms. Owen. Notably, Student's behavior had improved and he had made progress on goals that addressed, among other areas, his behavior, by focusing on his following two-step directions, joining a group game, and joining a small group activity. Ms. Vidal's testimony was persuasive in this regard.

51. After the May 12, 2014, IEP meeting, and the May 14, 2014, removal from school, an IEP team meeting was next convened on January 12, 2015, to address Student's absence from school, creation of a plan to reintroduce Student to the classroom, and to discuss the reported assessments of Student performed at Children's Hospital. The IEP reentry and assessment plan was reasonable given Student's absence from school, and the fact that District was not made aware of any change in Student's psychoeducational needs or condition during the period from May 14, 2014, through January 11, 2015. Grandmother agreed to all aspects of the assessment plan except the FBA.

52. Student was then timely and appropriately assessed by District's school psychologist Dawn Roach for psychoeducational functioning in April and May of 2015, in all areas of suspected disability, including academic achievement, health, intellectual development, and social/emotional. A broad variety of assessment tools and methods were utilized to obtain comprehensive, valid, meaningful data on Student's academic, developmental, and functional abilities, capabilities, and difficulties. Assessments included, but were not limited to: review of education, medical, and assessment records; interviews with parent and Student; objective assessment tools; the use of assessment scales completed by Grandparent; and observations of Student.

53. The assessments were selected and administered so as not to be racially, culturally, or sexually discriminatory, and were provided and administered in Student's primary language of English. The assessments were also selected and used for the purposes for which the assessments or measures were valid and reliable, were tailored to Student's specific areas of educational need, and were technically sound and reliable. Ms. Roach was highly qualified, trained, and experienced in administering the assessments utilized, and was knowledgeable about Student and his suspected disabilities. The problems Ms. Roach experienced with Student's attentional issues in performing her assessment were similar to those experienced by every assessor of Student, including other District assessors, Children's Hospital, and Dr. Gilbertson. Under the circumstances, each of the assessors appropriately assessed Student in light of his attentional challenges.

54. The judgment and recommendations of Ms. Roach, as related in the assessment report, was reasonable, considered, and based upon the information learned during the assessment. Ms. Roach considered the information she assembled in reaching reasonable conclusions regarding Student's eligibility category for special education.

55. Ms. Owen reasonably relied on the recent assessments of Student by Children's Hospital for data, as well as to formulate her opinions. Ms. Roach considered information provided by Grandmother about Student's behavior at home. The omission of the May 14, 2014 incident in her report did not render the psychoeducational report invalid or legally insufficient. Ms. Roach obtained sufficient information from Student during her assessment of him, including his behavior in interacting with her, demonstrating serious attentional issues and task avoidance, but not aggressive or violent behavior, nor negative emotionality such as sadness, withdrawal, anger, or tantruming. Although the behavior assessment scales and social-emotional functioning scales prepared by Grandmother showed consistently high or low scores, such extremes of behavior and social-emotional functioning were not observed during the assessment.

56. Consistent with the medical diagnosis reached by Children's Hospital that Student appeared to have ADHD, Ms. Roach found that the ADHD would impact Student's ability to access his education in the classroom, and based upon these findings, recommended that Student's eligibility be changed to other health impairment to reflect Student's attentional problems.

57. In sum, based upon the information available to it, District did not fail in its obligation to appropriately assess Student in suspected areas of disability in the psychoeducational realm during the relevant time frame. Student was not attending school during and after Ms. Roach's assessment, and continued to be out of school up to the time of filing of the due process complaint. Although Student had obtained a treating psychiatrist in approximately May of 2015, District was not notified of this by Grandparents. Likewise, Student's psychiatric hospitalization at UCLA, and his assessment by Dr. Gilbertson were not revealed to District until after the filing of the due process complaint. Student failed to present sufficient evidence either that Student should have been assessed additionally, or that the assessment conducted by Ms. Roach and Ms. Owen fell below the standards necessary for it to constitute a legally acceptable assessment.

#### *Issue 5: District's June 1, 2015 IEP Offer*

58. Student contends that District's offer in Student's June 1, 2015 IEP denied him a FAPE in the least restrictive environment as to placement, occupational therapy services, behavioral support services, and appropriate goals as District improperly cancelled the IEP meeting, did not timely reschedule the meeting, and never actually made an IEP offer to Student for the 2015 extended school year or the 2015-2016 school year. District disputes Student's contentions, and argues that the appearance of Student's advocate, Vicki Rice, necessitated District's tabling of the meeting in order to obtain legal representation at the IEP meeting.

59. Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting, and has an affirmative duty to provide adequate notice to parents. (34 C.F.R. 300.322(a)(b).) The IEP team may include, at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. 300.321(a)(6).)

60. At the beginning of each school year, each public agency must have an IEP in effect for each child with a disability. (34 C.F.R. 300.323(a).)

61. Under the IDEA, in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE; significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child; or caused a deprivation of educational benefits. (20 U.S.C. 1415(f)(3)(E)(ii); see also Ed. Code, § 56505 subd. (j); *Shapiro v Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078. See also *Amanda J. v. Clark Cnty. Sch. Dist.*, (9th Cir. 2001) 267 F.3d 877, 892.)

62. Here, District did not provide Student a FAPE in the least restrictive environment in the June 1, 2015 IEP. Even assuming Ms. Rice was found to be the equivalent of a legal representative, there is no legal basis supporting District's position that it was entitled to cancel an IEP meeting to obtain representation as a counterbalance to Ms. Rice.

63. Even if the cancellation were justified, District then failed to promptly reschedule the IEP meeting either before the end of the 2014-2015 school year, or over the summer. In failing to reschedule the meeting, District failed to have an IEP in place at the beginning of the school year. The prior IEP of January 12, 2015 ended on May 30, 2015, thus there was no IEP in place when Student returned for the beginning of the 2015-2016 school year. District only proposed rescheduling the IEP following correspondence from the Grandmother on September 14, 2015, requesting such a rescheduling. The June 1, 2015 IEP meeting was never rescheduled prior to the Student's filing for due process, and Student was never offered an IEP for the 2015-2016 school year.

64. Thus, at the June 1, 2015 IEP meeting, Student was never provided an offer by District. Such a failure by District is a procedural FAPE violation, as Student had no IEP after May 30, 2015. At the beginning of the school year, there was no IEP in place, and District did not seek to offer a new IEP meeting date until more than a month of school had passed. The absence of an IEP significantly impeded the opportunity of the Grandparents to participate in the decision making process regarding the provision of a FAPE to Student, and served to deprive Student of educational benefits consistent with his special education eligibility, and caused a deprivation of educational benefits to Student.

*Issue 6: Behavioral Supports*

65. Student contends that District denied him a FAPE by failing to address his need for appropriate behavioral support during the two years prior to the filing of the complaint by not implementing a behavior plan for Student. District disputes Student's contention.

66. 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).)

67. Student has not met his burden of proving a FAPE denial, as the behavioral supports that District provided Student while he was attending school were appropriate and allowed him to make meaningful educational progress. This was demonstrated in the present levels of performance in the May 12, 2104 IEP. Student's behavior at school improved during the 2013-2014 school year, as persuasively testified to by Ms. Vidal.

68. Student's increasingly problematic behavior in the home setting after his removal from school does not change the fact that District had adequate support for Student in the classroom while he was attending school. Student failed to present evidence that the behavioral supports utilized by District were inadequate at any time while Student was in school or that District was responsible for addressing Student's behavioral issues at home.

*Issue 7: District's Administration of Behavior Interventions*

69. Student contends that District failed to administer behavior interventions to Student in a manner that respects human dignity and personal privacy so as to violate the requirements of the IDEA or the California Education Code during the two years prior to the filing of the complaint. District disputes Student's contention.

70. Behavioral interventions, supports, and other strategies are to be used in consideration of a student's physical freedom and social interaction and be administered in a manner that respects human dignity and personal privacy. (Ed Code, § 56520, subd.(b)(3).)

71. Here, Student has failed to meet its burden of proof in establishing that behavioral interventions, supports, or strategies utilized by District were not administered in a manner that respects human dignity and personal privacy. Such evidence as was presented at hearing is persuasive that during the incident of May 14, 2014, Student's human dignity and personal privacy were respected. Student presented no credible evidence that Student was mistreated in any way while on campus or in his classroom. Student relies on unverified and unverifiable accounts of another parent to support his contention. District's witnesses, including Ms. Vidal and Mr. Shapiro were persuasive that no such insult to his human

dignity and personal privacy occurred. As such, Student has failed to meet his burden of proof, it is found that no such violation occurred.

*Issue 8: District's Failure to File for Due Process Within a Reasonable Amount of Time*

72. Student contends that District denied Student a FAPE from May 12, 2014, to December 23, 2015, by failing to initiate a due process hearing within a reasonable time after Grandparents failed to provide consent to the May 12, 2014 IEP. District disputes Student's contention.

73. The IDEA provides that if the parent refuses to consent to services offered in an IEP, other than an initial IEP, the school district may initiate a due process hearing. (20 U.S.C. § 1414(a)(1)(D)(ii)(II); 34 C.F.R. § 300.300(b)(3); *I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164, 1167-1168 (*I.R.*)). The California Education Code requires that "as soon as possible following development" of the IEP, "special education and related services shall be made available" to the student in accordance with the IEP. (Ed. Code § 56344(b).) If the parent consents to some, but not all, of the components of an IEP, the school district must determine whether the proposed special education program component is determined to be necessary to provide a FAPE. If the school district "determines that the proposed special education program component to which the parent does not consent is necessary to provide" a FAPE, "a due process hearing shall be initiated." (Ed. Code. § 56346(f).) The school district cannot opt to hold additional IEP team meetings, or continue the IEP process in lieu of initiating a due process hearing; rather, the school district must initiate a due process hearing expeditiously. (*I.R., supra*, 805 F.3d at p. 1169.)

74. In evaluating how long is too long for a school district to take in determining a component's necessity and initiating a due process hearing, the school district must have some flexibility to allow for due consideration of the parent's reasons for withholding consent to an IEP component. (*I.R., supra*, at 805 F.3d 1169.) However, a school district should be able to consider the parents' position and make a determination as to the component's necessity within a reasonable period of time. (*Ibid.*) If, in the school district's judgment, the child is not receiving a FAPE, the district must act with reasonable promptness to correct that problem by adjudicating the differences with the parent. The reason for this urgency is that it is the child who suffers in the meantime. (*Id.* at 1169-170.)

75. A school district's failure to comply with a procedural requirement, such as Education Code section 56346, subdivision (f), denies a child a FAPE when the procedural inadequacy results in the loss of educational opportunity or causes a deprivation of educational benefit. (*I.R., supra*, 805 F.3d at p. 1170.) To the extent a student loses an educational opportunity and was deprived of educational benefits for an unreasonably prolonged period, the school district can be held responsible for denying the child a FAPE for that period. (*Ibid.*) In *I.R.*, the Ninth Circuit found that the school district's delay of more than a year and a half in requesting a due process hearing following the parent's failure to consent to a provision of the IEP was an unreasonable delay. (*Ibid.*)

76. Here, Student failed to prove by a preponderance of the evidence that District failed to comply with the holding of *I.R.*, or that Student was denied a FAPE by District's failure to file for a due process hearing pending Grandparents' signing of the May 12, 2014 IEP.

77. The May 12, 2014 IEP was not objected to by Grandmother at the time of the IEP team meeting. However, she did not sign the IEP at the meeting because Ms. Torres told her not to sign in her absence and Grandmother wished to review the IEP with Grandfather. District continued to attempt to convene another IEP meeting or simply have Grandparents sign the IEP. Grandparents ultimately agreed to all aspects of the May 12, 2014 IEP as it was repackaged in the January 12, 2015 IEP offer, except for allowing Student to return to Ms. Vidal's classroom. However, at the January 12, 2015 IEP meeting both an alternative placement and an assessment plan were discussed, and thereafter pursued. It was not unreasonable for District to wait approximately seven months to get the IEP signed, as District had no reason to believe that Student had any objection to the May 12, 2014 IEP during that time period. Rather, Grandparents pursued several different options, and then ultimately agreed to all aspects of the IEP, except the teacher staffing the classroom.

#### REMEDY

Student prevailed on Issue 5 and is entitled to equitable relief. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid*, 401 F.3d at 524.) In fashioning relief, an ALJ must look at present needs and the degree to which those needs can be rectified by current services.

Student failed to present any meaningful evidence regarding compensatory education for District's FAPE violation related to the June 1, 2015 IEP. Student did not present credible evidence of the type or amount of compensatory education to which Student claims he is entitled. However, District, as an equitable remedy, shall provide training to its special education staff regarding proper notice, participation, and attendance at IEP meetings, including Student's right to representation at IEP meetings. The training shall comprise at

least one-half day (four hours), and be provided by the SELPA, the Kern County Superintendent of Education, or another non-District entity competent to provide such training.

Student offered no evidence to support any other specific relief.

#### ORDER

As compensatory education, District shall provide training to its special education staff regarding proper notice, participation, and attendance at IEP meetings, including Student's right to representation at IEP meetings.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issue 5, and District prevailed on all other issues presented.

#### RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATED: August 5, 2016

\_\_\_\_\_/s/  
TED MANN  
Administrative Law Judge  
Office of Administrative Hearing