

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LIBERTY UNION HIGH SCHOOL  
DISTRICT

OAH Case No. 2017020873

**DECISION**

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on February 17, 2017, naming the Liberty Union High School District as respondent.

Administrative Law Judge Penelope Pahl heard this matter in Brentwood, California, on May 16, 17, and 18, 2017. The hearing was open, and there were observers in the hearing each day.

Mandy Leigh and Damien Troutman, Attorneys at Law, represented Student. Father attended throughout the hearing. Mother attended part of the first day, and the second and third days. Student attended the second and third days of hearing.

Jan Tomsy, Attorney at Law, represented Liberty. John Saylor, Liberty's Director of Special Services, attended each day of the hearing on behalf of Liberty.

The parties requested permission to file written closing arguments, a continuance was granted for that purpose, and the record remained open until June 5, 2017. Upon timely receipt of closing arguments, the record was closed and the matter was submitted for decision.

## ISSUES<sup>1</sup>

1. Did Liberty deny Student a free and appropriate public education (FAPE) during his 2016/2017 school because:

a. Liberty failed to timely hold a transitional IEP meeting, despite having reasonable notice of his eligibility and need for special education services, causing Student to begin the school year without any special education services; and

b. Liberty's offer of FAPE, presented in the August 19, 2016 IEP, provided inadequate goals and services because:

1. Student's proposed spelling goal in actuality furthered a written expression goal, needed to be broken down into sub-parts, and failed to provide appropriate baselines, thus rendering it immeasurable and unlikely to ensure Student meaningful academic progress in this area;

2. Student's proposed oral reading goal failed to provide appropriate and accurate baselines therefore rendering the goal inappropriate and immeasurable and unlikely to ensure Student meaningful academic progress in this area;

3. Liberty's proposed reading goal failed to provide appropriate and accurate baselines and was unclear therefore rendering the goal inappropriate and immeasurable and unlikely to ensure Student meaningful academic progress in this area; and

4. Liberty's instructional support class, namely tutorial support, was inadequate and prevented Student from receiving needed academic services.

## SUMMARY OF DECISION

Student has dyslexia and has fundamental skill deficits in the areas of reading, spelling and writing. He transferred into Liberty from an elementary school district following the 2015-2016 school year. The elementary school district held an initial IEP team meeting on May 19, 2016, after completing a special education assessment for

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<sup>1</sup> Student's request for due process originally contained three issues. At the prehearing conference, Student agreed to withdraw issue number two, as it articulated a request for a remedy, as opposed to an issue, and that remedy was already included in Student's proposed resolutions. Student's issue number three alleged a violation of Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and relevant state and related civil rights statutes. The prehearing conference order dismissed issue number three as OAH lacks jurisdiction to hear such claims.

Student. Although the IEP team determined that Student was eligible for special education, Parents did not consent to Student's eligibility until July 29, 2016, which was the Friday before the August 1, 2016 start date of the 2016-2017 Liberty Union school year. The elementary school district did not arrange a transitional IEP by which Liberty would have been notified of Student's needs, as required by State law. Liberty was not provided with notice of consent to eligibility pursuant to the initial IEP team meeting in May 2016, until August 2, 2016.

Liberty convened an IEP team meeting on August 19, 2016, which they did as quickly as all necessary participants could be available. An IEP was developed at that meeting. There was no denial of FAPE as a result of the scheduling of the August 19, 2016 IEP team meeting.

Student established that the IEP of August 19, 2016, failed to provide a free, appropriate public education. The goals were not designed to address Student's learning deficits, and the tutorial support class did not offer academic support to meet Student's unique needs. Parents did not sign the IEP until December 19, 2016, because they had concerns about the proposed goals. Therefore, Student did not receive any special education services until the beginning of his second semester in January 2017, and the services he received during his second semester were inadequate.

Student is owed compensatory education for a denial of FAPE from August 19, 2016, through the last date of hearing which was May 18, 2017. In addition, staff training is also ordered.

## FACTUAL FINDINGS

### *Jurisdiction*

1. Student is a 15 year-old young man who has resided within the geographical boundaries of Liberty at all relevant times. His placement, at the time of the hearing in this matter, was in ninth grade general education classes at a comprehensive high school with a Tutorial Support class, in which he was to receive specialized academic instruction. Prior to his enrollment in Liberty, he was a Student in the Brentwood Union School District, the elementary district which feeds into Liberty.

### *Student's Advanced Abilities and Learning Deficits*

2. Student is extremely bright. All assessments show advanced abilities with areas of deficit in spelling, reading, and writing, including both the physical act of writing, and the formulation and organization of written communication. Over the years, Student has devised methods of compensation for his learning deficits that have allowed him to get homework done. Student has consistently been less successful on in-class work and tests. One of the means Student uses to get through his school work is

determination. Assessors and teachers who have met Student acknowledge that he is an extraordinarily hard worker who does not like to give up before a task is complete.

3. Father described Student's determination by relating a story about Student, at nine years old, building a full-size Batmobile by dumping out all of the Legos he had accumulated over the years and designing it on his own. Student had been told the family could not afford the expensive kit so Student decided he could make what he wanted using photos he found online and did just that. Student had always been able to build and design using erector sets and Lego sets above his age level. He solves Rubik's cubes of various sizes on a timed basis for fun, completing the puzzles in seconds. Having proudly described Student's abilities, Father stated Student's difficulties were that he was not able to read or write at his grade level and certainly not at the level of the instructions he received with the advanced building sets he was using. He accommodated by using pictures and working out his conclusions with trial and error.

4. Student's difficulties with letters and sounds began to appear in kindergarten and he was held back to repeat that year. An additional retention was considered in first grade although it was ultimately decided against because it was thought Student would be able to catch up. He has not. He has never been able to read at grade level despite reading interventions and additional tutoring that began in first grade and continued through fifth grade.

5. Student's reading is slow and laborious. He has devised a method of guessing words from context that has been minimally successful and is becoming less so as the reading material he is assigned increases in complexity. Writing is also difficult. Student does not hold a pencil correctly and finds writing, especially for long periods of time, to be strenuous and painful. Student also struggles to organize and articulate his thoughts in written form. Part of that difficulty is based on his inability to read and understand instructions describing essay expectations; and part is that Student struggles to read and understand the source materials from which the written assignments are drawn. Student is embarrassed by his learning deficits, so he is not always candid about his difficulties. For example, when asked by Brentwood School Psychologist Derek Dammemeyer if he had difficulties writing for long periods of time Student denied it, although he has admitted it to other assessors. Student's ninth grade English teacher described him as quiet; in the clamor of a class of 32 students, his fundamental skill deficits were not noticed so, absent asserting a need for assistance, his needs were often overlooked.

6. One of Student's most prominent hurdles is that he is unable to retain information he has learned. Despite practicing spelling words daily he could not retain the information. He had similar difficulties with learning sight words for reading. He has difficulty pronouncing words, so it is also difficult to spell them. He routinely tested at 30-50 percent of expected reading fluency.

7. Despite these issues, Student was not assessed for special education until the eighth grade. He was provided a range of accommodations and interventions through the fifth grade. The interventions ceased in middle school. He did continue to receive extra time to complete tests. However, his reading issues did not abate with extra time, as he could not decode bigger words. He used the extra time to apply a guessing system he devised. His reading abilities continued to be far below grade level.

8. In the fall of 2015, during Student's first semester of eighth grade, Parents sought a comprehensive assessment of Student due to his increasing frustration with schoolwork. Although Student worked very hard, often hours each night, he struggled with homework centered on spelling, reading and writing. At one point, Student was described as so frustrated he curled into the fetal position on the floor in tears and wouldn't respond when his parents tried to talk to him. He often told his parents they could not understand what he was going through. Student exhibited extreme stress in trying to complete homework, often staying up quite late because he felt a responsibility to complete the work.

9. Student has aspirations to become an engineer and could not understand why he could not master the concepts being taught. His Parents saw his self-esteem drop considerably in eighth grade. They received a referral to Dr. Marni Sandoval as a person who could help diagnose Student's learning difficulties.

*Assessment by Dr. Marni Sandoval, Psy. D.*

10. Dr. Sandoval testified at hearing about her extensive assessment of Student. Dr. Sandoval holds a Psy D. in Psychology and has been a California licensed clinical psychologist since 2005. Dr. Sandoval divides her time between a private psychotherapy practice, which she started in 2007, and her position as the Deputy Director of the Children's division of the Monterey County Behavioral Health Department which she has held since 2015. The varied aspects of her private practice include education disabilities, learning differences and dyslexia. Cumulatively, Dr. Sandoval devoted nine hours to testing and observation over four days, during her evaluation of student, which included interviews of Parents and of Student. Her report was completed on February 2, 2016. Dr. Sandoval was clear, professional and relayed her personal knowledge about Student consistently and with detail. Her testimony was given considerable weight.

11. Dr. Sandoval noted Student's delayed acquisition of speech in his developmental history as well as the family history of learning disabilities similar to those evidenced by Student. Parents and Student's siblings share similar struggles, particularly in reading, writing, and spelling. Student's academic struggles are causing him increasing concern in light of his goal of becoming an engineer.

12. Dr. Sandoval reviewed work samples from Student as well as standardized and classroom testing results dating back to his kindergarten year. She

noted that English language arts testing results were consistently below proficiency range in many areas. His written work revealed that, at the time of the assessment, Student was writing in extremely short sentences with numerous misspellings. His written work took an unusually long time to complete and resulted in many errors despite his attempts to proofread. Errors included reversals of letters, poor mastery of capitalization and punctuation, grammar, syntax, and suffixes. Student also struggled physically with writing, demonstrating poor spacing of words on the page, and holding writing instruments in an awkward manner.

13. Student was noted to have organizational difficulties and frequently misplaces things. These deficits cause Student great distress, as he genuinely wants to do well, and he works very hard in an attempt to do so. Despite his obvious academic struggles Dr. Sandoval opined that Student's strong verbal and interpersonal skills, as well as his stronger abilities in non-language related subjects, resulted in his academic weaknesses being overlooked by teachers. Dr. Sandoval also noted that Student is an extraordinarily hard worker who dislikes giving up on any task until it was completed.

14. Dr. Sandoval's testing showed that Student had impairments in reading, word reading accuracy, reading fluency and reading comprehension. She identified problems with dyslexia and dysgraphia. She diagnosed him with a specific learning disability, with impairments in reading, moderate word reading accurate, reading fluency, reading comprehension, written expression, moderate spelling accuracy, grammar and punctuation accurate, clarity and organization of written expression as well as a developmental coordination disorder, specifically, grapho-motor difficulties.

*Brentwood Union School District*

ASSESSMENTS

*BRENTWOOD ASSESSMENT*

15. Parents asked Brentwood to assess Student for eligibility for special education and related services based on the testing results in Dr. Sandoval's report. Her report was provided to School Psychologist Derek Dammemeyer.

16. Student was assessed in May of 2016, at the end of his eighth grade year, for special education eligibility by Brentwood School Psychologist Derek Dammemeyer, Derek Treichelt, an Instructional Support Provider (special education teacher) for the middle school, Libby Brownrigg, Brentwood's speech and language pathologist, and Lindze Antonich, occupational therapist.<sup>2</sup> Testing reports from Mr. Dammemeyer and Mr. Treichelt were admitted into evidence.

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<sup>2</sup> None of these assessors testified at hearing, but a transcript of the May 19, 2016 IEP team meeting, was submitted into evidence and in that document the assessors described the outcome of their testing.

17. In his assessment report, Mr. Dammemeyer summarized the same academic testing and additional assistance provided throughout Student's academic career noted in Dr. Sandoval's report. Student had received grades ranging from A's to D's through middle school. However, his grades during eighth grade had been all A's and B's.

18. Mr. Dammemeyer assessed Student using the Differential Ability Scales, Second Edition, the Test of Auditory Processing Skills, third edition and the Behavior Assessment System for Children, second edition, and he reviewed the testing results from Dr. Sandoval. He noted that the outcomes of his assessments were similar to those reported by Dr. Sandoval. Mr. Dammemeyer used the Differential Ability Scales to test Student's cognition, and he compared his results to those Dr. Sandoval obtained using the Wechsler Intelligence System for Children, Fifth Edition. A processing speed deficit was noted on the Wechsler and lower results were present on rapid naming scores and phonological blending using auditory sounds and in Student's ability to remember and repeat nonsense words. In contrast, scores in the high average to very high range were noted in the Differential Ability, Spatial composite, Visual spatial and Nonverbal Reasoning. Student excelled at identifying visual patterns though Mr. Dammemeyer acknowledged his slow work on the test.

19. Student's overall conceptual ability score on the Differential Ability Scales was a 134, which is considered to be in the very high range. Differentiating this result with the full scale IQ of 112 on the Wechsler Intelligence assessment used by Dr. Sandoval, Mr. Dammemeyer noted that the Differential Ability test does not include processing speed in its calculation of overall performance. Student's processing speed score was the lowest of his Wechsler scores by a substantial degree which functioned to lower the overall full scale IQ on that test.

20. The academic evaluation conducted by Brentwood's Instructional Support Provider Derek Treichelt reinforced the conclusions of the other testing. The Woodcock-Johnson Test of Academic Achievement, Fourth Edition was administered, and Student had very low scores in letter word identification, oral reading and low scores in broad reading, reading fluency, math fluency and spelling. Low-average results were seen in speed reading fluency, word attack, the phoneme-grapheme cluster, reading vocabulary and passage comprehension. Although noted to have achieved a "high average" score in his writing sample, it was noted that Student's score was not discounted for spelling errors. Examples of his sentences included, "*If you where head phones wile riding a bikeon a bissy streat you can get hit by a car because you are not paying attention.*" Student was only required to write single sentences on this test, so his ability to formulate writing in excess of single sentences was not evaluated by this instrument.

21. Dr. Sandoval's theory of Student's positive personality impacting the evaluation of his difficulties in the school setting were borne out by the conclusions and recommendations of Mr. Dammemeyer. In his conclusions in the psycho-educational

report, the school psychologist noted that Student often worked very slowly on the tests. However, instead of that raising a concern, he noted only, “Generally he was observed to come up with the correct answer if he analyzed the task enough. His strategy of taking his time was a successful one.” Despite acknowledging similar testing outcomes to Dr. Sandoval’s results, Mr. Dammemeyer failed to analyze the testing disparities or acknowledge the areas in which Student struggles. His conclusions as to Student’s needs were quite different than that of Dr. Sandoval and were not supported by the testing results.

22. Mr. Dammemeyer concluded that Student had minor weaknesses in phonological blending, a processing speed deficit, and deficits in rapid naming of colors, symbols, numbers and letters. He noted impaired abilities in the areas of reading and math fluency<sup>3</sup> as well as deficits in the areas of processing speed and auditory processing. However, Mr. Dammemeyer did not acknowledge any areas of need for Student stating, “Student’s overall cognitive abilities are quite remarkable and [Student’s] ability to work around any weaknesses he has are remarkable as well.” He determined Student had no need for special education and related services stating, “He has been consistently able to achieve passing grades through his time at [middle school] without need for modifications or additional supports. Some basic accommodations may be beneficial to further strengthen his academic success.”

23. Mr. Dammemeyer’s conclusion that Student had no areas of deficit that were impacting him educationally failed to account for Student’s reported practice of having his Father re-read and correct all written work before he could submit it to his teachers; nor did it account for his observation of Student faltering as he read in class. There is no indication that Mr. Dammemeyer reviewed any work samples from Student to evaluate his spelling or writing abilities. Mr. Dammemeyer’s conclusion also failed to address deficits indicated by his own acknowledgement that Student would struggle with unfamiliar words that he was hearing for the first time. Nor did Mr. Dammemeyer address the concerns expressed by Dr. Sandoval. There was no explanation for why Student’s learning deficits were discounted other than the fact that Mr. Dammemeyer concluded Student coped and ultimately got passing grades. There was no indication that Student was getting educational benefit commensurate with his circumstances.

24. Overall, Brentwood’s assessments and the assessment completed by Dr. Sandoval established that Student had deficits in the areas of processing speed, reading comprehension, reading fluency and math fluency. Spelling and writing deficits were also demonstrated.

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<sup>3</sup> Although it is notable that Mr. Dammemeyer had also originally noted a deficit in the area of writing fluency. At some point, the word “writing” was lined out, and the word “math” inserted but by whom was never explained. As Mr. Dammemeyer did not testify, the only evidence available is his unclear written report.

25. Although originally the Brentwood IEP team did not recommend eligibility for Student for special education based on his grades and testing results, after a meeting of the full IEP team on May 19, 2016, Student was determined eligible for special education and related services under the category of specific learning disability. Student's teacher agreed with Father that Student had difficulty relaying a story fluently, often pausing both in formal recitations in class, as well as in casual conversations when trying to tell a story. Parents also expressed concern that Student could not read multi-syllable words and could only read single syllable words he had memorized

26. No goals were developed at the May 19, 2016 IEP team meeting. Student was offered five hours per week of individual or small group reading instruction in a special education setting. The service was proposed to take place from June 6, 2016 to July 1, 2016 with the exact proposal due to Parents by May 30, 2016. Brentwood personnel ended the meeting by informing Parents that they would schedule a meeting to discuss Student's transition to high school that would include the appropriate personnel from Liberty.

#### *Impact of Slingerland Instruction on Student*

##### DESCRIPTION OF SLINGERLAND BY DR. WHITE

27. Student attended a Slingerland program during the month of July 2016. Dr. Nancy Cushen White was Student's Slingerland teacher. Dr. White has a Doctorate of Education in Curriculum and Instruction and is a clinical professor in the Division of Adolescent and Young Adult Medicine in the Department of Pediatrics at University of California at San Francisco. She is also involved in the University of California at San Francisco dyslexia research team. Dr. White has multiple California teaching credentials including lifetime credentials as a learning handicapped, and severely handicapped specialist. Dr. White was a special education teacher for San Francisco Unified School District for forty years. She currently operates a private practice providing remedial reading, spelling, and writing education utilizing the Slingerland method.

28. Slingerland uses concepts from the Orton-Gillingham method which is a multi-sensory teaching method for reading, writing and speech. The multi-sensory approach includes singing and tracing letters in the air as well as writing and speaking the concepts individually and in groups. The course Student took in the summer just before he started high school lasted 19 days. Each class was three hours long. Orton-Gillingham breaks language down into single units of words and, using a variety of senses to cement the information, seeks to "teach to the intellect instead of by rote." The goal is to teach how the English language is structured so that students can draw on that knowledge and apply it to a variety of learning situations.

29. Dr. White evaluated Student's abilities prior to allowing him to begin the class to determine whether Slingerland would teach the skills he needed to learn. She

found that Student had word attack skills that were far below expectations for his age and substantially below expectations for someone of his intellectual abilities as revealed by Dr. Sandoval's and Mr. Dammemeyer's testing. Student's spelling was poor as was his ability to use proper capitalization or punctuation. At the beginning of the class, Student relied on guessing from context and relying on his visual memory for spelling and word identification.

30. To begin to address the noted deficits, Student was taught to write in cursive using a specific sequence of movements. He was taught just a few capital letters and then taught all of the lower-case letters to practice connections. Student then focused learning the base elements of the words, dividing them into syllables and then learned how to add prefixes and suffixes. This was considered preparation for reading so that Student could work through phrases with unfamiliar vocabulary and answer specific questions. During the short summer program, the reading practice was limited to dictating phrases and sentences and reading short pieces of text.

31. Student was described as absorbing the material like a sponge. He appreciated the specifically defined, systematic approach to learning the language and grasped the ability to apply the approach in a variety of academic situations. Student was older than most of the other students but he was a model student for the younger children in the class. By the end of the month-long class, Student was using cursive writing to present his thoughts more clearly. He was beginning to use decoding procedures to identify words with which he was unfamiliar. Student also began to notice punctuation marks as he read and was learning the way the punctuation affected the meaning of the passage. Dr. White did note that when Student felt rushed, he tended to revert to old habits and relied on guessing and memory. She recommended continued Slingerland instruction to refine Student's skills as the 19 days of the summer session functioned as only an introduction to the skills Student needed to develop.

#### DESCRIPTION OF SLINGERLAND BY STUDENT

32. Student testified enthusiastically about his experience with instruction in the Slingerland method. He stated definitively that Slingerland was "the most helpful thing [he's] learned throughout his schooling."

33. The program was held in San Francisco where he traveled with Father every week day for a month. The class started the day with a song about what they were learning which helped him recall what he was working on. He learned to write cursive, decode words, and spell words. Initially he learned to write the lower case letters in cursive because joining them was more fluid. He acknowledged having dysgraphia which made it difficult to write. The cursive writing helped the legibility of his writing. In the class they would write in cursive in the air when learning to spell to reinforce the muscle memory. They would touch the paper to feel what they were writing on. They would be shown a card to see the word and they would say the word out loud to help him memorize the letters.

### *Transition to Liberty*

34. The May 19, 2016 IEP team meeting, held by Brentwood to develop Student's IEP, was never completed. While eligibility was established, no goals or services were discussed. The meeting to discuss Student's transition to Heritage High School did not occur. The IEP was not signed by Parents.

35. Liberty's special education coordinator, Michelle Ramsey Leavitt, became aware of Student's impending transfer to Heritage High School from discussions with Brentwood personnel on or near July 10, 2017. However, there was no signed IEP document establishing eligibility for services. Despite that, Ms. Leavitt called Mother to find out if there were accommodations or services needed for Student. Ms. Leavitt was referred to Student's attorney for any necessary communications.

36. Ms. Leavitt received Brentwood's electronic file on Student in mid-July and found it confusing. She did not receive the hard copy she usually receives. The unsigned IEP stated Student was eligible for special education but the Brentwood Union School District psycho-educational report recommended a finding of ineligibility. As Parents had not consented to the IEP Ms. Leavitt continued to be unsure of the status of the case.

#### CONSENT TO MAY 19, 2016 IEP DOCUMENT

37. Parents did not consent to the Brentwood IEP determining eligibility until July 29, 2016. When they did so, Parents consented with exceptions to the descriptions of Student's disabilities, the lack of goals and the failure to note all accommodations recommended by Dr. Sandoval. Parents also expressed concern about Student's high school schedule including a Spanish class and an elective English class in addition to the usual Freshman English course. The consent was provided to Brentwood one business day prior to the beginning of Liberty's 2016-2017 school year. Liberty received it August 2, 2016, the day after school had begun for the year.

38. After receipt of notification of Parents' consent to eligibility, Liberty contacted Parents on August 3, 2016 to schedule an IEP. Pursuant to Parents' request, in order to accommodate the schedules of people Parents wanted in attendance, an IEP team meeting was scheduled for August 19, 2016.

#### AUGUST 19, 2016 IEP TEAM MEETING

##### *ADEQUACY OF GOALS*

39. Liberty's special education coordinator, Michelle Ramsay Leavitt, created the draft goals for the IEP team meeting of August 19, 2016. Ms. Leavitt has held a California Special Education credential since 2008. She is authorized to work with students with mild to moderate disabilities. Her duties in her position as a Special

Education Coordinator for Liberty include performing academic testing, drafting IEP's, and teaching students. She supports Liberty, Heritage High School and the Matrix program for Students with emotional disturbance issues. She had seven years of experience as a classroom teacher prior to becoming a special education coordinator with five of those years teaching at the high school level. Ms. Leavitt received her Education Specialist teaching credential from St. Mary's College of California. During her credentialing program, she took a class on writing goals which taught best practices for goal writing. She coaches others on goal writing.

40. Ms. Leavitt testified that it was her understanding that providing special education to assist a student in accessing the general education curriculum has different implications at the high school level than at the elementary school level. Her testimony was that in elementary school there is a focus on remediation. At the high school level, Ms. Leavitt believes her job is to work with the students to support them in the general education curriculum and teach them strategies surrounding their disabilities in order to support them in their general education classes. She testified that remediation for basic skills such as reading and spelling were not offered at the high school level.

41. In creating Student's goals, Ms. Leavitt referenced the academic assessment of Mr. Treichelt, Dr. Sandoval's report and the psychoeducational report from Mr. Dammemeyer. She also reviewed work samples from Student's ninth grade English teacher and his Read 180 teacher.<sup>4</sup> At the time the goals were developed, school had been in session approximately one week. Ms. Leavitt relied most heavily on the Woodcock-Johnson testing results in identifying Student's needs, but also reviewed the Wechsler scoring report. The Woodcock-Johnson is a testing instrument with which Ms. Leavitt was very familiar. However, Ms. Leavitt has been trained on, and has administered, both Woodcock-Johnson and the Wechsler Intelligence assessments and understands how to interpret the scores from both.

#### *SPELLING*

42. Student's spelling goal was developed using the state standard for paragraph writing for 9th and 10th graders because Ms. Leavitt believed she needed to create a goal that addressed an element of the current high school curriculum. She did not believe she was allowed to create a goal to measure Student's ability simply to spell. As a result of this understanding, the goal called spelling was actually a paragraph writing goal used by Ms. Leavitt for this purpose on the theory that spelling was part of

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<sup>4</sup> At the time Ms. Leavitt developed Student's goals, he had been in the Read 180 or "English Fundamentals" class and in his English 1 class for approximately two weeks. Due to the block schedule Student had attended each class for only a few days. Read 180 taught neither spelling nor reading fundamentals such as phonics or decoding. It was a computer based class that required Student to independently read along with the computer program and answer questions about the reading. As is more fully described below, Student was told the goal was to pass a test to get out of the class.

the mechanics of writing and therefore would be part of the goal. Specifically, the Spelling goal stated that:

“By August 19, 2017 [Student] will develop his paragraph writing by planning (i.e., researching, brainstorming, clustering, free writing, outlining, etc.) focusing on addressing what is most significant for a specific purpose and audience in which the spelling is 80% accurate for curriculum based assessments or student work samples on 4 out of 5 trials.”

43. Ms. Leavitt acknowledged that there was no high school standard for spelling and that the paragraph writing standard she used as a basis for the spelling goal included no measure of spelling proficiency. Ms. Leavitt testified that Student’s high school has its own internal spelling standard which requires 80 percent accuracy in spelling in four of five trials, so Ms. Leavitt incorporated that spelling standard into the paragraph writing standard to create the spelling goal. This statement was not adequately explained, as the other testimony established that spelling was not a subject at the high school and general education students are not measured on spelling but rather are expected to use spell-check to submit accurately spelled classwork. Progress as to the spelling aspect of the goal was to be based on an evaluation of curriculum-based assessments such as class writing assignments, or student work samples turned in to classroom teachers. This means of measurement of progress, however, does not measure Student’s ability to spell given the expectation that Student will use spell-check prior to submitting his work. No part of the goal measured Student’s independent ability to spell and no services for spelling instruction were offered as part of the IEP. The goal did not articulate any means of tracking Student’s progress to see if Student’s actual ability to spell independently was improving at all.

#### *ORAL READING*

44. Ms. Leavitt testified that there is no high school standard for oral reading. To address Student’s reading deficits, as revealed by his low Woodcock-Johnson oral reading score, she created a reading fluency goal. This goal included an expression requirement as Ms. Leavitt believed reading with expression implied a higher degree of reading comprehension. Specifically, the Oral Reading goal stated:

“By August 19, 2017, [Student] will read grade level text orally with 80% accuracy, at a fluency rate of 100 words per minute, and expression on successive readings as measured with 80% accuracy in 4 out of 5 trials by student work samples/teacher charted records.”

45. Ms. Leavitt wanted to ensure that the goal developed was not solely focused on getting Student to be a faster reader. The 100 word per minute at 80 percent accuracy goal was selected by comparing Student’s Woodcock-Johnson score for oral reading with his Wechsler score and determining his reading grade level. Student’s reading level was between that of a third and fourth grade reader. Readers at those grade

levels have fluency ranges of 90-120 words per minute. Student's reading speed goal was chosen at the mid-point of the range. However, the goal does not specify what grade level the reading passages upon which Student's progress would be measured. Since Student was reading at about a third grade level, had he been given a first grade passage, he likely would have been able to meet the goal far more easily than if he was given a ninth grade passage. Because the goal does not specify the grade level of the passage, it is not measureable. Different instructors could interpret whether Student met this goal differently based upon their personal understanding of the grade level of the material they provided for Student. Ms. Leavitt noted that she was at a disadvantage in developing goals for Student with whom she was wholly unfamiliar. She based the draft goals solely on the documents she had available including the work samples from Student's English class. No measurement for determining reading with expression was included in the goal. No reading instruction was offered in the IEP to assist Student in advancing from the third to fourth-grade level reader he was to the grade level reader the goal expected him to become in a year.

#### *READING*

46. Based on Student's low Woodcock-Johnson word letter identification score, Ms. Leavitt created a goal called "reading" to introduce Student to commonly used academic words from his core classes in advance so that he could understand the vocabulary he would encounter in the classroom. The goal was articulated as follows:

"By August 19, 2017, when given commonly used academic vocabulary words from core classes, [Student] will accurately read those words with 90% accuracy in 3 out of 4 trials."

47. Ms. Leavitt created this goal because she thought that if Student could not recognize words he would see in his classes, "there was a possibility that he wouldn't be able to access the curriculum." The staff members responsible for implementing the goal included the general education teachers and the special education teacher. Student's English and Earth Science teachers would be responsible for providing words to the special education teacher who would give the lists to Student. However, the goal does not state whether the words given to Student were words he could not read at the time the words were provided to Student or how many words would be mastered during the school year. The way the goal is written, Student could be given two words a year and meet the goal if he could read the two words. Therefore, the goal is not measurable. Based on this goal, during the second semester of his Freshman year, Student was taught 3 lists of 10 words each. It is unclear whether Student simply memorized these words or actually learned to read the words. Student was not offered any services that taught him fundamental reading techniques to address how to decode unfamiliar words.

*SUFFICIENCY OF TUTORIAL SUPPORT AS SPECIALIZED ACADEMIC  
INSTRUCTION*

48. At the August 19, 2016 IEP team meeting, Student was offered 220 minutes per week of specialized academic instruction, in a class called Tutorial Support, to work on the goals developed.

49. Ms. Leavitt described the Tutorial Support class as working with students on transition plans or goals and “being the place students get support on accessing the curriculum based on their disability.” Her description of the course was that it taught students how to take notes, formulate essays and organize essays. If organization or executive function needs were present, students were taught how to use organizational planners and other strategies such as using technology to assist them in accessing the curriculum. Ms. Leavitt’s description of the class differed markedly from Student’s which is set forth in detail below.

50. Tutorial Support class was also the place where Student was given his reading assessment, once per class period, pursuant to his Oral Reading goal. He had to read the same passage from *Of Mice and Men* each time while the teacher read along, timed him and noted the words he mispronounced.

51. In addition to the 220 minutes of specialized academic instruction, Student was provided with classroom accommodations consisting of extended time for tests and assignments, no penalization for spelling errors, receipt of copies of teacher notes, and a prohibition of calling on Student to read in class unless he volunteered. Parents also asked that he be removed from the Spanish class in which he had been placed, and that he also be removed from the English Fundamentals (Read 180) class. Student was switched to the classes “Keyboarding” and “Jumpstart Engineering” instead.

52. Ms. Leavitt believes the offer of FAPE in the August 19, 2016 IEP document was appropriate because she believed that high schools were not required to provide remediation. Ms. Leavitt prepared the goals and recommended services and supports based on her understanding that state and federal special education law only required high schools to support students to access the general education curriculum in order to work towards a diploma. To do that, she believed Liberty’s job was to teach strategies to be able to access the curriculum and she believed the goals and services stated in the August 19, 2016 IEP document, would allow Student to access the curriculum.

53. Ms. Leavitt had little knowledge of Student or his learning disabilities. She could not define the concept of multi-sensory education. She had no detailed understanding of dyslexia or approaches for teaching a student with dyslexia. On numerous occasions throughout her testimony, Ms. Leavitt rotely referred to students needing to be able to “access the curriculum” in high school and the high school’s job

as “support[ing] the student in accessing the curriculum.” Ms. Leavitt never clearly articulated how a student with Student’s deficits would develop skills to be an independent learner, and prepared to successfully navigate the increasingly difficult high school curriculum based on the goals she drafted. She believed technology such as spell check, audio books and other word processing supports such as grammar check would support Student in accessing the curriculum. At no time in her testimony did Ms. Leavitt describe how a student demonstrated they were accessing the curriculum. At no time was providing Student with educational benefit mentioned by Ms. Leavitt as a standard by which his special education and related services were measured.

54. Student credibly testified in great detail about the instruction he received in the Tutorial Support Class. He described being tested on reading a single passage from *Of Mice and Men*. The teacher gave Student the book, with the passage he was to read and he held it so they could both see the words. He read and she timed him. She wrote down the words he mispronounced. The teacher did this with him multiple times but the exercise did not help him improve his ability to read the passage. He was required to attempt this test once each class period. On the fifth attempt, the teacher gave Student a different passage to try because Student was so frustrated with his inability to master the first one. Changing the passage did not help Student meet the goal because the new passage had more unfamiliar words. Points were subtracted when he mispronounced a word. Because he did not know the words, he often guessed. He was not able to use the decoding skills he had learned at Slingerland because he was being timed; however, he did not believe he would have been able to decode the words from *Of Mice and Men* because the words were more difficult than the words he had learned to decode in the 19 day summer program he had taken the previous summer. Student stated that at no time did he ever receive any specialized academic instruction in how to read, spell, or write in the Tutorial Support class.

#### *Consent to August 19, 2016 IEP*

55. Parents did not consent to the August 19, 2016 IEP document, until December 19, 2016. At that time, Parents consented to the IEP offer pending further review by Dr. Nancy Cushen White, Student’s Slingerland teacher.

56. Liberty did not file a request for a hearing to be granted permission to implement the IEP without Parents’ consent. Student did not begin receiving special education and related services or accommodations until the beginning of the second term of his Freshman year in January of 2017.

#### *Student’s Performance in High School*

57. Student testified about his own situation for nearly two hours. His testimony was candid, detailed and heartfelt. At times, Student struggled to hold back tears as he recalled difficulties in school and his feelings of frustration and inadequacy as a result of his disabilities. Student’s testimony was given significant weight.

58. Student described any class involving reading as being more difficult for him. He finds it difficult to read multi-syllable words because he does not know the words and thus does not understand the content of what he is reading. He has never been taught to read easily with his disability and when he does read the parts he is able, it takes a long time. He sometimes gives up trying to understand reading assignments because it “stresses him out.” However, he does not give up on homework. He tries to be hard-working. Student stated that his spelling and reading comprehension do not improve despite hours that he devotes to homework. He gets considerable assistance from his parents, particularly Father, on any work he brings home.

59. Student described a current class he was taking called MS Office Basics. This was a second semester class so all accommodations in his IEP applied. Student described the class as difficult because his disability makes it hard for him to read and spell words. He is expected to copy from a textbook using Word, Excel and PowerPoint. Sometimes he is required to copy tables. When he reads, he copies things incorrectly and misspells words. The class was told that if they made three errors, they would get 10 percent deducted from their grade for each error. There were many opportunities to make errors. Initially, the teacher of this course reduced Student’s grade for spelling because he was unaware of the terms of Student’s IEP. Student told him he was not supposed to reduce his grade for spelling. Student credibly testified that the teacher told him that he had decided to simply take three points off each assignment Student submitted because the teacher did not know how to grade Student because of his disability.

60. Student is finding the work in ninth grade to be much more difficult than the work in eighth grade. The slang in the novel *Of Mice and Men* made it very hard for Student to understand the points of the story. The language of the play, *Romeo and Juliet* has also challenged Student greatly.

61. Student described the work that was reviewed to create his goals. He was unsure what his English teacher was asking them to do for the requested textbook preview, which was his first English assignment in early August of 2016. He did not know what a “textbook preview” meant and did not understand how to find some of the information requested. He struggled to spell words correctly even though he was copying from the textbook. Words such as “about” and “series” were misspelled as “abut” and “serys” respectively. He did not understand the word “literary” and misspelled the word “double” as “doble”.

62. A few days later, Student was assigned to annotate an article entitled “The Secret to Raising Smart Kids”. He was unable to finish and what he did complete took him hours. Student found it very stressful that he could not finish, but the assignment was “just too much” for him. The annotation assignment shows that Student was unable to properly spell: fail (spelled “faile”); friend (freand); growth (groth- this was misspelled several times despite the fact that it was spelled correctly in the text of the document); key (kee); and future (fueter). Student was given from Friday August 12,

2016, to the following Tuesday, August 16, 2016, to complete the annotation of the six page article. Student annotated approximately three and a half pages in that time.

63. Later work shows little improvement. Student's "Marigolds" precis from September 19, 2016, which he understood to be a "rough draft" because that is what he understood the word "precis" to mean, was uploaded to the "Turnitin" website for assessment. Students are required to attach their work and upload it into this program which then does an assessment of the writing project and sends it back to the student with a report of all of the noted errors. Student's grade was a "D." On a worksheet, Student was required to explain the noted problems with the essay. Student had difficulty expressing understanding of the errors. The essay had sentence fragments, capitalization errors, and demonstrated little understanding of the core concept of the assignment which was the use of imagery in writing. Student has adopted a writing coping mechanism of repeating words from the phrase the teacher gave them to start their essay. Student employed that strategy more than once in this single paragraph essay to lengthen it; however, in doing so, he did not add any substance to the explanation of the imagery in the story. Student was asked to state his goal for his grade on the next writing assignment. Student hoped for a "B".

64. The next writing assignment, on *The Scarlet Ibis*, was done on December 13, 2016, approximately three months after the "Marigolds" assignment. This essay, on characterization, demonstrated a continuation of the same kinds of errors seen in the September essay on "Marigolds." There is not a single sentence, other than the starter sentence supplied by the teacher, which is error free. Student is unable to show a noun's possession correctly. The word stubbornness is spelled "stuberness." Doodle appears to be a proper noun but is never capitalized and there are other capitalization errors. Many of the sentences are unclear in their references and make little sense in the context of the essay. There are noun-verb agreement errors. Overall, the essay fails to progress from the topic sentence idea, through supported examples making points about the topic through to a conclusion.

65. The March 13, 2017 essay on *Companionship*, which was written about the novel *Of Mice and Men*, continues to demonstrate limited progress in Student's essay writing capabilities. It also continues to demonstrate Student's struggles with basic language concepts including spelling, grammar and punctuation. Student testified that he wrote the first sentence of this essay (the topic sentence) and the teacher provided the second sentence. The teacher provided information regarding the chapters and passages from which evidence supporting the topic could be gathered. From the evidence, students were to fill in the characters and statements in the story demonstrating companionship. Student testified that he found this essay the easiest to write because they were given the most direction on this assignment. Despite that fact, Student employs his essay coping mechanism of repeating phrases included in the teacher's starter sentence at multiple points in the essay. These sentences often do not make sense and function to cement the conclusion that Student does not understand the fundamental lessons being taught. By mid-March of 2017, Student had been working on learning

how to structure a short essay in a variety of contexts for seven months but demonstrated little progress. Although there were fewer misspellings, Student used spell-check and other word processing functions for assistance.

#### FRESHMAN ENGLISH

66. Student's ninth grade English class is taught by Jolene Foster. Ms. Foster holds a single subject teaching credential that authorizes her to teach English to grades six through twelve. She has no special education credentials. She currently teaches ninth and tenth grade English at Student's high school. She has been employed by Liberty for six years. Ms. Foster participated in the August 19, 2016 IEP team meeting.

67. Ms. Foster testified that she knew Student primarily through the work she graded, as he was quiet in class. It was her opinion that his work demonstrated a clear understanding of the material she presents in class. She testified that she had no great concerns about the quality of the work Student turned in. She acknowledged that no spelling and reading instruction was offered in her class and stated that such remediation was not offered in high school. Instead, students were expected to utilize spell check and grammar checking functions to assist them in their writing.<sup>5</sup> All readings being taught were presented in class. The entire class listened to an audiobook recording of, *Of Mice and Men*. Class members had been volunteering to read the various parts of the play *Romeo and Juliet*.

68. Ms. Foster has had no training about the learning disability dyslexia. She could not articulate the difference between memorizing words and reading. It was her opinion that memorizing words was essentially what reading is although she did acknowledge that if a student was only able to read by memorization that could be problematic. She did not understand the concept of decoding words. Ms. Foster testified that she had been provided with a list of accommodations for Student but she had not seen his IEP goals. She did not know if Student struggled to understand the directions she gave in class but acknowledged such information might be on his IEP.

69. Ms. Foster, testified that she commonly provided the first sentence or two of a writing assignment to get the students started. Classroom writing is usually started in class and then completed by students at home. Student commonly was unable to finish writing assignments in class. Work is done on a word processor and turned in through "Turnitin.com." "Turnitin.com" is a computer program that allows the students to attach their work to the program and submit it for review. The program automatically assesses the work and returns it to the student with coded comments and an explanation of the codes noted. Originally intended to check for plagiarism, the program has been

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<sup>5</sup> No evidence was presented regarding how a student who did not know the proper spelling of a word would choose from spelling options presented by a spell checking function; nor how a student without an understanding of English grammar would be able to determine if a computer suggested correction was, in fact, correct.

expanded to offer an automatic grading function. Students are expected to use the spell check and grammar checking functions of their word processing program prior to submission of the assignment. The “Turnitin” program did not correct spelling and did not catch all of Student’s writing errors. On one assignment, the program failed to correct Student’s use of the word “sod” when he should have used “sob”.

70. Ms. Foster testified that grading in the class depended on the assignment, but completion of homework and writing assignments were a substantial part of Student’s grade. All work is included in a “pool” that, together, constitutes 100 percent of a student’s grade. In-class tests and quizzes were a small part of Student’s grade and generally were only on vocabulary and the quarterly multiple choice Liberty common assessments that measure what Student should have learned during that particular quarter. Homework is worth a larger proportion of the grade than quizzes. Writing assignments, which are often completed at home, are a larger part of the grade than homework. Most of the points earned in Ms. Foster’s class were on work that could be completed at home. Ms. Foster was unaware of how much help Student was getting when he took work home, or how long it took Student to complete assignments. Spelling was not graded. Despite earlier testimony that all Students were held to a spelling goal of 80 percent, Ms. Foster testified that it was not a part of the high school curriculum and Ms. Foster was aware that Student was never to be graded down for misspelling according to his accommodations.

71. As of the date of Ms. Foster’s testimony, Student was getting a “B” in her class and she had no concerns about the quality of Student’s work. It was her opinion that Student’s work demonstrated that he understood the material. No evidence was presented of any standardized grading applied to the work in Student’s English class. Liberty did not establish that Student’s grade was based on an ability to independently complete ninth grade level work.

72. Ms. Foster’s testimony regarding Student’s performance lacked detail. She had little information about Student or his work. Her evaluations of his work were superficial and although she asserted Student’s skills were improving, she did not draw connections to specific skills he was demonstrating. She was unable to comment on whether his spelling was improving because he was using spell-check. The improvement she asserted was being made was not evident from the work samples from her class. On several occasions she recited the opinion that Student was “able to access the curriculum” in a rehearsed way. She opined that Student had improved in his writing ability between a first term essay on the short story, “Marigolds”, and an essay related to the Scarlet Ibis. Neither writing assignment demonstrates an understanding of the concepts on which the essay is supposed to be focused. Her opinions regarding Student’s skill levels were given little weight.

## ENGLISH FUNDAMENTALS (READ 180)

73. Student's English Fundamentals class was a general education class. The teacher of the class, Lisa Kingsford,<sup>6</sup> does not hold a special education credential. However, the class was considered to be remediation. The specific areas of remediation were not described. There is also another program that is a sister program to the Read 180 course that is a special education course. Student was not assigned to that course.

74. Dr. John Saylor, Liberty's Director of Special Services, explained the basis for Student's original placement in the class "English Fundamentals" which occurred prior to Parent consenting to Student's special education eligibility. Placement in English Fundamentals was based on scores attained on a screening test given to all students at the end of their eighth grade year. Dr. Saylor stated that some students did not take the assessment test seriously so Ms. Kingsford routinely gave a different assessment at the beginning of the course to identify the students who did not require the service. Dr. Saylor testified that the score on that Read 180 test given by Ms. Kingsford, called a "lexile" score, solely indicates a student's level of functioning on the Read 180 test. Dr. Saylor described the term "lexile" as a "term of art" used in a variety of different intervention programs. He acknowledged the test was neither standards based nor statistically measured.<sup>7</sup>

75. Student testified credibly and with substantial detail about English Fundamentals. The class was originally called "Homework Club" but it was also known as Read 180 and English Fundamentals. Student was given a text and a notebook with assignments to read. He was told to answer questions in the notebook. Student testified that when he asked for help, he was asked which word he needed help with, and then was told to figure it out by himself. The work was expected to be completed independently. The goal was to pass an untimed test with a high enough score to get out of the class. He was required to take words and put them in a sentence for multiple choice questions. Student did not understand most of the words and, as a result, he frequently guessed the answers to the multiple choice questions or used a process of elimination, beginning by eliminating the words he did not know. He was able to employ some of the strategies he had learned over the prior summer at Slingerland to help figure out some of the answers. Eventually, Student received a high enough score

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<sup>6</sup> Ms. Kingsford did not testify at the hearing.

<sup>7</sup> In their closing brief Liberty proffered a definition of the lexile score that was not offered into evidence in this case by quoting from a prior OAH case. OAH cases are not precedential. (Gov. Code §11425.60(a); Cal. Code Regs., tit. 5, §3085.) Furthermore, findings of fact from a prior case cannot be substituted for submission of evidence in a later case. The offered definition of the term "lexile" has not been considered for purposes of this decision.

to pass the test. He accomplished this by skipping words he could not figure out. Choosing from the words he could figure out, he would guess the one that sounded close.

76. Student received no spelling, reading or writing remediation in Read 180. Ms. Leavitt instructed Ms. Kingsford to eliminate the spelling aspect of the class after receipt of an email from Father requesting that Student not be tested on spelling. Father credibly testified that he had not intended for Student to have that aspect of remediation eliminated from the class; he simply wanted to avoid having Student penalized for spelling errors as he was learning other concepts in his core classes.

77. Parents asked that Student be removed from the Read 180 class shortly after the beginning of the school year because the Read 180 class offered Student no useful remediation. Based on that structure it appeared to simply be extra work for Student that was not designed to meet Student's unique needs. At the IEP team meeting of August 19, 2016, it was agreed the Read 180 class and the Spanish class would be exchanged for Keyboarding and "Jumpstart Engineering" class.

#### *Student's Grades*

78. Student achieved a 3.29 grade point average in his first semester of high school without any accommodations or special education. He received all A's and B's in the eighth grade. The evidence established that homework completion led to high grades in his eighth grade classes as well as in classes at Liberty. This was true even if homework was incorrect or incomplete. Father helped Student complete his homework in both eighth and ninth grades and also checked his homework for accuracy. Student spent several hours each night completing homework.

#### *Evaluation of Dr. Peters*

79. Student's records were evaluated by Daniel Peters, Ph.D. who was consulted by Parents to make recommendations for Student's academic and learning needs. Dr. Peters received his Ph.D. in 1998 and has been a licensed psychologist since 2000. Dr. Peters has assessed adolescents for approximately 20 years and has focused on dyslexia for the past 12 years.

80. Dr. Peters reviewed the assessments by Dr. Sandoval and Dr. White as well as the psychoeducational evaluation prepared Mr. Dammemeyer. He also reviewed Student's IEP and conducted a one-hour interview with Student and Parents. His opinion of Student's intellectual capabilities, learning deficits, and needs corroborated the views of Dr. Sandoval and Dr. White. He noted that Student's intellect allowed him to devise coping mechanisms that helped him move through elementary school, but those strategies were proving increasingly less effective as the material presented increased in complexity. He referred to Student as "twice exceptional" that being a term used to describe people who test in the

gifted ranged on standardized testing and who also have challenges on the other end of the curve such as dyslexia or autism.

81. Dr. Peters conducted no assessments of Student. His testimony was given little weight based on his very limited interaction with Student and the lack of substantial contribution to the analysis of Student's needs or deficits.

## LEGAL CONCLUSIONS

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

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In 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 that contains a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and nondisabled 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

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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.

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 re-enacting the IDEA in 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.) Recently, the U.S. Supreme Court elaborated on the *Rowley* standard declaring that, “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, (2017) 137 S. Ct. 988, 999.)

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

#### *Timeliness of Liberty IEP*

5. When a student is scheduled to transfer from an elementary school district to a high school district, the elementary school district is responsible for inviting the high school district representatives to a transition IEP team meeting. This meeting is intended to be a student’s final IEP team meeting in elementary school, and is convened to name the destination high school as the student’s next placement, and plan for and hand off the student for special education and related services in the high school environment. If the high school district has not participated in such a meeting, the elementary school district is charged with notifying the high school district about the

student. If the elementary school district fails in its responsibilities, the high school district must make an interim placement in accordance with Education Code section 56325 or shall immediately convene an IEP team meeting. (Cal. Code Regs. tit. 5 §3024).

6. In this case, the middle school failed to convene a transitional IEP after promising one during the May 19, 2016 IEP team meeting, in which eligibility was determined. Parents were promised a transitional IEP team meeting, and were provided with an IEP document that had no developed goals or an offer of a FAPE. Therefore, it was reasonable for Parents to pursue a complete offer of a FAPE by waiting to provide consent until the promised transitional IEP team meeting occurred. However, the transitional meeting did not occur. School then ended for the year.

7. Student's first issue raises the question of Liberty's obligation to Student in connection with a transitional IEP and when that obligation arose. The situation is complicated by a series of uncommon occurrences. First, the May 19, 2016 IEP team meeting, held at Student's middle school to develop Student's IEP was not completed. While eligibility was established, no goals and only a vague description of services were offered. Brentwood personnel informed Parents that a further meeting, including the Liberty personnel, would be scheduled for purposes of designing a transition for Student from middle school to high school. However, that meeting was not scheduled by Brentwood.

8. Second, Parents did not consent to the IEP determining eligibility until July 29, 2016. When they did so, they consented with exceptions, as the IEP document was incomplete. The consent was provided one business day prior to the beginning of Liberty's 2016-2017 school year, but was sent to Brentwood and not directly to Liberty. Without consent, Liberty was prohibited from providing services. (20 U.S.C. §1414 (a)(1)(d)(ii)(II).) Without parental consent to an initial IEP, Liberty was not required to convene an IEP team meeting and was also not required to provide special education and related services. (20 U.S.C. §1414 (a)(1)(d)(ii)(III) (aa) and (bb).) Therefore, Liberty had no responsibility to move forward with the IEP process before it had knowledge of parental consent which occurred on August 2, 2016.

9. Once Liberty's duty was made clear by receipt of consent, Liberty contacted Father on August 3, 2016, to schedule an IEP team meeting and scheduled the meeting for August 19, 2016. This was the most immediate date available for all necessary participants according to Parents.

10. Liberty did not deny Student a free appropriate public education by failing to hold a timely transitional meeting IEP team meeting. Once consent to the initial IEP was received by Liberty, a meeting was immediately scheduled, using the date chosen by Parents.

## *Adequacy of Goals and the Proposed Methods for Meeting Them*

11. The IEP is considered the centerpiece of the IDEA's educational delivery system for disabled children. The procedures required to prepare a child's IEP emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. Adherence to the mandated process is designed to result in special education and related services that are tailored to the unique needs of a particular child. (*Andrew F.*, *supra*, 137 S. Ct. at p. 994.) An IEP must contain annual goals, including academic and functional goals, that are measurable, meet the unique needs of the individual that result from the disability, and enable the pupil to be involved in and make progress in the general education curriculum; and meet each of the other educational needs of the pupil that result from the disability. (Ed.Code § 56345, subds. (a)(2)(A) and (a)(2)(B).) "The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided." (Cal.Code Regs., tit. 5, § 3040, subd. (b).) The Supreme Court, in *Andrew F.* declared that the IDEA required a fact-intensive exercise to develop an IEP that is reasonable, based on the information available regarding the child's circumstances, including expertise of school officials and parents. The court emphasized that the instruction must be *specially* designed and meet a child's *unique* needs through an *individualized* education program. (*Id.* at p. 999, emphasis in original).

12. The purpose of goals is to permit the IEP team to evaluate whether a student is making progress in an area of need. (Ed. Code §56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation (or most recent evaluation) of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code § 56345)

13. A failure to offer an appropriate goal is a procedural violation of the IDEA. However, a procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

14. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is "a snapshot, not a retrospective." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir.1993) 993 F.2d 1031, 1041.)

15. In this case, the goals proposed by Liberty failed to meet the required legal standards. Liberty failed to create a specially designed program for Student to address

Student's unique needs at his present levels of performance. Liberty decided that, at the high school level, it no longer had a duty to remediate Student's fundamental spelling and reading deficits. Somehow, it had been determined that accommodations and modifications, such as the use of spell-check and audio books, were a substitute for reading and spelling instruction. This does not comport with the requirements of the law.

#### SPELLING GOAL<sup>9</sup>

16. The development of Student's spelling goal failed to consider his unique needs, the outcome was not measureable and the goal could not allow him to make progress in the general curriculum. Student has fundamental spelling deficits that also impact his ability to read and write. His spelling goal made no effort to address those deficits. Its essential failure was that the goal did not describe any measure of Student's spelling at all. Rather than address the spelling deficit, the goal articulated a paragraph writing improvement plan that required spelling to be 80 percent accurate for "curriculum based assessments or student work samples on four out of five trials." The goal did not clearly delineate the type of work on which Student's spelling would be judged.

17. Testimony from Liberty personnel revealed that Liberty encouraged and required Student to use spell check to meet the targets related to spelling. The measurement of achievement would be student work samples which were primarily completed at home and used word processing software with spell-check. A spelling goal that measures spelling augmented by a computer program's spell-check function does not and cannot measure Student's ability to spell.

18. Testimony from Ms. Leavitt and Ms. Foster confirmed that spelling remediation was not part of the specialized academic instruction given Student. Liberty's stated view was that, once a student started high school, any special education was limited to assisting him to access the general education curriculum, as opposed to remediation of basic skills. Liberty personnel confuse "access to the curriculum" with the requirement to provide educational benefit.

19. Liberty failed to establish any standardized grading for ninth grade English. Liberty uses the "Turnitin.com" program, which provides automated assessments of Student's work that did not address all errors made by Student. Many of Student's writing deficits were ignored when essays were graded. Therefore, the fact that Student had a B in his English class as of the date of the hearing was not determinative of the Student's receipt of educational benefit. While Liberty personnel acknowledged that technology was not a wholly adequate substitute for learning to decode words for reading, or for teaching the rules of spelling words for writing, use of spell check to correct spelling, and audio books and word memorization for reading, the work Student turned in after extensive time and with the assistance of his Parents and

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<sup>9</sup> No finding is made that goals were developed in all areas of need for this Student.

spell check were deemed adequate to allow Student to “access the curriculum” which was all that Liberty personnel believed was required of special education at the high school level. Accessing the curriculum was never defined by Liberty. However, a review of Student’s work samples indicates that, at least in his English class, and contrary to his teacher’s assertion, he did not understand the concepts being taught, and was not an independent learner at the ninth grade level, or indeed any level close to ninth grade. Therefore, Student was not receiving educational benefit in this area.

20. The methods employed by Liberty to improve Student’s spelling are not an adequate special education approach. There is no provision in the law that removes the responsibility of a school district to address fundamental skills deficits at the high school level. Accommodations and modifications are not, by themselves, an adequate special education plan, as special education requires specialized instruction by definition. Liberty’s position that Student should just memorize the spelling of every possible word he will encounter makes no sense. Spelling is taught as a method of rules and conventions that allow a student to learn spelling systems. Without those basic abilities, people have no means of approaching unfamiliar vocabulary. Even spell check requires the ability to be able to identify the correct spelling, as it is not infallible. Nor do the grammar checking functions of word processing programs offer correct options every time. A person must be more than basically literate in order to effectively use tools such as spell-check and grammar checking, which is why we still teach children to read and spell. Failing to offer Student remedial instruction in how to spell words did not meet his unique needs in this area.

#### READING GOALS

21. In addition to the spelling goal, two reading goals were developed for Student. The first was an “oral reading” goal focused on Student’s ability to read faster and more “fluently” out loud. The second was simply entitled “reading” and focused on developing Student’s ability to recognize the common vocabulary of core ninth grade courses, including words from his English and Earth Science classes. Student, however, needs to develop core competencies in reading fundamentals such a decoding words and recognizing the parts of speech, to help him decipher unfamiliar vocabulary. The two reading goals, as written, failed to be developed around his unique needs. They did not describe Student’s present levels of performance in the area of reading. Neither Student’s specific reading deficits nor their source were identified. The goals provided no information from which one could determine what reading skills needed to be improved to reach an improved accuracy or fluency rate, or to acquire necessary vocabulary for English and Earth Science. Nor did the goals, as written, allow one to evaluate whether it was reasonable for Student to achieve them in a year.

#### *ORAL READING*

22. The oral reading goal was predicated on the premise that Student needed to read out loud faster and more smoothly or “fluently.” The goal included a requirement that

Student read with expression, as that implied comprehension, according to Liberty personnel. The goal overlooked the fact that Student's inability to read fluently was the result of his inability to decipher the words he encountered as he read. The goal was not measureable in present levels, and failed to describe Student's present reading abilities or the specific reading deficits that impeded his ability to read. The goal described no specific means by which Student's reading accuracy, speed, or expression would be improved. The goal did not acknowledge that Student's inability to read impeded him from being involved or progressing in the general education curriculum, which testing and psycho-educational reports indicated was true. Overall, the goal failed to show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal.Code Regs., tit. 5, § 3040, subd. (b).) The ineffectiveness of the goal should have been noted and addressed when it became apparent that Student's fluency was not improving after five unsuccessful attempts to read the same 100-word passage of a novel that had been heard in class. Student was unable to read the passage with fluency. The sixth fluency test was then based on a different passage as Student had become too frustrated with the first one to continue. Student was not improving because he was not being taught any strategies for improving his basic reading skills.

#### *READING*

23. The second goal, labeled simply "reading", was actually a vocabulary memorization goal and failed to address Student's need to learn the methods of attacking unfamiliar vocabulary that would allow him to progress in his studies in high school and beyond. Student's coping mechanism for his disability was to attempt to memorize as many words as possible using context for clues when words were similar. This system was, of course, of only limited value as similar words were easily confused and resulted in a change in the meaning of the sentence Student was trying to read. For example, Student confused the words sod and sob in writing about a short story. That same short story assignment from December of 2016, demonstrates that Student was struggling to articulate thoughts, instead stringing together words that indicate a lack of precise understanding of the vocabulary being employed. While expanding Student's vocabulary was a goal Student should have had, it was not a means of remediating Student's fundamental inability to read as he did not have the ability to memorize every word he might encounter. The goal as written did not meet Student's unique need to learn how to decode unfamiliar words. The fact that he "met" this goal by memorizing three lists of ten words each drawn from his English and Earth Science classes over the course of three months indicates no mastery of reading skills.

24. Student's IEP must be evaluated in line with the "snapshot" rule, that is, that it cannot "be judged exclusively in hindsight ... an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*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.) However, the "snapshot" rule does not eliminate a school district's obligation to revise a

student's educational program if it becomes apparent over the course of the school year that the student is not receiving any educational benefit. (*Id.*)

25. Access to the curriculum is not a student's only goal. Educational benefit must flow from access to the curriculum. Sitting through an audio book presentation of, *Of Mice and Men*, or listening to classmates read parts of the play *Romeo and Juliet* provides minimal access to the curriculum but does not necessarily result in a student deriving educational benefit from the material. While access at an appropriate level must be provided to students needing special education, it is not a substitute for educational benefit. Student could not derive educational benefit when he clearly did not understand the words being used and the concepts being taught and without evidence his reading and spelling skills were actually improving. His writing was mostly mimicry of the teacher's starter sentences which, when examined, demonstrated little if any understanding of the material being taught.

26. Given the failure to recognize Student's needs for fundamental reading, spelling and writing instruction, and the lack of adequate goals to meet those needs, the only possible conclusion is that Student was denied the academic benefit he required. Special education is specially designed instruction to meet the unique needs of a child with a disability and must be provided in conformity with the student's IEP. (20 U.S.C. §§1401, subds. (9)(D), (26), and (29); *Andrew F.*, *supra*, 137 S. Ct. at p. 994.) However, when the IEP goals fundamentally fail to address a student's needs based on a misunderstanding of the district's obligations under the IDEA, there is a *de facto* failure to meet the requirements of federal and state law. These goals did not address Student's unique needs because the drafter was operating on a mistaken belief that Liberty had no obligation to provide fundamental skills remediation at the high school level. However, if remedial reading, spelling and writing instruction is Student's unique need, fundamental skill remediation must be provided until the he no longer requires the instruction, graduates from high school, or attains the age of 22. (20 U.S.C. § 1412 (a)(1)(A); Ed. Code, §56040, subd. (a).)

27. Student has hopes of becoming an engineer and shows potential talent in that area, based on his test scores and in the products of his leisure time activities. There is simply no way he will meet that goal if he is not given the reading and spelling remediation he requires to read and write with confidence. Frankly, without the necessary remediation it is unlikely he will successfully complete high school. The goals developed failed to meet legal standards. While it is unfortunate that the necessary remedial instruction will take place in what will be tenth grade, it is not too late for Student to learn the skills he needs to become an accomplished reader with the development of goals targeted to address this Student's unique learning deficits. His progress in the one-month Slingerland course demonstrated that he is a motivated learner who wants to improve his skills.

## SUFFICIENCY OF TUTORIAL SUPPORT AS SPECIALIZED ACADEMIC INSTRUCTION

28. In order to reach Student's three goals, he was offered approximately 220 minutes per week of specialized academic instruction. This was to be provided in a class called "Tutorial Support." The weekly minutes were approximate due to the block scheduling. The Tutorial Support curriculum focused on academic readiness skills such as keeping a planner for managing homework assignments, and utilizing the teaching resources for accessing additional help with classwork. The Tutorial Support teacher also performed the time reading tests to evaluate Student's progress towards the goals developed for his IEP, and provided Student with lists of vocabulary words he would encounter in his English and Earth Science classes. No evidence was provided that as of the date of the hearing, the Tutorial Support class had offered any specialized instruction on reading, writing, or spelling that was tailored to meet Student's specific needs. The nature of the Tutorial Support class was consistent with testimony from Liberty personnel that remedial reading and spelling were not offered at the high school level. The Tutorial Support class was described in the August 19, 2016 IEP team meeting, as being almost identical to Study Hall, and in actuality, that is what it was: Study Hall with a different name. No aspect of the Tutorial Support class was devised to meet Student's unique needs.

29. Liberty's offer of FAPE in the August 19, 2016 IEP document did not meet legal standards and denied Student a free appropriate public education from August 19, 2016 through May 18, 2017. Evidence was compelling that neither Student's English teacher, nor the special education coordinator responsible for writing Student's goals, nor the special education teacher responsible for providing Student's specialized academic instruction, were trained in methods of teaching dyslexic students to learn.

## REMEDIES

1. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. 359, 374 [the purpose of the IDEA is to provide students with disabilities "a free appropriate public education which emphasizes special education and related services to meet their unique needs."].) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d. at p. 1497.)

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v.*

*Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) The authority to order such relief extends to hearing officers. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484].) These are equitable remedies that courts and hearing officers may employ to craft “appropriate relief” for a party. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3, supra*, 31 F.3d at p. 1496.) An award of compensatory education need not provide “day-for-day compensation.” (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific. (*Ibid.*)

3. In addition, staff training is an appropriate compensatory remedy under these facts. The IDEA does not require compensatory education services to be awarded directly to a student. Staff training can be an appropriate compensatory remedy, and is appropriate in this case. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief considering the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid.*)

4. Student has been denied a free appropriate public education since the August 19, 2016 IEP team meeting, at which time the inadequate IEP was proposed. As discussed above, Liberty became responsible for providing a FAPE as of August 19, 2016, when the IEP team meeting to complete the initial IEP was held.

5. Although Parents did not consent to the August 19, 2016 proposed IEP document, until December 12, 2016, the goals and services offered in the document were inadequate. Therefore, even if consent had been secured on August 19, 2016, the program would not have met legal standards, and Student would still have been denied FAPE from that date. The fact that parents did not consent immediately does not change the fact that the IEP document failed to offer FAPE.

6. At the time of the August 19, 2016 IEP team meeting, none of the goals proposed were designed to meet Student’s unique needs. The specialized academic instruction offered lacked personalized focus on Student’s learning deficits in the areas of reading, spelling, and writing. As of August 19, 2016, the appropriate service Student should have been provided was one hour per day of instruction in Orton-Gillingham, or the Slingerland method, each school day, or the equivalent thereof provided in the block schedule utilized by Student’s high school. The denial of a FAPE continued through the last date of hearing in this matter which occurred on May 18, 2017. According to Liberty’s official calendar the number of school days involved is 152.<sup>10</sup>

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<sup>10</sup> The undersigned takes official notice of Liberty’s 2016-2017 academic calendar posted online at <http://libertyunion.schoolwires.net/Page/2>.

7. The District shall amend Student's August 19, 2016 IEP to include one hour per day of specialized academic instruction specifically in the areas of reading and spelling, using an Orton-Gillingham or Slingerland method as part of his school day.<sup>11</sup>

8. Hour-for-hour relief for a denial of FAPE is not required by law. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3, supra*, 31 F.3d at p.1497.) Neither is it prohibited, and at a minimum it can form a beginning basis for calculating relief, in the absence of a better measure. Appropriate relief in this case must also avoid interfering with Student's ongoing education and overwhelming him, but still must provide support to remedy the failure to provide adequate instruction, the additional loss due to the delay in providing adequate instruction, and the need for expedited instruction to remedy his fundamental skill deficits as he proceeds with his high school education. A combination of the creation of a bank of hours for tutoring to be administered by Parents, combined with required in-school specialized academic instruction, is the most equitable approach. No evidence was presented by either Student or Liberty as to the number of hours of specialized instruction appropriate to remedy the denial of FAPE that occurred between August 19, 2016 and May 18, 2017.

9. No evidence was presented as to the number of minutes either side thought would be appropriate to compensate student for the denial of FAPE. There were 152 school days from August 19, 2016, through May 18, 2017. As compensatory education, it is reasonable that Student receive one hour per school day that a FAPE was denied him of reading, writing and/or spelling tutoring, for a total of 152 hours. No evidence was presented that Student would need more or less services to compensate him for any denial of FAPE.

10. This will compensate Student for the loss of actual instruction at school during his freshman year as well as the additional impact of further delay in being provided the appropriate instruction. At this point in Student's education, the delay is as significant as the loss of tutoring minutes. Therefore, Parents shall be allowed to determine whether the instruction on which they use the block of tutoring hours shall be provided through a Slingerland program, which Student testified was the most useful instruction he has ever received, or through another tutoring organization, so long as the instruction is taught in person and not online. The cost of private instruction shall not exceed \$85 per hour. If the previously successful Slingerland program is not selected, Parents shall choose an alternative, reputable, research-based, reading, spelling and/or writing program that meets Student's needs. The bank of 152 hours of instruction may be accessed during the summer months, during other non-instructional days, after school, or on weekends at the Parents' discretion.

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<sup>11</sup> As found above Student also has extensive needs in the area of writing. However, goals and services for writing were not raised in this matter. Therefore, no finding regarding denial of FAPE in writing or determinations regarding Student's need for specialized instruction in this area are made herein.

11. In order to provide the specialized instruction ordered during the school year, to ensure that the instruction is carried over into Student's general education English class, and in order to ensure that the person writing goals for Student has a thorough understanding of the remediation needs of a dyslexic student, Liberty shall ensure that the English teacher to whom Student will be assigned for 10th grade, and the special education teacher responsible for his specialized academic instruction, successfully complete 15 hours training in the Orton-Gillingham or Slingerland method of instruction and 10 hours of training in the nature of reading and spelling disabilities in adolescents and their remediation between the date this decision is issued and October 31, 2017. Additionally, the special education staff member responsible for drafting Student's goals shall receive the same training so that s/he has an adequate base of knowledge on which to draw when designing goals to meet Student's unique needs. The instructor selected by Liberty to provide this training shall have at least five years of experience in teaching instructors in the methods being presented and in the identification and remediation of adolescent reading and spelling disabilities. This training shall not be provided by a District employee or by an employee of the attorneys' office representing the District. Rather, it must be provided by an independent expert in the areas specified. Otherwise, the selection of the instructor shall be at Liberty's discretion. Within five business days of the completion of the training, Liberty shall provide Parents with the name of the person who conducted the training, the names of the employees who completed the training, topics trained and the dates training was received.

12. Additionally, evidence demonstrated that Liberty's special education staff was inadequately trained in the requirements of the IDEA and California law regarding the need for remedial education at the high school level. Liberty shall provide no less than three hours of training for all district special education personnel in the requirement to provide education that addresses a high school student's unique educational needs, whatever those may be. This training shall not be provided by a District employee or by an employee of the attorneys' office representing the District. Rather, it must be provided by an independent expert in state and federal special education laws. This training shall be arranged and completed by October 31, 2017.

13. Finally, Student is awarded a private transition assessment. While transitional assessments are intended to assist with planning for Student after he leaves high school and generally are not completed until the IEP where a Student turns 16 (Ed. Code §56345.1), the delay in properly identifying and providing services to remedy Student's rather severe reading and spelling needs has contributed to an urgency in Student and Liberty accessing information that will help them bridge the gulf between his current skill levels and admission to a university program that will allow him to reach for his dream of becoming an engineer and plan Student's remaining program at Liberty accordingly. This is an unusual case. Evidence indicates that Student is capable of performing at the university level. However, Student's intelligence so markedly differs from his current skill levels he will need careful, long-term planning to identify services he can access now to allow him to achieve in high school at a level allowing for

admission to college. The transition assessment shall also evaluate post-secondary educational options that will offer Student the needed services and accommodations to allow him to thrive once accepted at college or university. No evidence has been presented that Liberty has such an expert. Therefore, Parents are to be allowed to select the transition expert of their choice for a fee not to exceed \$6,000 to assist in evaluating Student's needs as described in this paragraph. This fee shall include the cost of the transition assessor attending an IEP to review the assessment.

14. In his closing brief, Student requested a series of remedies that are not connected to denial of FAPE found in this matter. The private assistive technology assessment requested is denied as a request for an independent education evaluation was not pled as an issue nor was any denial of FAPE found for which this remedy flows. Student's request for reimbursement for Dr. White's services is denied as Student has failed to connect Dr. White's October 2016 assessment with any denial of FAPE pled or for any denial of FAPE found. No evidence was presented that Dr. White's report was provided to the IEP team for consideration in connection with the goals or specialized academic instruction that are at issue in this case. Student's request for reimbursement for tutoring from the Hope Academy is denied as Student failed to meet his burden of proof as to the exact amount of expense incurred, dates expenses were incurred or the exact type of tutoring provided or how the tutoring addressed any denial of FAPE. Student's request for an expert in the areas of twice exceptionality, dyslexia and individual therapy to be assigned to create goals for Student is denied. Student has failed to demonstrate that Liberty is unable to craft goals to address Student's areas of need. The fact that the first goals did not meet legal standards is not evidence that the district is incapable of developing acceptable goals. Furthermore, Student did not raise the issue of failure by Liberty to provide goals in all areas of need. No evidence was presented to connect the request for an expert to develop goals in the area of individual therapy sessions to the issues pled in this case.

#### ORDER

1. Liberty shall fund the relief ordered and implement it within 30 days of the date of this order unless otherwise indicated. Any cancellation of compensatory education sessions shall be credited to Student. Scheduled Student absences and absences with more than 24 hours' notice given to the provider will be credited to Student. Any Student absences with less than 24 hours' notice given to the provider will not be credited to Student. All compensatory education bank hours must be used by August 31, 2019 after which they shall be forfeit.

2. These services are compensatory. Therefore, Student's entitlement to them does not end if Student moves out of the District before the services are fully provided.

3. All other requested relief is denied.

## PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on Issue No. 1 (a), the question of whether the transitional IEP was timely. Student prevailed on all other issues heard and decided.

## RIGHT TO APPEAL

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

DATE: July 6, 2017

/s/

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PENELOPE S. PAHL  
Administrative Law Judge  
Office of Administrative Hearings