

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

IRVINE UNIFIED SCHOOL DISTRICT,

OAH Case No. 2017030696

IRVINE UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2017031348

CORRECTED¹ DECISION

Student filed his Due Process Complaint on March 13, 2017. ² Irvine Unified School District filed its Due Process Complaint on March 23, 2017. The parties stipulated to consolidating the cases, and on April 12, 2017, the Office of Administrative Hearings consolidated the cases, with Student's case designated as the primary case and the case upon which the decision deadline would be calculated.

Administrative Law Judge Kara Hatfield heard this matter in Irvine, California, on May 2, 3, 11, and 16, 2017.

¹ The previously issued June 27, 2017 Decision is corrected concerning the year in which the Decision was issued, noted on the final page. No other changes to the Decision were made.

² District filed its response to Student's case on April 27, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. May 30, 2017) 2017 WL 2330662.)

Bruce Bothwell, Attorney at Law, represented Student. Mother attended the hearing on all days and Father attended the hearing on May 2 and 3, 2017. Student did not attend the hearing.

Peter Sansom, Attorney at Law, represented Irvine Unified School District. Jennifer O'Malley, District's Director of Special Education, attended May 2, 3, and 11, 2017. Melanie Hertig, District's Executive Director of Special Education, attended the hearing on May 2, 3, and 16, 2017.

At the parties' request, OAH continued the hearing to June 5, 2017, for written closing arguments. Closing arguments were timely filed, the record was closed, and the matter was submitted on June 5, 2017.

ISSUES

Student's Issues

1. Did District deny Student a free appropriate public education by denying Parents meaningful participation in the educational decision-making process and depriving Student of educational benefit by failing to have an individualized education program in place prior to the start of the 2016-2017 school year?
2. Did District deny Student a FAPE by failing in the September 15, 2016 IEP to offer Student appropriate behavioral services and supports, specifically:
 - a. a one-to-one behavior aide; and
 - b. supervision and consultation?

District's Issue

3. May District assess Student pursuant to the November 15, 2016 assessment plan regarding Special Circumstances Instructional Assistance without parental consent?

SUMMARY OF DECISION

Student contends he was denied a FAPE because District did not have an IEP in place for him before the start of the school year. He also contends he was denied a FAPE because District did not offer or provide Student appropriate one-to-one aide behavior support to start the school year nor did District offer Student appropriate one-to-one behavior aide support

with appropriate supervision and consultation services in the 30-day IEP on September 15, 2016 IEP. District knew Student, at his prior school district, had a full-time behavior aide from a nonpublic agency throughout his school day, with five hours per week funded by the district and 25 hours per week funded by Parents' health insurance. But District only offered Student aide support for one hour a day, and with no supervision service and only consultation service to support District personnel, not Student. Student also contends District is not entitled to conduct the Special Circumstances Instructional Assistance assessment District proposed to evaluate whether Student required behavior intervention services from a non-public agency for the duration of his school day. Student asserts District should not be allowed to conduct the assessment without parental consent because District proposed the assessment in November 2016 only to garner evidence months after-the-fact to justify District's earlier failures to provide Student, at the start of the school year and in District's September 15, 2016 IEP offer, the level of one-to-one aide services he required.

District contends it did not deny Student a FAPE because District was prepared to provide the services offered by Student's prior school district in the last agreed upon and implemented IEP, which District interpreted to include only 5 hours per week of assistance from a one-to-one behavior aide. District contends it had no information as of September 15, 2016, that suggested Student required a behavior aide for more than an hour a day during recess and lunch, and therefore offered what the prior district offered in the last agreed upon and implemented IEP, which was reasonably calculated to provide Student a FAPE. District also contends that due to the dispute between District and Parents regarding the level of aide support Student required, conditions warranted reassessment of Student through the Special Circumstances Instructional Assistance assessment because District required more information to verify that its offer of five hours per week of behavior intervention services was appropriate for Student. District contends it complied with all legal requirements for proposing an assessment and that it is entitled to conduct a Special Circumstances Instructional Assistance assessment.

Student met his burden of demonstrating that District denied him a FAPE by failing to have an IEP in place before school started, failing to offer Student appropriate one-to-one behavior aide support to begin the 2016-2017 school year, and failing to offer him appropriate one-to-one behavior aide support 30 days after the start of the 2016-2017 school year, in the September 15, 2016 IEP. Student also demonstrated District denied him a FAPE by failing to offer appropriate supervision and consultation services regarding the one-to-one aide support.

District did not meet its burden of demonstrating that all procedural requirements for conducting an assessment without parental consent were satisfied, including that it was necessary to evaluate the extent of Student's needs for one-to-one aide assistance from a non-public agency during Student's school day.

FACTUAL FINDINGS

Background

1. Student was nine years and four months old at the time of hearing. Student had resided with Parents and his twin brother, who did not receive special education services, in another school district until after the end of the 2015-2016 school year. Student moved into District in June 2016, immediately after District's 2015-2016 school year ended. Student was eligible for special education and related services due to autism.

PRESCHOOL YEARS

2. Student was a Regional Center consumer and then became eligible for special education in January 2011. The school district in which Parents resided at this time recommended Student be placed in a special day class for preschool, but Parents successfully negotiated for Student to participate in regular district preschool. Parents also placed Student in a private preschool on the three days per week the school district did not provide preschool. After about five months, Parents withdrew Student from the district preschool when the school district proposed to discontinue individual speech therapy and provide it only as part of the classroom milieu. Student continued to attend the private preschool three days per week, with a full-time aide for the three and a half hours per day of class.³ Student later attended private preschool for five days per week.⁴

3. When Student was four and a half years old, in early summer 2012, Parents were about to move to a different school district and had Student evaluated by Mary Large, Ph.D. Dr. Large was a licensed psychologist who had completed a post-doctoral neuropsychology training program. She had extensive experience conducting neuropsychological, developmental, and forensic evaluations of people of all ages, with particular expertise in assessing developmental/cognitive delay, pervasive developmental disorders, autism, attention disorders, learning disabilities, and neuropsychiatric conditions. She had been the clinical director of the Kayne-Eras Center, where she provided clinical oversight for the therapeutic services delivered in a non-public school to children, adolescents, and young adults who had significant behavioral, emotional, and/or learning problems, and/or developmental disabilities.

4. Dr. Large's neuropsychological assessment report, dated July 19, 2012, noted that Parents spoke both Vietnamese and English to Student when he was an infant, but had only spoken English to him since he was almost 2 years old; Parents continued to speak Vietnamese to each other and to Student's brother. Dr. Large recommended Student attend a general education preschool, and she believed he "must have a full-time, one-to-one aide" for

³ There was no evidence regarding who funded the aide.

⁴ There was no evidence regarding if Student had an aide and if so, for what frequency and duration, and who funded the aide.

approximately 18 hours per week due to his ongoing difficulties with taking social initiative, sustaining interactions with peers, managing frustration, problem solving in ways that were constructive and adaptive, negotiating transactions, participating in all class activities, and initiating and sustaining reciprocal verbal interactions. Dr. Large opined Student required adult facilitation for all of these. She stated ongoing, one-to-one intervention was indicated to provide Student with the containment, support, prompting, redirection, and explicit instruction he needed to integrate fully and seamlessly with his peers. Dr. Large “strongly recommend[ed]” that the same provider of behavior intervention deliver services in school and at home (for 15 to 20 hours per week), to prevent confusion, contradictory interventions, and the increased potential for regression.

5. Student enrolled in a new school district, which held an IEP team meeting on August 28, 2012. The IEP team included Dr. Large and representatives from the nonpublic agency that had been providing applied behavior analysis services to Student.⁵ The IEP team developed 24 goals and a behavior support plan. The “behavior team” was explicitly stated as among the persons responsible for 10 of the goals. The school district offered a public general education preschool program for three and a half hours per day, five days per week, with full day support in the classroom with a trained applied behavior analysis aide. A plan to transition Student from the nonpublic agency provider to school district personnel was included in the offer. The school district also offered to provide 90 minutes of individual applied behavior analysis support in a separate classroom outside of the school day, with 30 minutes before school and 60 minutes after school each day. Mother’s signature on the August 28, 2012 IEP regarding authorization and approval was dated August 28, 2012; the signature page of the IEP had a handwritten notation of “see settlement agreement,” but no settlement agreement was introduced into evidence to provide any context for the notation.

6. In May 2013, Student’s school district conducted a behavior assessment. The report stated that at that time, Student received three and a half hours per day of behavior intervention services from a non-public agency in the public school setting. The same nonpublic agency provided 10 hours per week of service in the home. The school district’s assessment indicated Student functioned successfully in the classroom with no significant behavior of concern observed during the assessment period. He engaged in appropriate classroom behaviors during 80 to 100 percent of intervals. However, the report acknowledged that Student received far more direct instruction than his classmates, particularly for non-preferred demands, because he had support from a “one-to-one therapist.” The school district recommended adding proactive strategies to Student’s classroom, such as a token board and social skills instruction, as an antecedent intervention to increase Student’s motivation to engage in appropriate behaviors and reduce the number of demands that had to be made. The school district also recommended that he receive behavior intervention services during “unstructured times of the day, or more specifically, snack, lunch, and unstructured play time (recess).” The school district further recommended

⁵ There was no evidence regarding who funded the applied behavior analysis services.

30 minutes a week of supervision of Student's behavioral programming, including ongoing training of behavior support staff and collaboration with classroom staff and parents, and a 60-minute monthly clinic meeting with Parents, the behavior team, and the classroom teacher to review data on Student's progress.

7. An IEP team meeting was held on May 21, 2013. Despite checking the boxes indicating that Student's behavior impeded learning for himself or others and that a behavior support plan was attached to the IEP, the notes of the IEP team meeting stated a behavior support plan was not necessary at that time. The IEP team developed 14 goals. The "behavior team" was explicitly stated as among the persons responsible for implementing 10 of the goals.

8. The IEP team agreed Student would continue in the public school general education preschool class for three and a half hours a day for the remainder of the 2012-2013 school year and the 2013 extended school year. Student would have been old enough to start kindergarten in the 2013-2014 school year, but the IEP team decided to have Student participate in the school district's transitional kindergarten, which had the advantage of "special education support seamlessly embedded in the classroom for a trained special education assistant." Related services of speech and occupational therapies were offered.

9. With respect to behavior support services, there was a disagreement between the school district personnel and Parents. The school district recommended Student have behavior support services during unstructured times of the day, including recess, "free choice," and lunch time, totaling 360 minutes a week. The applied behavior analysis therapist from the nonpublic agency suggested Student might need more support at the start of transitional kindergarten and that data could be collected in the new environment and the IEP team could determine a plan to fade aide support after school started. Parents wanted Student to continue to have a full-time aide from the nonpublic agency. The IEP team discussed possibly transitioning Student from a nonpublic agency aide to a school district aide during the 2013 extended school year, with increased supervision and collaboration from the school district and the nonpublic agency during the summer to assure a smooth transition. The school district proposed to provide full-time behavior support services by a school district aide for the first 45 days of the 2013-2014 school year and then develop a fade plan. Parents disagreed with the school district's proposal to change to a school district employee as the behavior aide. The May 21, 2013 IEP services grid pages as well as the meeting notes pages indicated that as of June 26, 2013, attorneys had not yet finalized a settlement agreement, and that the IEP was affirmed without a settlement agreement in place "to meet the CASEMIS deadline" of June 28, 2013.

TRANSITIONAL KINDERGARTEN

10. For the 2013-2014 school year, Student attended the school district's transitional kindergarten. His twin brother entered kindergarten. In effect, Student was held back one year and Student was always one grade level behind his twin brother, and older than most of his classmates.

11. Student's next annual IEP team meeting was held on May 20, 2014. Student had continued to receive full-time behavior support from a one-to-one aide from a nonpublic agency during transitional kindergarten. The services grid notes of the May 20, 2014 IEP documented that on the 28th day of an illegible month in 2013, attorneys had finalized a "settlement agreement" and Student would attend transitional kindergarten with an aide from a nonpublic agency, and the school district would be "responsible for five hours of ABA support." The meeting notes of the May 20, 2014 IEP team meeting indicated that through a "stipulated agreement" with the school district, the school district funded five hours a week of behavior support services from a nonpublic agency during the 2013-2014 school year, and Parents funded the rest of the nonpublic agency behavior support program through their health insurance plan.

12. On May 20, 2014, the IEP team developed 15 goals; six explicitly stated the "behavior intervention team" was responsible for implementing the goals. The nonpublic agency providing Student's behavior services recommended that the behavior services remain at their current level. The school district agreed to continue to provide Student's behavior support services through the nonpublic agency on the same terms, with the school district funding five hours a week and the Parents funding the rest of the service for the full school day through their health insurance. This was reflected on the IEP team meeting notes pages. The services grid page reflected behavior intervention services as individual within a general education class, from a nonpublic agency under contract with the school district, for 300 minutes a week. The school district proposed to add the school district's behavior team, called Behavior and Socialization Intervention Services, for consultation service 60 minutes per week. The services grid page reflected behavior intervention services of consultation, by a district provider, for 60 minutes weekly. The school district offered Student specialized academic instruction in a group in a separate classroom for two 30-minute sessions a week.

13. For the remainder of the 2013-2014 school year, Student received one-to-one aide support from the nonpublic agency for 5 hours a week funded by the school district, and the remainder of the week funded by Parents, through their health insurance. In addition to therapeutic behavioral services for Student, Parent's health insurance also provided for mental health service plan development by a non-physician, and home care training for Student's family. The plan development service seemed to be supervision service of the behavior aide and program.

14. No one from Student's prior school district or prior nonpublic agency behavior services provider testified regarding definitions of supervision and consultation. An understanding of these terms was derived from the testimony of District personnel, Dr. Large, and Student's current nonpublic agency behavior services provider. Supervision is direct observation of the child receiving applied behavior analysis services, assessment of his skills, and ongoing modification of the treatment plan. It involves directly probing skills with the child, analyzing data, seeing if there are additional skills that need to be worked on and added to the treatment plan, seeing if approaches to behavior intervention are not working and need to be revised, and if interventions have been successful and can be reduced

or removed from the treatment plan. Supervision involves observation of a behavior therapist while providing service to the child to analyze the treatment as it is being implemented and directing the therapist if changes need to be made to teaching strategies. Supervision involves providing direct feedback about what the therapist is doing, modeling and teaching new intervention strategies, suggesting alternatives where a child is struggling and what has been tried is not effective. Supervision involves work with the therapist to provide hands-on reinforcement, feedback, and instruction to ensure the fidelity of behavior intervention services. Supervision can also be indirect, in the form of clinic meetings, where providers get together and analyze frequency data that does not need to be directly observed by the supervisor, to discuss where there have been improvements, how to modify the program because the child has made progress, and how to fade certain things out and bring in new components to continue to push the child forward. The Behavior Analysis Certification Board recommends that at least 50 percent of the supervision hours involve direct interaction with the child and observation of the therapist providing treatment to the child.

15. Consultation is providing support to and collaborating with the team supporting the child. The distinction between supervision and consultation, as District understood the term consultation and explained it at the due process hearing, is that consultation is ongoing monitoring and improvement of a child's behavior program when the child does not have a behavior tutor and is receiving behavior support in other ways. Supervision is a term for the same activities when the child has a behavior tutor, because a behavior tutor must be supervised, and that is called supervision. If services are directed to a student, the service would be called supervision or collaboration. If services are directed to staff, it would be called consultation. Dr. Large believed it was important to have a behavior specialist provide direct supervision by observing Student's behavior therapist in action on a routine basis, at least once a week, and offering suggestions to the therapist to make improvements where Student was having difficulty. She did not believe it was appropriate for a behavior specialist only to provide consultation once a week, every other week, or once a month.

16. Based on these definitions, Student received aide services as well as applied behavior analysis program supervision funded by Parents' health insurance; the May 20, 2014 IEP did not list the behavior intervention services supervision funded by health insurance. The classroom teacher received support through consultation with a school district behavior team member. The May 20, 2014 IEP listed the behavior intervention services consultation provided by the school district.

KINDERGARTEN

17. Student began kindergarten for the 2014-2015 school year. In fall 2014, Dr. Large again evaluated Student, two and a half years after she first evaluated him. Based on Dr. Large's interview with the director of the nonpublic agency who provided Student's behavior program, Student's independence in the classroom had improved significantly. Other than in relation to socialization, Student was entirely independent in the kindergarten classroom. At the end of the transitional kindergarten year he had begun to ask for help and

follow teacher directions without prompting, and in kindergarten was doing both independently. His greater independence in school had led to a reduction in crying and distress with corrective feedback, indicating Student was better able to control his emotions. Socialization continued to be Student's biggest area of need.

18. Student's kindergarten teacher reported Student was performing at least at grade level in all areas, and presented with no significant behavioral concerns or disruptions in class. Occasionally Student was thrown off by changes to the regular schedule, a substitute teacher, or minor corrective feedback from the teacher, which caused Student to become upset and cry, but he quickly recovered with reassurance from the teacher. The teacher described his social skills as limited and just emerging.

19. Student's speech therapist reported that after working with Student in group sessions for two years, three times a week, Student had made good progress. He still required priming for good eye contact, and was not consistent in being able to engage in sustained activity or to demonstrate appropriate reciprocity with peers. Even during structured activities, Student required prompting, although his need for prompting had somewhat decreased. Student sometimes became teary-eyed when redirected.

20. Student's occupational therapist reported that after working with Student for over a year, Student had made "amazing progress" in all areas. He was responsive to corrective prompts and not distressed when prompted.

21. During testing by Dr. Large, Student did not engage in protest behavior or cry, but he did get teary-eyed at some points during the more challenging items of various tasks.

22. Dr. Large's report dated November 26, 2014, detailed Student's performance in many areas and compared his abilities and challenges in spring 2012 to his abilities in fall 2014. Dr. Large summarized Student's progress and present levels of functioning and made recommendations for interventions and support. She believed he should remain in a general education kindergarten classroom. Although his academic skills development was in the low average range for children his age, he was not in first grade as other children his age would be, and academically he was achieving at a level commensurate with his kindergarten peers. She also "strongly recommend[ed]" Student continue to be supported by a full-time one-to-one aide in the classroom for at least the next 12 months. Dr. Large advised against shifting Student from an aide who provided direct, individual coaching and prompting to an aide who was a "shadow"; Dr. Large described what she specifically was not recommending as an aide Student did not know was only observing him and standing by to intervene if Student did not consistently approach and take initiative with peers or sustain interactions for a substantial period of time in an appropriate way. Student continued to demonstrate significant social deficits that required direct intervention. Dr. Large recommended Student have a full-time one-to-one aide in the school setting for 27 hours a week, and 8 to 10 hours a week of direct service in the home/community, exclusive of supervision and training time. In the November 2014 report, Dr. Large stated it was "crucially important" that the same provider work with Student in the home, community, and school settings, to increase

generalizability of skills across environments, and to reduce the risk for competing interventions that may directly contradict one another, confuse Student, and/or result in regression.

23. Student's triennial IEP was due in May 2015, so at the end of kindergarten, Student's school district prepared for his triennial IEP by conducting assessments in the areas of adapted physical education, health, occupational therapy, speech and language, academic achievement, behavior and socialization, and psychoeducation. Student was over seven years old at the time.

24. The occupational therapist recommended continued occupational therapy services. The speech language pathologist recommended continued speech therapy services.

25. On the Woodcock-Johnson IV Test of Achievement, Student's scores were in the average to high average ranges for the kindergarten grade level in all domains of reading, mathematics, written language, and academic knowledge. Student had average reading skills and was able to accurately answer explicit comprehension questions, such as those easily found in text, but he struggled with implicit questions, such as inferences and predictions. The special education teacher recommended a goal in that area. Also, despite his average math skills, Student had a relative weakness in the area of applied mathematics problems, which required analysis to solve a math problem. The special education teacher believed Student's weakness in applied mathematics was due to his difficulty understanding academic vocabulary. She recommended a goal in that area.

26. The behavior assessment conducted by the school district examined Student's conversational exchanges, sustained cooperative play, seeking a preferred peer, and compliance with group instructions. Student was observed for 30 minutes on four dates, and for 50 minutes on a fifth date. In conclusion, the school district's behavior analysis site lead described Student as a bright, compliant boy who demonstrated emerging cooperative play skills and an interest in playing with a peer of his choosing. His ability to initiate social interactions was not yet consistent, but he was able to sustain cooperative play during inside and outside activities. In class, he was able to follow group instructions and engage with seated work and circle time activities. He had some difficulties tolerating peers who joined in when he was playing with a friend, and with interjecting during social situations. He had difficulties when he was not chosen for an activity, or if the class was reprimanded for something. He sometimes cried, which drew the attention of peers and prompted inappropriate responses from Student. The report recommended continued behavioral support to target social interactions.

27. The school psychologist concluded Student had average cognitive ability. His general education kindergarten teacher listed her concerns as Student being able to handle unexpected events, such as schedule changes, substitute teachers, and missing out on something in class. His special education teacher listed concerns as interacting with his peers; he had improved in the last year but still struggled. The school psychologist concluded that Student had responded favorably to the structure and support of the special

education services that had been provided, and support staff believed he would continue to benefit from such supports.

28. The school district held an IEP team meeting on May 6, 2015, to review the results of the triennial assessments and to develop an educational program for Student. Participants of the IEP team meeting included the program director of the nonpublic agency that provided Student's behavior intervention program at school and at home. During the IEP team meeting, the speech language pathologist reported Student had met three speech goals and partially met a fourth. Student internalized things, and needed prompting to use expressive language when he was upset. This would be addressed in a goal. The special education teacher reported Student had met his two academic goals, and proposed new goals in reading comprehension, phoneme segmentation, and mathematical reasoning. The nonpublic agency behavior services provider reported Student had met three behavior goals and partially met three others. The nonpublic agency proposed four behavior goals, to address "peer vocational," social play, group play, and coping skills.

29. The IEP team developed goals in the areas of reading comprehension, phonemic awareness, mathematical reasoning, pragmatic/social language, receptive language, articulation, skipping (gross motor function), visual motor/handwriting, fine motor (regarding hand strength and endurance), three behavior goals in the area of social skills, and one behavior goal regarding coping skills. The school district again offered Student group specialized academic instruction in a separate classroom for two 30-minute sessions a week. Accommodations as strategies for instruction were presenting Student with one task/direction at a time, repeating or rephrasing instructions, and checking for understanding. The IEP team meeting notes pages indicated regarding behavior services, "[nonpublic agency provider] services are remaining the same at this time. 1 x 300 weekly[.] [School district provider] services are remaining consultation 1 x 60 weekly[.]" The services grid page reflected behavior intervention services as individual within a general education class, from a nonpublic agency under contract with the school district, for 300 minutes a week. The services grid page reflected behavior intervention services of consultation, by a district provider, for 60 minutes weekly. Parents signed that they agreed to all parts of the IEP.⁶

30. For the remainder of the 2014-2015 school year, Student received one-to-one aide support from the nonpublic agency for approximately 25 hours a week funded by Parents through their health insurance, and 5 hours a week funded by the school district. Student received supervision of the behavior aide and program through Parents' health insurance, and supervision was not listed on the May 6, 2015 IEP. The classroom teacher received support through consultation with a school district behavior team member. The May 6, 2015 IEP listed the behavior intervention services consultation provided by the school district.

⁶The school district offered but Parents declined extended school year services for summer 2015.

FIRST GRADE

31. For all of the 2015-2016 school year while Student was in first grade, Student received one-to-one aide support from the nonpublic agency for approximately 25 hours a week funded by Parents, through their health insurance, and 5 hours a week funded by the school district. Student also received behavior intervention services supervision from the nonpublic agency, while Student's teacher received behavior intervention services consultation from the school district's behavior services team.

32. The school district convened Student's annual IEP team meeting on May 6, 2016. Participants of the IEP team meeting included a representative from and the program director of the nonpublic agency that provided Student's behavior intervention program at school and at home. During the IEP team meeting, Student's first grade general education teacher reported Student had made progress in all academic areas over the course of the year. While Student's ability to cope with unexpected situations and to control his emotions had improved, he continued to need support in those areas. The speech language pathologist reported Student had met or made progress toward his three speech goals. The speech language pathologist presented two new goals and proposed reducing Student's services from two 30-minute group sessions to only one session. The occupational therapist reported Student met all his goals and proposed to change the service from group occupational therapy to a consult model.

33. The nonpublic agency behavior services provider reported Student had met three of his behavior goals and made progress on the other. He continued to have difficulty with independently selecting the appropriate responses in social situations, such as self-advocacy and assertiveness with peers, and he was consistently engaged in appropriate social interactions for shorter durations than his peers. He had not met his coping skills goal. He still cried sometimes with challenging tasks, which was believed to have occurred because Student encountered a higher frequency of challenging tasks as first grade became more difficult. The nonpublic agency proposed three behavior goals, to address social communication, social skills, and coping skills. Student's present level of performance regarding social communication was that he did not consistently respond to peer requests for attention, and he continued to struggle with maintaining peer interest when engaged in conversations. He engaged in social interactions at a rate far below his peers. The new behavior goal for social communication was for Student to "remain socially engaged at least 90 percent as often as his peers during all activities wherein it was appropriate to do so (e.g., down time, choice time, group work in the classroom, transitions, recess, etc.). Appropriate social engagement includes initiating, responding, and attending to peers, greeting others, reciprocal conversations, joining in ongoing peer vocal interactions, and gesturing while maintaining appropriate eye contact and utilizing attention-gaining strategies."

34. Student's present level of performance regarding social skills was that when he had the opportunity to assert himself to have his needs and wants met, such as requesting behavior of others like asking them to stop something he disliked, he independently did so

without crying in 60 percent of opportunities, which is to say that he cried 40 percent of the time. The new behavior goal for social communication was for him to improve his assertiveness with peers “as evidenced by requesting desired actions and information of others (e.g., telling a peer that he was cut in line and is actually next, asking a peer for help with a problem) in at least 80 percent of opportunities.”

35. Student’s present level of performance regarding coping skills was that although he continued to utilize coping strategies to prevent vocal and physical protest behavior, he still cried two times per week as measured across three consecutive weeks. It was not clear how this information intersected with the present level of performance regarding Student crying a little under half the time he tried to assert himself to have his wants and needs met. Student had partially met his prior behavior goal in this area and the modified new goal was for Student to improve his coping skills by “remaining calm and refraining from crying when faced with unexpected situations (e.g., peer accuses of taking blocks, unsure of rules to new game in P.E.) Specifically, [Student] will reduce instances of crying to no more than 1 instance per 2 weeks, across 4 consecutive weeks.”

36. Regarding behavior services, the IEP team meeting notes pages indicated, “Services will continue.” The school district’s Behavior and Socialization Intervention Services team member shared the importance of playdates and creating more meaningful relationships with a few select friends. The school district’s behavior team would be “on consult. Services will remain the same.” The services grid page reflected behavior intervention services as individual within a general education class, from a nonpublic agency under contract with the school district, for 300 minutes a week. The services grid page reflected behavior intervention services of consultation, by a district provider, for 60 minutes weekly. The IEP team developed goals in the areas of written expression, mathematics, articulation, syntax/expressive language, social communication, social skills, and behavior (coping). Once again, the school district offered Student group specialized academic instruction in a separate classroom for two 30-minute sessions a week. Parents signed that they agreed to all parts of the IEP.

37. For the remainder of the 2015-2016 school year, Student continued to have an aide at school from a nonpublic agency, with most of the hours funded by Parents’ health insurance, and five hours a week paid for by the school district. Mother testified that during first grade, Student made progress and data supported some reduction in the behavior aide, so about two months before the end of the school year, the nonpublic agency behavior team decided to reduce Student’s aide support by having him attend the first hour of the school day independently, without an aide. There was no evidence regarding the impact this reduction had on Student’s ability to access his education.

Student’s Move to District Summer 2016

38. Parents were in the process of purchasing a home in Irvine and, before escrow closed, went on May 24, 2016, to a meet-and-greet function at Beacon Park Elementary School, which would be Student’s and his brother’s new neighborhood school. Parents met

the principal Bob Curley and special education teacher Anna Berger and introduced themselves and the fact that Student had an IEP. Ms. Berger instructed Father to send District the current IEP. The next day, Mother emailed Mr. Curley to follow up with him about information Parents had shared the day before. Mother stated the family lived in another school district but would be moving to Irvine when escrow closed on June 13, 2016. Mother stated she had already completed the initial online registration of her sons with District and would complete the next steps after escrow closed. Mother informed Mr. Curley that Student had autism and that although he was academically average for first grade, he had challenges reading social cues and initiating and sustaining reciprocal interactions with peers and teachers, especially during social interaction times inside class as well as during recess and lunch. Mother reported Student had difficulty coping with unexpected situations, speaking up for himself, problem solving to resolve conflicts, and working collaboratively in groups. Mother described his expressive and social pragmatic language as a bit delayed, with Student having difficulty effectively expressing frustration and sometimes easily crying when overwhelmed or upset. Mother stated Student had received applied behavior analysis to work on behavioral and social skill building at home and at school from agencies that specialized in autism treatment, and that Student had made wonderful progress.

39. Mother explained that Student received one-to-one behavioral support at school funded by Parents' medical insurance for 24.5 hours a week, and that the school district funded five hours a week. Mother stated the aide funded by medical insurance was not written in the IEP. She listed the other special education and related services Student received, and she attached a signed copy of the most recent, May 6, 2016, IEP to her email. Mother stated Parents hoped District would provide Student comparable services at Beacon Park, including allowing the nonpublic agency to continue providing behavior and social support for Student in the school setting. Mother requested Mr. Curley contact her if there were any questions or if further information was needed. She asked that he let her know if there was anything Parents could do at that time to prepare for the transition.

40. On June 9, 2016, Student withdrew from his prior school district because of the family's move to Irvine. It was the last day of the 2015-2016 school year in the prior school district as well as in District. District was in a different county and different special education local plan area than the prior school district.

41. On June 13, 2016, Mother again emailed Mr. Curley to verify he had received her earlier email, with the IEP attachment, to which he had not responded. She reported that escrow would close on their new home that week and she wanted information about when and where to do the rest of the enrollment process. In less than 30 minutes, Mr. Curley replied to Mother. He explained the personal and professional reasons for his delayed response, and indicated he had not yet looked at Student's IEP but planned to talk to the school psychologist and special education teacher that week. Mr. Curley forwarded Mother's email to school psychologist Nicole Jackson and special education teacher Anna Berger.

42. Because Student moved to Irvine, Student stopped receiving applied behavior analysis services on June 17, 2016, from the nonpublic agency that had been serving him for many years. On June 20, 2016, he began to receive applied behavior analysis services from Autism Spectrum Consultants, Inc., a nonpublic agency in Orange County that contracted with Parents' health insurance. Autism Spectrum Consultants began service immediately by utilizing the previous nonpublic agency's treatment plan and then conducting ongoing assessment to get to know Student and develop Autism Spectrum Consultant's own treatment plan goals. Parents' health insurance covered one-to-one behavior intervention services at an annualized average rate of 25 hours per week, and 8 hours of supervision per month, which annually averaged one hour of supervision for every 13.5 hours of direct therapy. Autism Spectrum Consultant's Clinical Director, Cindy Underwood,⁷ provided the 8 hours a month of supervision service.

43. District's process for students who transferred in was to implement an IEP similar to the IEP last agreed upon and implemented at the school they previously attended.

44. On June 30, 2016, special education teacher Ms. Berger emailed Mother to verify that the family was still moving to Irvine and planned to attend Beacon Park. Ms. Berger stated she was working with District about what supports District would have for Student. Mother replied 30 minutes later confirming that the family had moved to Irvine, planned to have Student and his brother attend Beacon Park, and had, three days earlier, completed the registration paperwork with District. She invited Ms. Berger to let her know if there were any questions or if there was anything else the family needed to prepare, beyond immunization records, before school started.

45. Within 30 minutes, Ms. Berger replied that she had sent Mother's email to a program specialist, who stated that District did not "allow private service providers into the public school setting. This means that although your insurance pays for someone to be there 25 hours a week, we can't have that person in our school setting." Ms. Berger reported she was working to get a "BT" (behavior tutor) set up for Student and that because Student was new to District, there would be a 30-day IEP "so we can review his level of services and needs at that IEP meeting." Within an hour, Mother replied that Student had been attending a summer program of the Irvine Public Schools Foundation⁸ on a District elementary school

⁷ Ms. Underwood had a bachelor's degree in Health Science with a minor in Social Psychology, and a master's degree in counseling psychology. She was a Board Certified Behavior Analyst. She had been a behavior therapist at Autism Spectrum Consultants for four years, then became a supervisor for one year, was the assistant clinical director for three and a half years, and then became the clinical director in 2007.

⁸ Irvine Public Schools Foundation was described during hearing as a non-profit organization that offered summer enrichment classes for students. Although the Irvine Public Schools Foundation classes were held on District's campuses, they were not part of or affiliated with, and not provided by, District.

campus and had been receiving support from an aide from Autism Spectrum Consultants. Mother explained the aide had been working really well with the Irvine Public Schools Foundation staff and helped Student “utilizing a comprehensive behavior intervention program” that “address[ed] skill deficits and buil[t] appropriate social/communication/coping skills across school and home/community settings.” Mother stated it was “crucial” for Student to have one behavior agency to support him across all settings, and claimed the family’s experience in the prior school district, where one applied behavior analysis agency provided one-to-one support for Student, was very positive and successful. Mother offered to provide District with Student’s comprehensive assessment and recommendations by a psychologist before the IEP team meeting. Mother invited District to observe Student and assess him while he was in the Irvine Public Schools Foundation program to see how the nonpublic agency aide was working with Student during the remaining four weeks of academic summer classes. Mother also offered to bring Student to District for assessment during the summer. Mother stated the family was available for an IEP team meeting as soon as possible, even before school started if District’s team was available.

46. On August 10, 2016, Mother emailed Ms. Berger again about possible IEP team meeting dates and “any necessary assessments for” Student. Mother stated she wanted Student to begin on the first day of school, August 24, 2016, and asked if it was possible for Student to have his aide from Autism Spectrum Consultants at Beacon Park until the IEP team meeting happened. On August 11, 2016, Ms. Berger replied that she was checking with program specialist Stacy Kredel and would further reply to Mother after speaking with Ms. Kredel. Ms. Berger provided Mother with Ms. Kredel’s email address.

47. On August 15, 2016, Mother emailed Ms. Kredel, Ms. Berger, and Mr. Curley regarding behavior support for Student at Beacon Park. Mother explained the services and activities Autism Spectrum Consultants had provided Student during the summer months in his programs with Irvine Public Schools Foundation and in the home. Mother stated again, as Dr. Large had written in her November 2014 report, that it was crucial for Student to receive services at school and at home/in the community from the same behavior services provider. Mother again explained that Student had been in regular education classrooms in the prior school district and since transitional kindergarten had behavior aides funded by Parents’ health insurance policy. Mother reported that Autism Spectrum Consultants had worked within Orange Unified School District to support students with autism, and that she believed Autism Spectrum Consultants had worked with District before. Mother again requested to have behavior aides from Autism Spectrum Consultants support Student at Beacon Park until District held an IEP team meeting.

48. On August 22, 2016, Mother emailed Mr. Curley about a school tour she heard was happening that afternoon but had not received any details. She asked if Student and his brother could come to the school where they would be starting in two days. She also asked if there was any update about Autism Spectrum Consultants providing behavior aide service for Student at Beacon Park.

49. Thirty minutes after Mother's email to Mr. Curley, Ms. Berger emailed Mother and asked if Mother could meet the next day, Tuesday, August 23, 2017, at 8:00 a.m. Mother replied due to other plans she could meet at 7:00 a.m. Ms. Berger responded that they were trying to coordinate with someone from the district office and 7:00 a.m. was too early. She stated they were trying to set up a meeting and would email Mother again when they "had it all figured out." Mother offered to be available by phone during the day while Student had a doctor's appointment, or in person after 4:30 p.m.

50. Mother took Student and his brother to Beacon Park to see the campus during the open house on August 22, 2016. Beacon Park was a brand new elementary school that had just opened.

51. On August 23, 2016, Mother emailed Ms. Berger asking to meet or talk by telephone that day about Student's support services because school was starting the next day. Mother stated Parents could not send Student to school without Autism Spectrum Consultants aides and appropriate support. Mother and Ms. Jackson spoke twice by phone on the afternoon of August 23, 2016. District would only provide a behavior tutor for one hour a day and would not allow Student's nonpublic agency aide on campus.

Start of the 2016-2017 School Year

52. On August 24, 2016, just before 6:00 a.m. on what was supposed to be the first day of school, Mr. Curley replied to Mother's August 22 email stating he had heard conversations between Ms. Kredel and school psychologist Ms. Jackson and he thought they were going to "connect" with Mother before school started. He was unaware if Mother and Ms. Kredel had met or spoken. He had information that Student might not be at school that day, the first day of school, and he understood Mother's concerns. He said he would see Ms. Kredel sometime that morning and try to meet with Mother some time that day.

53. Mother replied shortly before 8:00 a.m. and informed Mr. Curley she had spoken to Ms. Jackson the afternoon before and learned District would only provide one hour a day of aide support and would not allow the nonpublic agency to provide service the balance of the school day. Mother stated Parents could not send Student to school without appropriate aide support. Mother revealed, for the first time, that in the prior school district Student had received four hours a day of aide support from a nonpublic agency, reflecting the aide fading the nonpublic agency had implemented toward the end of the 2015-2016 school year. Mother again requested to have a nonpublic agency aide accompany Student to school, at no cost to District. Mr. Curley replied shortly before 9:30 a.m. stating Ms. Kredel was trying to get in touch with Mother to see if she wanted Student to attend school that day during the time that the District behavior tutor would be present. Mother responded 30 minutes later that Student needed full day support, at least during the first couple weeks of school to facilitate transition and other skills. Mother requested that District allow Student to attend with support from Autism Spectrum Consultants at least until the IEP team meeting, so the District's behavior tutor could observe Student, collaborate with the nonpublic agency, and District could do any necessary assessments during that time before the IEP.

54. On August 25, 2016, the second day of school, Mother and Student toured the Beacon Park campus, the classroom, and library. Ms. Berger and Mr. Curley showed Mother and Student around, introduced them to classroom teacher Kevin Miller, and at the end they very briefly met District speech language pathologist Lindsey Muir. District told Mother District would provide Student a district employee behavior aide for one hour each day, during the “unstructured” times of recess and lunch.

55. Parents were uncomfortable having Student attend school without a fulltime behavior aide and were only willing to send Student to school during the time he would have an aide. Parents emailed Ms. Berger and Mr. Curley on the night of August 25, 2016, expressing reservations about sending Student to school with an aide for only one hour of the day. And since District was proposing to provide Student the hour of aide support during the lunch time, Parents had concerns about Student arriving in the middle of the day and then leaving school early. But Parents agreed to send Student to school the next day, Friday, August 26, 2016, from noon to 1:00 p.m., and be supported by a District behavior tutor. Parents understood Student would come to school and eat lunch, then attend some time in general education teacher Mr. Miller’s second grade class until 1:00 p.m. Parents agreed to have Student attend Beacon Park under the same circumstance the following Monday and Tuesday, too, because it was the only way District could somehow “observe and evaluate” Student. Mother’s email asked what tests or assessments would be done on the days Student was going to Beacon Park, and when the IEP team meeting would be held. The following morning, Ms. Berger replied that District would have a behavior tutor at Beacon Park on those three days to work with Student. She stated she would email again later in the day about dates for an IEP team meeting.

56. District was aware Student’s May 6, 2016 IEP stated that the prior school district provided five hours a week of individual behavior intervention services from a nonpublic agency. District believed it had employees who were qualified to provide that service and that it was not necessary to contract with a nonpublic agency to serve Student. District had aides, called behavior tutors, who had the same amount and type of training as was required by the Behavior Analyst Certification Board to be a Registered Behavioral Technician. This included 40 hours of coursework within 90 days, which were five core trainings in applied behavior analysis: basics of applied behavior analysis; data collection; good teaching strategies; behavior change procedures; and training specifically about what autism is. Further, all of District’s behavior specialists, who were supervisors, held master’s degrees and were Board Certified Behavior Analysts. The behavior specialists provided the behavior tutors, also called behavior interventionists, ongoing trainings throughout the school year and ongoing supervision of their work with students.

57. District regarded the fact that a District behavior tutor, instead of a nonpublic agency, would provide five hours a week of aide support as the only difference between what District would provide and what Student had received through the May 6, 2016 IEP. District considered its plan to only involve a change of provider.

58. District behavior specialist Ms. Reinartz prepared for Student to attend Beacon Hill by reviewing the May 6, 2016 IEP and coordinating for a behavior tutor to provide one hour a day of service. Ms. Reinartz did not review Student's May 6, 2016 IEP with any other District employees before the 2016-2017 school year started or before the first day Student attended Beacon Park.

59. On Friday, August 26, 2016, Student went to Beacon Park from noon to 1:00 p.m. District provided a behavior tutor for the hour. Ms. Reinartz told the behavior tutor that the behavior tutor was there to provide support as needed. Ms. Berger and Ms. Jackson walked with Student and the behavior tutor to the lunch area, and Ms. Berger watched Student for 15 minutes; Ms. Jackson did not stay. During the entire 15 minutes Ms. Berger observed, Student ate lunch with his brother. Ms. Berger did not take any data. After he ate lunch, Student went to Mr. Miller's second grade classroom. The fact that Student received any aide support during some class time was a mistake due to Ms. Reinartz not knowing that lunch did not start at noon but in fact started earlier, and that students played first and ate second. If Ms. Reinartz had known that lunch began earlier, she would have shifted the aide support to be sure it covered all of the lunch.

60. When Student was at school on August 26, 2016, District gave Mother a form entitled Authorization for Exchange of Information and/or Release of Records to authorize District to communicate with Autism Spectrum Consultants regarding Student. Mother signed the form. District did not give Parents authorization/release forms for any other entities, such as the prior school district and its personnel, the prior nonpublic agency that provided Student behavior support services at the prior school and in the home, or Student's doctors. The only use District made of this authorization was that District behavior specialist Ms. Reinartz called Autism Spectrum Consultants and got the name of Student's case manager, Cindy Underwood. Ms. Underwood, who was Autism Spectrum Consultant's Clinical Director, was not available at that time.

61. On Monday, August 29, 2016, Student went to Beacon Park from noon to 1:00 p.m. District provided a behavior tutor for the hour. He ate lunch and then went to Mr. Miller's second grade classroom. District behavior specialist Ms. Reinartz observed Student for about 50 minutes eating lunch at the lunch tables, transitioning into the classroom, and in the classroom. She did not take data, make notes, or prepare a report of her observation. Ms. Reinartz reviewed Student's behavior goals with the behavior tutor when she went to observe Student on August 29, 2016.

62. On Tuesday, August 30, 2016, Student went to Beacon Park from noon to 1:00 p.m. District provided a behavior tutor for the hour. He ate lunch and then went to Mr. Miller's second grade classroom. Other than the behavior tutor and Mr. Miller, no one from District observed Student during the hour. District could not explain why no special education staff or administrators besides Ms. Reinartz took time to observe Student when he was at Beacon Park.

63. Mother emailed Dr. Large's 2014 neuropsychological evaluation report to Ms. Berger, Ms. Jackson, and Mr. Curley on September 8, 2016. Mother provided the report for District to review for the upcoming IEP team meeting. Mother informed District that Dr. Large had recently conducted an updated assessment and she expected to receive the report within the next week or so. Mother committed to share the report with District when she received it.

64. At some time during the first few weeks of school, Mr. Curley spoke to Parents about other options for having Student attend school at Beacon Park with District providing one hour a day of aide support. Mr. Curley understood Parents did not like Student coming to school in the middle of the day and leaving early. Mr. Curley had heard from Parents that at the end of the last school year, Student had attended school for one hour in the morning without aide support. Without having first conferred with any other District personnel, Mr. Curley proposed to Parents that instead of District providing one hour of aide support during lunch, Student could come to school at the start of the day and participate in one hour of class without aide support, and then a District aide could come to the classroom and support Student for one hour. Parents declined. They wanted Student to attend school the full day, with aide support. District never proposed to provide more than one hour a day of aide support to facilitate Student attending school and enable District to do more observations or any assessments.

65. District notified Parents on September 12, 2016, that an "Interim" IEP team meeting would be held on September 15, 2016.

The September 15, 2016 IEP

66. District held an IEP team meeting on September 15, 2016. Before the IEP team meeting, District reviewed Dr. Large's November 2014 neuropsychological evaluation report, the prior school district's May 2015 triennial psychoeducational assessment report, and the May 6, 2016 IEP. District received from the prior school district its May 2015 triennial behavior assessment report along with the triennial psychoeducation report before the September 15, 2016 IEP team meeting. But District did not review it because school psychologist Ms. Jackson believed District's policy and practice for a transferring student who needed an interim placement was to review the last triennial (psychoeducational) assessment report and IEP and she did not know she should look at other reports that the prior school district sent. The first time District reviewed the 2015 behavior assessment report was before an IEP team meeting in March 2017.

67. The September 15, 2016 IEP document had boxes checked stating the purpose of the meeting was "Interim" and also "Other – 30-day Review." The meeting notes page stated, "Team met to review student's transition to Beacon Park Elementary School and hold a 30 day IEP." Parents and Ms. Underwood attended. District participants were principal Mr. Curley, special education teacher Ms. Berger, general education teacher Mr. Miller, behavior specialist Ms. Reinartz, school psychologist Ms. Jackson, program specialist Ms. Kredel, and speech language pathologist Ms. Muir.

68. Parents had not sent Student to school after August 30, 2016, because they did not think that his aide support should decrease from having full-time aide support, approximately six hours a day, to only one hour a day. Because Student had attended Beacon Park on three dates for one hour each day, District wanted to hold another 30-day IEP team meeting to get current baselines and discuss Student's transition to school after he attended regularly, but District was only willing to provide an aide one hour per day.

69. Mr. Miller shared positive remarks about the limited time Student had spent in his class. The IEP team reviewed Student's present levels of performance as recorded by the prior school district in the May 6, 2016 IEP, and the goals written by the prior school district. Mr. Miller believed the goals in written expression and math were appropriate and tied to the grade level curriculum. The speech therapist reviewed the speech goals and Parents agreed they were appropriate. Behavior specialist Ms. Reinartz reviewed the behavior goals and stated she wanted to get more data about and rewrite Student's goal regarding social communication, but she believed the behavior goals regarding social skills and coping were appropriate. Mother shared Parents' previous experience that having a behavior therapist at school was helpful for Student to generalize his skills. Mother again explained that in the prior school district, Student had aide support funded by insurance, but it was not expressly written in the May 6, 2016 IEP.⁹ Mother described the types of interventions the full-time aide provided. Mother attributed Student's progress to having one-to-one behavior support that was the same at school and at home.

70. The IEP team reviewed Student's accommodations and services, and the accommodations appeared appropriate, but District wanted them to "be reviewed at the 30 day meeting." District stated there would likely be additions after Student could be observed in a classroom. The speech therapist stated that "at the 30 day meeting" speech and language services might be proposed in yearly services rather than weekly.

71. Parents again explained that in the prior school district, behavior intervention services were provided by the school district for five hours a week but the rest of the day was funded through Parents' insurance. The IEP team meeting notes prepared by District stated again that the full-day aide arrangement was not written into the current IEP by the prior school district. District asked Mother what the aide had been responsible for and Mother again described the types of interventions the full-time aide provided, in more detail. The aide worked on goals and collaborated with the classroom teacher to help Student participate within the group. The aide supported social skills during unstructured times; during structured times, the aide intervened when Student became upset and needed a break. The aide also worked on academic goals, and on initiating play and conversations with peers at

⁹ This arrangement had been expressly written in the May 20, 2014 IEP; the May 6, 2015 IEP stated the nonpublic agency's services were "remaining the same at this time" and the May 6, 2016 IEP stated, regarding "outside behavior provider," "services will continue."

recess. District indicated it was offering 300 minutes a week (five hours) of aide support by a District behavior tutor, not a nonpublic agency due to unspecified “challenges of having an outside agency provide services during the day.” District noted that Parents had signed a release of information form authorizing the nonpublic agency providing Student behavior services at home to communicate with District, and stated that “services can be reviewed prior to the 30 day i[f] concerns become evident.” District had not made use of the release of information form Mother signed on August 26, three weeks before what was, actually, Student’s 30-day IEP team meeting.

72. Parents did not believe the level of support District offered was sufficient. They were concerned about Student not having the additional support, six hours instead of one, written into his IEP. District said it would review its offer after Student attended school with the supports written into the previous IEP, referring to the services grid indicating only one hour a day of aide support. Mother again explained what the arrangement at the prior school district had been and that the full details had not been written into the most recent IEP because the meeting was quick.

73. The services grid of the September 15, 2016 IEP indicated that, among other special education and related services, District offered, from September 15, 2016, through May 6, 2017, to provide Student 300 minutes a week of individual behavior intervention services by a District aide. For the same time period, District offered 60 minutes a week of consultation for behavior intervention services, as other supports for school personnel – not Student. Similarly, District offered 30 minutes a month of occupational therapy consultation services as other supports for school personnel, not Student. District did not offer any behavior program supervision service despite taking on the responsibility for providing a behavior tutor one hour per day.

74. Parents did not consent to the September 15, 2016 IEP. The next evening, Mr. Curley emailed Mother requesting that Parents send Student to school for the hour a day District had offered a behavior tutor, from noon to 1:00 p.m., so District could collect more information. He invited Mother to come observe Mr. Miller’s class and offered her three dates and times. Mother replied within an hour requesting a different date to observe Mr. Miller’s class, and stating Parents believed it was disruptive to send Student to school for only one hour, with him arriving later than everyone else and leaving earlier than everyone else. Parents suggested having the insurance-funded behavior aide attend school with Student full-time so District staff could observe and assess Student. Parents requested District be more open-minded about nonpublic agencies and more collaborative with Parents to provide an appropriate IEP for Student.

75. The following Monday, September 19, 2016, Mr. Curley responded to Mother confirming a date and time to observe Mr. Miller’s classroom. He stated the reason District was not allowing the nonpublic agency behavior aide to be at school with Student was because District needed to observe him without an aide to get accurate baselines for Student: “We would have a difficult time assessing appropriate services with [Autism Spectrum Consulting] attending/coaching. It would influence his level of engagement and make it

difficult for us to know what's appropriate – that's the main reason we follow the previous IEP.” Mr. Curley suggested District was entitled to an informal assessment period of 30 days, but acknowledged that a student did not have to struggle for 30 days and that an IEP could be adjusted before 30 days had passed, “just as long as we have good data.” Later that night, Mother replied only confirming the observation for Friday, September 23, 2016, from 1:00 to 2:00 p.m.

76. At the due process hearing, District staff consistently testified that District adopted the May 6, 2016 IEP developed by the prior school district to begin the school year as a matter of policy or practice for transfer students. They also consistently testified that at the September 15, 2016 IEP team meeting, District adopted the May 6, 2016 IEP goals and services because they did not have any data suggesting that anything else was appropriate. District asserted the IEP team did not remove any goals or services from the May 6, 2016 IEP because since District had not seen Student in the classroom, District had no data to warrant removing any of the goals or services. District personnel believed they were following a policy that for any level of service, if District was going to remove something, District required data to back up why it was removing something.

77. Parents were Vietnamese, spoke Vietnamese as a first language, spoke Vietnamese at home to each other and to Student's brother. Parents had only spoken English to Student since he was about two years old. Parents' initial contact with District at the open house in May 2016 and first email to District the next day were in English. All emails Mother sent to District were in English and were well written. No evidence suggested Parents requested a Vietnamese language interpreter for any IEP team meetings or to have any IEPs translated into Vietnamese. Parents did not request a Vietnamese language interpreter for the due process hearing, during which Mother testified. Parents were competent in written and spoken communication in English.

Parents' Notice of Intent to Place Student at Private School and District's Prior Written Notice

78. On September 30, 2016, Parents notified District that due to District's failure to offer Student a free appropriate public education, they intended to place him, in 10 business days, at a private school with aide support and would seek reimbursement from District. Less than two hours later, District emailed and mailed Parents a prior written notice denying Parents' request for private school placement reimbursement. District stated, “After review of the IEP from the previous [school district], the Interim offer of FAPE and the September 15, 2016 IEP, the District believes that the offer of goals, services and placement in the September 15, 2016 IEP are appropriate for [Student] to make adequate progress in the Least Restrictive Environment [].”

Dr. Large's 2016 Neuropsychological Evaluation Report

79. On October 3, 2016, Mother emailed Mr. Curley and Ms. Kredel the most recent neuropsychological assessment conducted by Dr. Large. Dr. Large had assessed

Student in August 2016 and her report was dated September 28, 2016. Dr. Large administered to Student standardized testing instruments and obtained new information from Mother, Cindy Underwood from Autism Spectrum Consultants, Student's first grade teacher in his prior school district, and Dr. Karen Wood, a psychologist who provided Student additional intervention while he participated in a research study at the University of California, Los Angeles, from June 2015 through April 2016. Ms. Underwood reported that Autism Spectrum Consultants had been working with Student for approximately three months at the time of the interview, since the family moved to Irvine. Ms. Underwood stated Student's biggest limitation was in the areas of social skills, including self-advocacy, maintaining sufficient volume when speaking, assertiveness, using social problem solving skills, not quickly crying, initiating with peers, persisting in interactions, and generalizing skills in other settings or with different peer groups. When circumstances changed, Student could not do things he was successful with before, and he required more intensive prompting and support to engage.

80. In the areas of social interaction and pragmatic communication, Student tended not to give much information in conversation and needed to be prompted to persist. He had difficulties picking up on external environmental cues, which contributed to his problems with social problem solving. He had issues with flexibility, including in playing games and showing good sportsmanship.

81. Student had difficulty regulating his emotions. He went from "no tears to tears" very quickly. The duration of his teary episodes varied depending on Student's investment in the activity, and lasted from a few seconds, during which a prompt to take a deep breath was all he needed to calm down, to 10 to 15 minutes, for which he needed to be pulled aside by his aide to calm adequately.

82. Ms. Underwood also reported to Dr. Large that Student demonstrated stereotypic and repetitive humming and self-talk, and peripheral eye gazing. Student was sometimes aggressive with his brother, but not with any other individuals.

83. Student's first grade teacher from the prior school district told Dr. Large that Student was not disruptive in class and generally followed the classroom routine when requirements were made clear to him. She recalled that Student was "perfectionistic." Student struggled with anything new, and when there was a new expectation, new social situation, new routine, or the like, he teared up or cried. In the early part of first grade he needed "quite a bit" of redirection to help him recover when he became upset; his aides were adept at facilitating his recovery and typically were able to soothe him with a touch on the shoulder and a "quick word." In addition to being overly sensitive about anything new, he was also sensitive to any perceived slight or reprimand. If he believed he heard a "mean sound" in someone's voice or saw a "mean face," he became upset. He tended to personalize group remarks, even if they were not intended for him, and became upset at things like the teacher directing the whole class to be quiet when a few students were disruptive. His first grade teacher also reported that the aide consistently encouraged Student to join groups of

peers, because he rarely took initiative to join a group. He engaged in parallel play much of the time, and participated in interactive play with peers only when his aides facilitated it.

84. Dr. Wood reported Student had low frustration tolerance and responded to frustration by tearing up, crying, and withdrawing from situations. Over time, he became less likely to cry in situations in which he felt more competent, but he still continued to tear up and cry with some frequency. Student had low social motivation and he tended to tear up when his behavioral aide prompted him to interact.

85. During Dr. Large's direct assessment of Student, she noted that his voice was soft and she often had to ask him to repeat himself to be sure she heard everything Student said. In numerous instances, she heard Student talking to himself, sometimes repeating something Dr. Large had said, sometimes repeating to himself something he had said, as an echo. At other times it did not appear he was repeating what anyone present had said, but was vocalizing something else he might have heard elsewhere. His vocalizations were barely audible, but his lips were moving and Dr. Large heard very soft words. Dr. Large also noticed Student's peripheral eye gaze, sometimes apparently in response to certain stimulus materials but at other times without any obvious precipitant. Dr. Large summarized these as stereotypic visual and verbal behaviors, appearing to serve a self-stimulatory function.

86. Within the academic achievement tests, Student demonstrated adequately developed reading skills, but scored poorly in comprehension; while he was adequately able to decode text, he had far more difficulty deriving meaning from it. He had adequately developed spelling and fill-in-the-missing-word skills within a sentence stem, but his writing fluency was well below typical limits. Notably, Student frequently erased and rewrote letters and words, seemingly when they did not meet some standard he seemed to have for how neat they were supposed to be. His perfectionistic tendencies might have interfered with the speed with which he was able to produce work. His achievement in math was variable, with adequate skills in quickly and accurately retrieving overlearned math facts, but with significant difficulty in calculation skills and application of math procedures and concepts to word problems.

87. Dr. Large observed Student on one day for 90 minutes during an Irvine Public Schools Foundation program, where he was accompanied by his aide from Autism Spectrum Consultants. The children were building remote-controlled Lego androids.

88. Dr. Large summarized the purpose of her assessment as well as her findings. This was her third evaluation of Student, and it was to clarify where he had made gains compared to two years earlier, what new or ongoing areas of limitation or need Student had, and what interventions and supports were indicated. In addition to confirming a diagnosis of Autism Spectrum Disorder, there was evidence of deficits in executive functioning, which was not uncommon in children with the overarching problems with self-regulation that characterize autism. There was also evidence that Student was beginning to have more challenges in some areas of academic achievement that had not been observed in Dr. Large's

previous evaluation, likely due to his young age and the fact that he had just started kindergarten at the time of the last evaluation.

89. Student had foundational language skills development within typical limits in some areas, but Student had trouble with grammar and syntax. Dr. Large explained that difficulties in relation to these aspects of language had the potential to affect the organization and clarity of discourse and written language. Explicit instruction and corrective feedback needed to be routinely incorporated to facilitate oral and written expression.

90. Student had made progress in the flexibility of his thinking and behavior, but still showed a tendency toward perseverative responding. Student tended to get stuck in one way of problem solving and had difficulty shifting to a different strategy when what he was doing did not work, engaged in repetitive verbal behavior or “scripting,” and was inflexible in that he only wanted to play games his way. Dr. Large recommended continuing to foster greater flexibility in thinking and behavior, along with improved coping when Student did get stuck and experienced frustration as a result, and stated these were important components of his treatment plan.

91. Dr. Large recommended that Student continue to be educated in the general education classroom because the data indicated he had the neurocognitive capacities to effectively meet the demands of the general education curriculum, provided he had accommodations to account for limitations in selected aspects of achievement and executive functioning. She recommended targeted interventions for his impairments in reading comprehension and applied math. She explicitly stated she did not recommend a more restrictive setting, such as a special day class; she recommended not less than two hours per week of resource room support.

92. Dr. Large found that in spite of Student’s modest gains over the prior years, he continued to show significant limitations in socialization, social and pragmatic communication, reciprocity in conversation and play, appropriate help seeking and self-advocacy, frustration tolerance and constructive coping, behavioral and cognitive flexibility, and emotional regulation. Because of these deficits, Dr. Large stated Student “must continue to have” a full-time one-to-one aide for the entire time Student was in the school setting, at the rate of approximately 30 hours a week, exclusive of supervision and training time.

93. Dr. Large also recommended Student receive home-based behavioral intervention services for six to eight hours a week, with an emphasis on addressing social and pragmatic skills development, conversational initiative and reciprocity, play skills development, cognitive and behavioral flexibility, frustration tolerance, emotional regulation and constructive coping, self-advocacy, reducing stereotypic, repetitive, and self-stimulatory behaviors, and conflict and aggression with Student’s brother. Dr. Large “strongly and explicitly recommend[ed]” the same treatment provider implement services in the home and school settings, to ensure consistency of treatment and generalization of skills across individuals and environments, and to reduce the potential for competing interventions that might confuse Student or directly contradict one another.

94. Although Dr. Large repeatedly recommended continuity between the home and school behavior services provider, Parents did not insist that District provide behavior services through the nonpublic agency from which Student had been receiving behavior services since he moved to Irvine. Parents repeatedly requested that District allow the nonpublic agency aide to accompany Student at school because as the first day of school approached, District had provided no information about what services District would provide Student. Parents wanted to ensure that Student had the full-time aide services with which he had attended school for the last three years. While Mother's emails stated it was important for there to be continuity of provider at home and at school, the thrust of Parents' requests for Autism Spectrum Consultants to be allowed to go with Student to Beacon Park was to provide the full-time aide support at school that was consistent with the educational program Student had received under his 2014, 2015, and 2016 IEPs in the prior school district. Parents wanted Student to have the same level of support to start the school year and at least until District held an IEP team meeting to discuss Student's needs. When District informed Parents District would only provide an aide for one hour a day, Parents requested to have the nonpublic agency aide provide supplemental hours, funded by Parents' health insurance, to provide Student full-time support. District incorrectly understood Parents to be demanding that aide service be provided by a non-public agency, instead of by a District behavior tutor. Parents were not insisting that Student be provided aide support from a nonpublic agency; Parents were insisting that Student be provided full-time aide support at school to start the school year as he transitioned to a new school and new gradelevel.

Student's Enrollment in Private School

95. On October 6, 2016, Student filed a request for due process hearing in OAH Case No. 2016100202, challenging the September 15, 2016 IEP and seeking reimbursement for private school placement.

96. Parents enrolled Student at a local parochial school on October 10, 2016. There were non-refundable fees associated with enrolling Student, as well as the monthly tuition. Because Student enrolled after the school year had started, one of the non-refundable fees was prorated. Parents were charged \$910 to enroll Student, and \$699 per month. Because the family was not a follower of Parochial School's religion, Student's tuition was designated as the cost for those who were not involved in the religion. Parents submitted evidence of payment for the enrollment fees and tuition for October, November, and December 2016, and January and February 2017. The invoice for January 2017 tuition had the monthly tuition cost of \$699 and charges for 18 "Service Hours" at a rate of \$15 each, totaling \$270. Student offered no evidence to explain this charge. Student submitted invoices for March and April 2017. The total charges for mandatory enrollment fees and seven months of tuition were \$5,803.

District's November 15, 2016 Assessment Plan for Special Circumstances Instructional Assistance Assessment

97. On November 16, 2016, District wrote Parents requesting consent to “collect additional information relevant to the question of whether [Student] require[d] behavior intervention services from a non-public agency for the duration of his school day.” District enclosed more release of information forms for Parents to sign authorizing communication and exchange of information with the prior school district, the prior nonpublic agency that provided behavior intervention services, Parochial School, and Autism Spectrum Consultants, the current nonpublic agency for which Mother had already provided authorization. District also requested consent to a Special Circumstances Instructional Assistance assessment, for the purpose of “assist[ing] the team in determining if [Student] require[d] behavior intervention services from a non-public agency for the duration of his school day.” The November 15, 2016 Assessment Plan form was in English and indicated the assessment District proposed was “Other – (SCIA) Special Circumstance Instructional Assistance – review need for additional aide support to include observations, record review, and completion of SCIA documentation packet.” The November 15, 2016 Assessment Plan indicated the examiner’s title was “Special Education Administration Staff.” The form stated, as part of the check box verbiage for a parent to consent to the proposed assessment, “. . . I also understand that no special education services will be provided to my child without my written consent.” District’s November 16, 2016 letter stated District preferred to conduct the assessment at Beacon Park “in the educational placement made available to him by the September 15, 2016 IEP team.” If Parents did not agree, District was willing to conduct the assessment in his private school placement at Parochial School. District included the Notice of Procedural Safeguards.

98. In written closing argument, District characterized the reason for the Special Circumstances Instructional Assistance assessment as, “[District] required more information to verify that its offer of 300 minutes per week of behavior intervention services [was] appropriate for Student.” District concedes that after Student filed a due process complaint in October 2016, District sought to obtain information in November 2016 for the purpose of substantiating the decisions it had already made in August and September.

99. District did not provide Parents with the “SCIA documentation packet” named in the Assessment Plan, but it was an exhibit at the due process hearing.

100. On January 19, 2017, District wrote to Parents again requesting that Parents execute the release of information authorization forms and consent to the Special Circumstances Instructional Assistance assessment on the November 15, 2016 Assessment Plan. No additional information about the Special Circumstances Instructional Assistance assessment was stated in the letter.

101. On January 31, 2017, District filed a motion as part of Student’s October 2016 due process case to compel Parents to allow District to observe Student at Parochial School. On February 3, 2017, OAH granted District’s motion and ordered Parents to cooperate to arrange for District to observe Student at Parochial School for up to two hours within 20 days of the Order. Ms. Reinartz observed Student at Parochial School for two hours on February 13, 2017, and prepared a written report of her observation.

102. An IEP team meeting was held on March 2, 2017, to review 1) Dr. Large's November 2016 report and a December 7, 2016, written update she provided¹⁰ based on an observation of Student she conducted for 90 minutes at Parochial School on November 30, 2016, as well as 2) Ms. Reinartz's report regarding her observation of Student at Parochial School. After some discussion and due to time constraints, the parties agreed to continue the IEP team meeting and reconvene on April 13, 2017.

103. On March 10, 2017, Student withdrew OAH Case No. 2016100202, and OAH issued the dismissal on March 20, 2017. Student filed his instant case on March 13, 2017.

104. In a letter to Parents dated April 11, 2017, District explained that the Special Circumstances Instructional Assistance assessment proposed in the November 15, 2016 Assessment Plan would be conducted "by the Program Specialist as well as school psychologist and/or Education Specialist and includes records review, observation of [Student] in his educational program and completion of a SCIA packet which is a summary that includes information and data regarding classroom schedule, school day analysis, curriculum and instruction, behavior supports, planning team meetings and layout of current setting and other supports currently provided." The April 11, 2017 letter reiterated that District wanted to do the assessment while Student attended Beacon Park "while he accesses the placement and services" in the September 15, 2016 IEP, but District also was willing to perform the assessment at Parochial School. District asserted the observation Ms. Reinartz had conducted was not a Special Circumstances Instructional Assistance assessment because "her observation was limited to a single, two hour observation, no other District personnel observed [Student], a SCIA packet was not completed, and she was not provided with access to relevant records regarding [Student]." On April 17, 2017, District wrote to Parents stating the April 11, 2017 letter had "neglected to note that a District Behavior Specialist will also participate in the Special Circumstances Instructional Assistance assessment" proposed in the November 15, 2016 Assessment Plan.

105. An IEP team meeting was held on April 21, 2017, which was both the continuation of the March 2, 2017 IEP team meeting regarding Dr. Large's November 2016 report and December 7, 2016 update and District's February 13, 2017 observation report by Ms. Reinartz, as well as Student's annual IEP team meeting. Parents did not consent to the April 21, 2017 IEP.

106. The following information about the Special Circumstances Instructional Assistance assessment was elicited through testimony at the due process hearing and is not information that was shared with Parents as part of seeking their initial consent to the assessment or District's subsequent requests with expanded information. The Special Circumstances Instructional Assistance assessment was created by a group of District's

¹⁰ Student provided the December 7, 2016 update letter to District on January 23, 2017.

behavior specialists and program specialists. It was rolled out at the end of the 2015-2016 school year. The process and the forms for documenting information related to the assessment assumed a student was attending a District school. The categories of people who participate in conducting the assessment vary by the student and what unique needs the child has, which may include significant or chronic health challenges, mobility limitations, communication challenges, and behaviors that pose a safety risk for the child or others.

107. In Student's case, District wanted to have the involvement of Student's general education classroom teacher to provide information about: 1) the classroom schedule, including whether there is a posted classroom schedule, what elements were identified on any classroom schedule (times, activities, staff names, students, and location), and whether a classroom schedule was daily, weekly, or on some other basis; 2) whether there was an individual student schedule, and details about its format, the student's ability to follow the schedule, how the student used the schedule, and if the room was arranged with a structure to correlate to tasks on the schedule; 3) with respect to curriculum and instruction, whether materials and activities were differentiated for the student based on age, ability, or interest level, what the curricular domains of the student's program are, and challenging and easy activities for the student; and 4) with respect to behavior support, the existence and description of problem behaviors "interfering with the learning of self-care [sic] or others," and other information regarding current types of behavior support and their efficacy.

108. District wanted to have the involvement of Autism Spectrum Consultants, as Student's behavior support provider, also regarding behavior support, including specifics about any positive behavior support plan, the anticipated level of support to implement the plan, including frequency of reinforcement, prompting, and redirection, and what supports exist for implementing the plan. District also wanted the involvement of Autism Spectrum Consulting for information about current data systems and collection of data.

109. District wanted school psychologist Ms. Jackson to observe Student in his classroom, whether at Beacon Park or Parochial School, to assess the supports that were in that classroom, and identify the times of day he was most independent and times of day he needed more support. To obtain this information Ms. Jackson would need to observe Student for a total of two hours but divided across several days to "get the whole picture" and have information that was not from only one day or only one time of day.

110. District wanted behavior specialist Ms. Reinartz to observe Student in his classroom, whether at Beacon Park or Parochial School, to provide input regarding behavior support. Like Ms. Jackson, Ms. Reinartz would need to observe Student multiple times on multiple days at different times of day. To minimize disruption to a classroom and to obtain a broader collection of information, District might have only one observer at a time go to the classroom and conduct separate observations. Ms. Reinartz wanted to see Student for at least two hours, in one hour or 45 minute increments, and she might have re-evaluated whether she needed a different amount of time to observe Student depending on what she actually saw during observations. Ms. Reinartz would have observed Student both with one-to-one aide support and while backing off the aide to see how he functioned without that support.

111. District wanted program specialist Ms. Kredel to observe Student in his classroom, whether at Beacon Park or Parochial School. Ms. Kredel wanted to observe Student for between one and three hours.

112. District wanted Student's case manager, special education teacher Ms. Berger, to observe Student in his classroom, whether at Beacon Park or Parochial School, or to otherwise participate in the assessment process. Ms. Berger's understanding of the consideration of whether a student required full-time one-to-one aide support was focused on whether the child was a safety risk to himself or to others.

113. District normally conducted Special Circumstances Instructional Assistance assessments over the statutory time period for assessments of 60 days. In Student's case, District estimated it would require two weeks to adequately collect information, conduct observations, and conclude District personnel had seen enough of Student to have the information they wanted about Student. District thought Student would not attend Parochial School for those two weeks. Program specialist Ms. Kredel admitted the idea to conduct a Special Circumstances Instructional Assistance assessment in November 2016 was another attempt to figure out a way to have Student attend a District school.

114. District's intention was that after District personnel had amassed the information they wanted, District would call an IEP team meeting to review the information and make a decision about the question the Special Circumstances Instructional Assistance assessment was stated it was proposed to determine: whether Student required behavior intervention services from a nonpublic agency for the duration of the school day.

115. Significantly, Ms. Jackson explained that a Special Circumstances Instructional Assistance assessment only looks at a student's current environment and allows District to make recommendations about that environment. If a student changed environments, meaning schools, classrooms or possibly even only personnel, the environment and a student's performance in it would have to be reconsidered.

Other Pending OAH Due Process Case Between the Parties

116. On April 25, 2017, District filed a request for due process hearing in OAH Case No. 2017041158 seeking a determination that the April 21, 2017 IEP offered Student a FAPE and authorization to implement it without parental consent. That case also sought authorization to conduct assessments proposed in a March 31, 2017 assessment plan. On May 1, 2017, Student filed a request for due process hearing in OAH Case No. 2017050205 seeking a determination that, among other claims, District failed to offer Student a FAPE in the April 21, 2017 IEP. On May 4, 2017, OAH granted Student's motion to consolidate District's and Student's cases regarding the April 21, 2017 IEP. The consolidated cases regarding whether District offered Student a FAPE in the April 21, 2017 IEP (and other claims) were scheduled for hearing in September 2017. This Decision does

not address what was educationally appropriate for Student any time after October 2016, when Parents placed Student at Parochial School.

Exhaustion of Insurance-Funded Behavior Intervention Services

117. Autism Spectrum Consultants provided behavioral intervention services for Student at Parochial School. Three different aides provided Student services. The insurance funding allocated a bulk quantity of hours to cover an extended time period, and was estimated to average out to 25 hours a week of aide service, and eight hours a month of supervision service. But because Student was in Parochial School for approximately six or seven hours a day, five days a week, Student consumed the allocated hours more quickly than the insurance funding anticipated. Early in April 2017, Autism Spectrum Consultants realized that there was not funding to provide Student 34 hours a week of behavior aide service through the end of the school year.

118. To extend the availability of insurance-funded service hours, it was necessary to reduce Student's aide service by three and a half hours per week so there could be aide service until the end of the school year. Autism Spectrum Consultants collected data and withdrew support based on the times of day they documented Student engaged in the least maladaptive behaviors, which varied by day of the week and the schedule. Aide service was withdrawn on Monday and Tuesday for an hour after lunch, on Friday morning while students were in church, and for the last 15 minutes of the day on Friday. The reduction in hours was not done all at once or even over only one week. The aide support was faded slowly.

119. Autism Spectrum Consultants found the reduction of aide service had a negative impact on Student. He displayed higher levels of emotionality and crying behavior. He had to be removed from class due to crying about twice a month, but the data Ms. Underwood had analyzed showed he cried 2.1 times per day. He was, however, by the time of the reduction in aide hours, better able to explain in words why he was upset or what he was struggling with. He also displayed high levels of new stereotypic behavior -- touching his first and middle finger to his cheek, and sometimes making a sawing motion with his arm, which was also described as a punching motion in front of the body.

120. Autism Spectrum Consultants believed in May 2017 Student still required full-time assistance and if there were sufficient insurance-funded aide service hours to support Student full-time until the end of the school year, Autism Spectrum Consultants would have provided full-time aide support. The reduction was not based on Student's improvements and his ability to be independent, but on the lack of funding for a full-time aide.

LEGAL CONCLUSIONS

*Introduction: Legal Framework under the IDEA*¹¹

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)¹² et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [in California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confersome

¹¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹² All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) 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. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950, fn. 10.) The Supreme Court’s recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) (2017) 580 U.S. ____ [137 S.Ct. 988] (*Endrew F.*) reaffirmed 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; any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

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.) 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 [126 S.Ct. 528]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student, as the complaining party, bears the burden of proof on Issues 1 and 2; District, as the complaining party, bears the burden of proof on Issue 3.

Issue 1: Failure to Have an IEP in Place at the Start of the 2016-2017 School Year

5. Student argues that District’s failure to have an IEP in place at the start of the 2016-2017 school year denied him a FAPE, both by denying Parents’ right to meaningful participation in the educational decision-making process and denying Student educational opportunity. Student contends District was required to either implement the prior school district’s May 6, 2016 IEP, which contextually included full-time aide support with supervision, or to develop a new IEP based on Student’s needs before the 2016-2017 school year started.

6. District contends it did have an IEP in place for Student at the start of the 2016-2017 school year as it was prepared to implement the May 6, 2016 IEP developed in the prior school district with only one minor, non-substantive change: District would provide five hours a week of individual behavior intervention service by a District behavior tutor instead of by a nonpublic agency behavior aide. District contends it was not required to allow Student’s health insurance-funded nonpublic agency aide on its campus, because that was not written into the May 6, 2016 IEP.

LEGAL AUTHORITY

7. Absent a statutory exception, the IDEA mandates that a district offer a FAPE to all students who reside in it. States must ensure that “[a] free appropriate public education is available to all children with disability residing in the State between the ages of 3 and 21.” (20 U.S.C. § 1412(a)(1)(A).) A school district must have an IEP in place at the beginning of each school year for each child with exceptional needs residing within the district. (Ed. Code, § 56344, subd. (c); 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).) Developing an IEP is a necessary predicate to offering a FAPE, and the obligation to offer a FAPE also includes an obligation to develop an IEP. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 238–39 [129 S.Ct. 2484, 174 L.Ed.2d 168] (“[W]hen a child requires special-education services, a school district’s failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.”).)

8. To provide a FAPE, a school district must develop an IEP that is reasonably calculated to provide an eligible disabled child with an educational benefit. (*Rowley, supra*, 458 U.S. at pp. 206-207.) The district must review the child’s IEP at least once a year and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1, subd. (d).) A parent’s failure to cooperate in the development of the IEP does not negate this duty. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055; 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a) (*Anchorage*) [School districts “cannot excuse their failure to satisfy the IDEA’s procedural requirements by blaming the parents.” (689 F.3d at p. 1055, citing *W.B. v. Board of Trustees of Target Range School Dist. No. 23, etc.* (9th Cir. 1992) 960 F.2d 1479, 1485, *superseded in part by statute on other grounds*]).)

9. While the IDEA generally requires completion of an evaluation and formulation of an IEP prior to placing and providing services to a student with a disability, there may be some circumstances in which a student may receive services under an interim IEP before the normal process is completed. (*Letter to Saperstone* (OSEP 1994) 21 IDELR 1127; *Letter to Boney* (OSEP 1991) 18 IDELR 537 (Part B of the IDEA neither requires nor forbids the use of interim IEPs for children with disabilities).)

10. When a student with exceptional needs transfers from an educational agency within California but not within the same special education local planarea, within the same academic year, the new district shall provide the pupil with a FAPE, including services “comparable” to those described in the previously approved IEP, in consultation with the parents, for not more than 30 days, by which time the new district shall either adopt the previously approved IEP or develop, adopt, and implement a new IEP that complies with federal and state laws. (Ed. Code, § 56325, subd.(a)(1); 20 U.S.C. § 1414(d)(2)(C)(i)(I); 34 C.F.R. § 300.323(e).)

11. The IDEA, its implementing regulations, and the Education Code are silent on the specific procedure by which a district is to provide FAPE to a child with a disability who moves into the district during the summer. In its Comments to 2006 IDEA Regulations, the United States Department of Education addressed whether it needed to clarify the regulations

regarding the responsibilities of a new school district for a child with a disability who transferred during summer. The Department of Education declined to change the regulations, reasoning that the rule requiring all school districts to have an IEP in place for each eligible child at the beginning of the school year applied, such that the new district could either adopt the prior IEP or develop a new one. (71 Fed. Reg. 46682 (2006).) When a student transfers to a new school district between school years, the new district is not required to implement a former district's IEP or give the student services that are "comparable" to those offered by a former district; it need only develop and implement an IEP reasonably calculated to provide the student a FAPE based on the information available to the district. (See, *Student v. Clovis Unified School Dist.* (2009) Cal.Offc.Admin.Hrngs. Case No. 2008110569; see also, *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrman v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrman*).) The new public agency also has the option of adopting the IEP developed for the child by the previous public agency in the former district. (*Questions and Answers On Individualized Education Programs, Evaluations, and Revaluations* (OSERS 09/01/11) 111 LRP 63322; see also, *Eagle Mountain-Saginaw Indep. School Dist.* (SEA TX 2012) 60 IDELR 178.)

12. Neither Part B of the IDEA nor the regulations implementing Part B of the IDEA establish timelines for the new public agency to adopt the child's IEP from the previous public agency or to develop and implement a new IEP. However, consistent with title 34 Code of Federal Regulations sections 300.323(e) and (f), the new public agency must take these steps within a reasonable period of time to avoid any undue interruption in the provision of required special education and related services. (*Questions and Answers On Individualized Education Programs, Evaluations, and Revaluations, supra*, 111 LRP 63322.) The IDEA does not state when the receiving district must begin providing the student FAPE, but the district must begin to do so as soon as possible based on the circumstances. (See *Christina School District* (SEA DE 2010) 54 IDELR 125; *Letter to State Directors of Special Education* (OSEP 2013) 61 IDELR 202 (whenever possible, school districts should attempt to complete evaluations and eligibility determinations for highly mobile children on an expedited time frame so they can receive a FAPE); *N.B. v. State of Hawaii Department of Educ.* (D. Hawai'i July 21, 2014, Civil No. 13-00439 LEK-BMK) 2014 WL 3663452 (enrollment triggers the obligation to provide a FAPE to a transfer student).)

13. When parents and a district disagree on the appropriate placement for a transferring student, providing services in accordance with the Student's previously implemented IEP pending further assessments effectuates the statute's purpose of minimizing disruption to the student while the parents and the receiving school district resolve disagreements about proper placement. (*A.M. ex rel. Marshall v. Monrovia Unified School Dist.* (9th Cir. 2010) 627 F.3d 773, 778-779.)

14. To facilitate the transition for an individual with exceptional needs who transfers from another school district, the new school in which the individual with exceptional needs enrolls shall take reasonable steps to promptly obtain the pupil's records, including the IEPs and supporting documents and any other records relating to the provision

of special education and related services to the pupil, from the previous school in which the pupil was enrolled. (Ed. Code, § 56325, subd. (b)(1).)

15. The failure to timely hold an IEP team meeting or timely prepare an IEP is a procedural violation. 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); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2) and (j); *W.G., et al. v. Board of Trustees of Target Range School District*, *supra*, 960 F.2d 1479, 1484; see *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, Mont.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

16. The IDEA and the regulations promulgated pursuant to the IDEA guarantee that the parents of each child with a disability participate in any group that makes decisions on the educational placement of their child. It emphasizes the participation of the parents in developing jointly with the school district the child's educational program and assessing its effectiveness. (20 U.S.C. § 1415(a); see also 20 U.S.C. § 1400(d)(1)(B) (rights of parents protected); 20 U.S.C. § 1414(c)(1)(B) (input from parents specified); 20 U.S.C. § 1414(a)(1)(D) (parental consent specified); 20 U.S.C. § 1415(b) (opportunity for parents to examine the record specified); and 20 U.S.C. § 1414(d)(2)(C)(i) and (ii) (requiring school district to consult with parents of students transferring into district in the development of a comparable interim IEP).)

ANALYSIS

17. Student proved by a preponderance of the evidence that District denied him a FAPE by failing to have an appropriate IEP in place before the start of the 2016-2017 school year.

18. Student transferred from the prior school district in a different special education local plan area to District during the summer, rather than "within the same academic year." Thus, the rights of transferring students as set forth in Education Code section 56325, subdivision (a)(2), Title 20 United States Code section 1414(d)(2)(C)(i)(I) and title 34 Code of Federal Regulations section 300.323(e) did not specifically apply to Student. It is nevertheless clear, as reflected in the Comments to 2006 IDEA Regulations, that the IDEA (20 U.S.C. § 1414(d)(2)(A)) requires each school district to have an IEP in place for a child at the beginning of the school year.

19. District was therefore required to either develop an IEP reasonably calculated to provide Student a FAPE based on the information available to District, or adopt the prior school district's IEP, which necessarily included consultation with Parents. Parents completed all requirements for registering Student to attend at Beacon Park. They were diligent in their efforts to extract from District concrete information as to what District proposed to provide Student so he could begin school on the first day of the 2016-2017

school year with an appropriate program of special education and related services, or when District would hold an IEP team meeting to discuss Student's unique needs and develop an IEP.

20. District believed it followed its policy regarding transfer students of adopting the last agreed upon and implemented IEP and in Student's case, the May 6, 2016 IEP prepared in his prior school district. However, although District had credible information that Student had last attended school with a full-time one-to-one behavior aide, District chose to interpret the May 6, 2016 IEP as providing Student only one hour a day of behavior aide support. Student's previous educational program included approximately 30 hours a week of one-to-one support from an applied behavior analysis trained aide, and eight hours a month of behavior program supervision service. The fact that the prior school district only paid for five hours a week of aide support did not mean Student's last agreed upon and implemented IEP only included five hours a week of one-to-one aide support. For three years Student had, with the prior school district's knowledge and financial contribution as memorialized in the May 6, 2016 IEP, received full-day aide support and behavior program supervision services. District's interpretation of the IEP as providing only an hour a day of aide support was unreasonable in light of the complete context of the May 6, 2016 IEP, which Parents shared and which District had ample opportunity to explore and verify.

21. District's claim that it had arranged for a District behavior tutor to attend school with Student for one hour a day and was ready to implement the May 6, 2016 IEP prior to the start of the 2016-2017 school year was unconvincing. Some members of the IEP team that met on September 15, 2016, believed the meeting on that date was to develop Student's interim IEP, the one that needed to be in place before the start of the school year. Also, District did not explain to Parents when the one hour a day of aide support would be provided until after Student had already missed the first day of school due to lack of a plan. District did not communicate its preparedness to Parents and even the morning of the first day of school, the Beacon Park principal emailed Mother at the crack of dawn inquiring whether anyone from District had been in communication with Parents. District did not even instruct the behavior tutor what Student's IEP behavior goals were until the second day the behavior tutor reported to Beacon Park to support Student during lunch.

22. However, even assuming that District was ready to provide Student with an aide for an hour a day during school from the start of the 2016-2017 school year, that amount of aide support failed to offer Student a FAPE. Significantly, District was aware Student had last attended school with a full-time behavior aide, and even was aware Student had most recently participated in the 2016 educational summer programs with the Irvine Public Schools Foundation with the support of a full-time aide. District claimed that its policy was not to remove a goal or service unless it had data to back up why it was removing something. But without any information beyond that available to the prior school district at the IEP team meeting on May 6, 2016, District abruptly removed 80 percent of Student's aide services, while starting at a new school, with a new teacher, with a new aide. District characterized its proposal as adopting the May 6, 2016 IEP and changing nothing except the nature of the aide service provider, from a nonpublic agency aide to a District aide. District was incorrect; it

changed far more. And although District may have had reason to change the provider of Student's aide service from a nonpublic agency to qualified District employees, District did not have justification to dramatically change Student's behavior intervention program without gradually transitioning Student from full-time, five- or six-hours-a-day, support to only one hour a day.

23. Regardless of whether District genuinely believed an aide for only one hour a day was all Student required to have a basic floor of opportunity, it was unreasonable to offer services that would instantly change his educational program from full-time aide support to only one hour a day. When Student's prior school district contemplated reducing Student's aide support for the 2013-2014 school year, as he transitioned from preschool to transitional kindergarten, it proposed to first gradually transition Student from full-time support from the nonpublic agency he had been receiving behavior services from to full-time aide support by a school district employee during the summer in extended school year. The next step the school district proposed was to provide a school district employee as a full-time aide for the first 45 days of transitional kindergarten and observe Student in his new classroom and increased difficulty of grade level, collect data, and then, if appropriate, propose a "fade plan" to gradually, over time, decrease Student's aide support. The prior school district did not intend to abruptly remove 80 percent of Student's aide support. And it certainly did not intend to abruptly reduce aide support and simultaneously change the aide provider.

24. Similarly, when Autism Spectrum Consultants realized Student's health insurance-funded behavior intervention hours would run out before the end of the 2016-2017 school year, the nonpublic agency took data to determine where and when Student needed less support than at other times, and gradually withdrew aide support services to conserve and prolong aide support to complete the school year. Autism Spectrum Consultants did not suddenly strand Student.

25. Student's case was not based on the argument that he required behavior intervention services from a nonpublic agency and that District denied him a FAPE by failing to continue to provide him with behavior aide support from a nonpublic agency. It is true that Dr. Large repeatedly recommended that the same behavior services provider deliver services in the school setting and at home, and Mother repeated to District language from Dr. Large's reports that it was "crucial" that Student have the same behavior services provider across environments to avoid conflicting interventions. But Parents' repeated requests for District to allow Autism Spectrum Consultants to provide full-time aide service to Student at school came when District was not yet communicating any specific offer of aide service and after District insisted that Student should drop, cold turkey, from full-time aide support to one hour a day, only during recess and lunch breaks. Parents' requests to District for behavior services from Autism Spectrum Consultants, and Student's due process case, were motivated by Parents' belief that based on Student's last agreed upon and implemented IEP, Student should start the 2016-2017 school year with full-time aide support, not necessarily with nonpublic agency aide support.

26. Student did not attempt to prove that to receive a FAPE, District was required to continue to have a nonpublic agency provide one-to-one aide services and supervision of the aides. What Student did prove by a preponderance of the evidence was that District did not have a plan in place that was reasonably calculated to confer progress appropriate in light of Student's circumstances prior to the start of the 2016-2017 school year. Student was denied educational opportunity, and therefore District denied Student a FAPE.

27. Parents recognized District's inappropriate program and for all intents and purposes kept Student home from August 24 through October 9, 2016. Student's remedies are discussed below.

Issue 2: The September 15, 2016 30-Day Offer of Placement and Services

28. Student contends District's offer on September 15, 2016 did not contain appropriate one-to-one behavior aide services or appropriate behavior supervision and consultation services and therefore denied Student a FAPE. District contends Student only required five hours a week of one-to-one aide support and 60 minutes a week of behavior intervention consultation service for school personnel and that District's offer in the September 15, 2016 IEP offered Student a FAPE.

LEGAL AUTHORITY

29. To determine whether a school district offered a student a FAPE the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

30. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams, supra*, 195 F.3d at p. 1149.) An IEP is "a snapshot, not a retrospective." (*Id.*, citing *Fuhrmann, supra*, 993 F.2d at p. 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed, by looking at the IEP's goals and goal achieving methods at the time the plan was implemented and determining whether the methods were reasonably calculated to confer an educational benefit. (*Adams, supra*, 195 F.3d at p. 1149; *Fuhrmann, supra*, 993 F.2d at p. 1041 ("an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted").) Also, after-acquired evidence "may shed light" on the adequacy of the program a public agency proposed, although such evidence is not outcome determinative. (*Adams, supra*, 195 F.3d at p. 1149.) The holding of *Adams* "that exclusive use of hindsight is forbidden does not preclude consideration of subsequent events. [Citation to *Adams, supra*, 195 F.3d at p. 1149-1150, quoting *Fuhrmann, supra*, 993 F.2d at p. 1041.] The clear implication of permitting some hindsight is that additional data, discovered later in the evaluation process, may provide significant insight into the child's condition, and the

reasonableness of the school district's action, at the earlier date." (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1006.)

31. The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

32. A school district must deliver each child's FAPE in the least restrictive educational environment appropriate to the needs of the child. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2).)

33. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) the educational benefits of placement full-time in a regular class; 2) the non-academic benefits of such placement; 3) the effect [the student] had on the teacher and children in the regular class; and 4) the costs of mainstreaming [the student]. (*Sacramento City Unified School Dist., Bd. of Educ. v. Rachel H., etc.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Bd. of Educ.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].) Whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an individualized, fact-specific inquiry. (*Daniel R.R., supra*, 874 F.2d at p. 1048.) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Id.* at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

ANALYSIS

34. The preponderance of the evidence established that District's 30-day IEP offer was not reasonably calculated to provide Student with some educational benefit under *Rowley*, or to enable him to make progress appropriate in light of his circumstances under *Andrew F.*, in the least restrictive environment.

35. Student and District agreed that the appropriate classroom environment for Student was a general education second grade classroom, along with related services and accommodations to ensure he was satisfactorily educated in that environment. To support Student in the general education placements in which he had been successful since preschool, Student required a one-to-one aide trained in applied behavior analysis. District had refused to provide Student the level of one-to-one behavior aide support Student had received under the May 6, 2016 IEP, or to propose a transition plan to reduce Student's aide support from the level he had been receiving to the level District believed the May 2015 psychoeducational triennial report and the May 6, 2016 IEP present levels of performance indicated were minimally sufficient. Parents refused to send Student to Beacon Park without the same level of aide support he had received for the last three school years or something reasonably approaching it. Therefore at the time of the 30-day IEP team meeting on September 15, 2016, District had not observed Student in school during those weeks. District claimed it had no new information that would justify changing the goals as developed in the May 6, 2016 IEP or the aide service level of the May 6, 2016 IEP, as District had unreasonably interpreted it, as explained regarding Issue 1, above.

36. By the time of September 15, 2016 IEP, District had received Dr. Large's 2014 assessment, which stated Student needed full-time aide as fall 2014, and knew from Parents that Student had consistently had full-time aide support since then. District had learned that near the end of the 2015-2016 school year, the nonpublic agency providing Student's behavior services had garnered data to support reducing Student's aide service by one hour a day and Student had attended the last two months of first grade for the first hour of the morning without an aide. Although District did not have the benefit of Dr. Large's 2016 report until 3 weeks after the September 15, 2016 IEP team meeting, it confirmed that as of August 2016, Dr. Large believed Student still required full-time aide service. Dr. Large's 2016 report was based on information obtained by interviewing Student's prior teacher, current nonpublic agency behavior provider, and an observation of Student in a summer enrichment program with a full-time aide, all opportunities of which District did not avail itself.

37. Even if District's interpretation of the limited information it had as of September 15, 2016, led it to conclude Student did not require full-time aide support to receive a FAPE, District's proposal to abruptly discontinue 80 percent of the services he had been receiving was not reasonable. District denied Student FAPE by failing to offer appropriate one-to-one behavior aide services. This Decision does not find District was required to offer Student full-time behavior aide support from a nonpublic agency, or full-time behavior support from a District aide, to provide Student a FAPE. This Decision only concludes that reducing the aide support Student had received in the classroom from full-time to one hour a day, without any transition or fade plan to accomplish the drastic

change, was not reasonably calculated to enable Student to make progress appropriate in light of his circumstances and denied Student a FAPE.

38. With respect to behavior supervision and consultation services, District failed to adjust the May 6, 2016 IEP services in light of District's proposal to take over providing Student's behavior program, including a behavior aide. During the time a nonpublic agency had been providing Student's full-time behavior aide and the behavior program treatment plan development and supervision of the aide with funding from Parents' health insurance, Student's May 2015 and 2016 IEPs had only contained 60 minutes per week consultation service by the prior school district provider, to support the classroom teacher. When District offered to provide the behavior aide, District did not change the classification of the additional service District would also provide from consultation – which was to support personnel – to supervision, which was to support Student through behavior program development/management and direct supervision of the District behavior aide. Even giving District the benefit of the doubt that it would have actually provided supervision of the District behavior aide with direct observation of the aide interacting with Student, 60 minutes a week would not have been sufficient supervision service for a behavior program that included more than one hour a day of aide support, as has been stated was necessary to provide Student a FAPE. District's September 15, 2016 offer of 60 minutes a week of behavior intervention service consultation for personnel only was not appropriate and denied Student a FAPE.

Issue 3: District's Right to Reassess Student

39. District requests an order permitting it to assess Student, through a process it internally developed and titled Special Circumstances Instructional Assistance assessment, for the stated purpose of evaluating whether Student required behavior intervention services from a nonpublic agency for the duration of the school day. District proposed this assessment in a letter dated November 16, 2016, with an Assessment Plan dated November 15, 2016. Student responds that District's proposed assessment was not genuinely necessary but was only proposed by District to obtain an after-the-fact justification for the one-hour-a-day aide support offer District made months before it proposed to assess Student. Student also disputes the validity and reliability of the District-invented instrument District proposed to use.

LEGAL AUTHORITY

40. A local educational agency must conduct a reassessment at least once every three years, unless the parent and the agency agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).) The agency must also conduct a reassessment if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Student transferred into District during the summer of 2016, and District had never conducted any assessments of

Student. However, District had received assessments conducted by Student's prior school district, and the last behavior assessment and psychoeducational assessment had been completed for Student's triennial IEP in May 2015. Therefore, District's issue pertains to a reassessment of Student.

41. If parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

42. Without an order after a due process hearing, reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. §§ 1414(b)(1); 1415(b)(3),(c)(1); 34 C.F.R. § 300.304(a); Ed. Code, §§ 56321, subd. (a).) The notice consists of the proposed assessment plan, and a copy of parental procedural rights under the IDEA and related state laws. (Ed. Code, § 56321, subd. (a).) The assessment plan must be in language easily understood by the public and in the native language of the parent; explain the types of assessments to be conducted; and state that no IEP will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4); 20 U.S.C. § 1415(b)(3)&(4); see also 34 C.F.R. § 300.9(a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

43. With respect to the "native language" requirement for the assessment plan, the assessment plan must be provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. (Ed. Code, § 56321, subd. (b)(2); 20 U.S.C. § 1415(b)(4).) The IDEA states, "The term 'native language', when used with respect to an individual who is limited English proficient, means the language normally used by the individual, or in the case of a child, the language normally used by the parents of the child." (20 U.S.C. § 1401(20).) The IDEA defines the term "limited English proficient" by referencing section 9101 of the Elementary and Secondary Education Act of 1965, which provides a definition that specifies it refers to "an individual who is aged 3 through 21." (20 U.S.C. § 1401(18); 20 U.S.C. § 7801(25)(A).) The IDEA's definition of "limited English proficient" therefore does not define the term with respect to a parent who is over age 21, and therefore the IDEA does not define what a "native language" is for a parent who is over age 21. But the guidance from the remaining definition of "limited English proficient" in the Elementary and Secondary Education Act, and by incorporation the IDEA, is illustrative. "Limited English proficient" describes someone who, among other possible circumstances, was not born in the United States or whose native language is a language other than English, *and* whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual (i) the ability to meet the State's proficient level of achievement on State assessments; (ii) the ability to successfully achieve in classrooms where the language of instruction is English; or (iii) the opportunity to participate fully in society. (20 U.S.C. § 7801(25)(D).)

44. With regard to the “or other mode of communication” requirement for proper notice to a parent of an assessment plan, 34 Code of Federal Regulations part 300.29(b) explains that for an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual, such as sign language, Braille, or oral communication. It does not pertain to an alternative written or spoken language.

ANALYSIS

45. On November 16, 2016, District mailed Parents an assessment plan and a copy of their procedural rights. After November 16, 2016, District gave Parents more than 15 days to approve the plan before District again asked Parents to consent to the assessment plan. Parents refused to consent to the November 15, 2016 Assessment Plan or the related authorizations for release of information from other entities. The evidence established that District made reasonable efforts to obtain Parents’ consent to the November 15, 2016 Assessment Plan.

46. The November 15, 2016 Assessment Plan, and the letter than accompanied it, were in clear language that would be easily understood by the public. Parents were not native speakers of English and spoke Vietnamese at home. But their clear and articulate written communications with District, their participation in face-to-face communications with District staff, their participation in IEP team meetings without an interpreter, and their participation in the due process hearing without an interpreter indicated that although English was not Parents’ first language or “native language” in the ordinary understanding of that term, they were not “limited English proficient,” as contemplated by the IDEA. They were fluent in spoken and written English, and District was not required to provide Parents the November 15, 2016 Assessment Plan in Vietnamese to fulfill the requirement that an assessment plan be provided to Parents in their native language.¹³

47. District poorly explained the type of assessment it proposed to conduct. The Assessment Plan itself only stated the name of the assessment District invented, and by its title, Special Circumstances Instructional Assistance assessment, did not explain the type of assessment. Parents were concerned about a behavior aide, not an instructional assistant. Further, the additional description only stated the assessment was to “review need for additional aide support,” but the title of the assessment did not indicate the aide related to behavior services as opposed to instructional services. The explanation on the Assessment Plan that the assessment would include observations, record review, and completion of a

¹³ Student’s opposition to District’s due process case seeking authorization to conduct the Special Circumstances Instructional Assistance assessment was not based on failure to provide the required notice in Vietnamese. Student’s arguments pertained only to challenges to District’s motivation in requesting the assessment and to the validity and reliability of the proposed assessment.

“SCIA documentation packet” by “Special Education Administration Staff” did not adequately explain the type of assessment to be conducted. The November 16, 2016 letter transmitting the Assessment Plan to Parents provided little other explanation. The letter explained District wanted the assessment to gather information to determine if Student required behavior intervention services from a nonpublic agency for the duration of his school day. District continued to misunderstand Parents’ objection to the September 15, 2016 IEP as being about the switch from a nonpublic agency behavior aide to a District behavior aide, when the basis of disagreement was the drastic and sudden reduction in number of hours per day of aide support within the general education classroom.

48. The November 15, 2016 Assessment Plan did not contain the statutorily required language stating that no IEP would result from the assessment without the consent of the parent. Instead, District’s form stated, “. . . I also understand that no special education services will be provided to my child without my written consent.” District’s form did not match the language required by Education Code section 56321, subdivision (b)(4).

49. District’s January 19, 2017 letter only again requested that Parents consent to the November 15, 2016 Assessment Plan and did not provide any further information to Parents to explain the type of assessment District had proposed. District’s April 11 and April 18, 2017 letters, together, finally identified with some specificity what types of professionals would conduct the assessment: a program specialist, a school psychologist and/or education specialist, and a behavior specialist. The April 11, 2017 letter provided some description of the “SCIA packet” as being a summary that included information and data regarding classroom schedule, school day analysis, curriculum and instruction, behavior supports, planning team meetings, and layout of current setting and other supports currently provided. District originally requested and again stated it preferred for Student to stop attending Parochial School, which Parents had placed him at in disagreement with District’s offer in the September 15, 2016 IEP, and return to Beacon Park with only one hour a day of behavior aide support. District stated a willingness to observe Student at Parochial School. However, District admitted the assessment was only useful for considering the environment in which a student was attending school and would not be transferrable between environments. An analysis of a public school environment into which Student might be injected for a two week marathon of observations would not be applicable to the environment in which Student had been receiving his education between October 10, 2016, and the date of hearing; an analysis of the private school environment in which he had been educated for seven months at the time of hearing would not be applicable to the public school environment available at Beacon Park.

50. District confessed its purpose in proposing the assessment had been to find a way to get Student to come back to Beacon Park. District did not need to reassess Student to determine whether he required behavior aide support from a nonpublic agency, as that had never really been the question or concern.

51. Further, even if other factors indicated District presented a fully compliant assessment plan, there is still the practical challenge involved to authorizing the assessment. OAH has no jurisdiction over Parochial School. OAH could only order Parents to request access for District personnel, and Parochial School would be under no obligation to allow the four District personnel required to conduct the proposed assessment onto Parochial School's campus for the frequency and durations District requires to conduct the assessment. Parochial School personnel would be under no obligation to communicate with District staff, even if Parents signed authorizations for release of information. And OAH could not compel Parochial School's cooperation. And where Parents have attempted to exercise their right to privately place Student in a good faith disagreement with District regarding the behavior supports and services offered in the September 15, 2016 IEP, OAH will not order Parents to return Student to a public school for participation over full school days for a period of multiple weeks in a type of behavior assessment in an unfamiliar environment, which is unlikely to lead to useful data and only serves to deprive Parents, and Student, of a remedy they have lawfully pursued.

52. Based upon the foregoing, a preponderance of evidence showed that the reassessment District proposed was not warranted, District's November 15, 2016 Assessment Plan did not meet statutory requirements, and Parents reasonably refused to consent to reassessment. Accordingly, District may not reassess Student in accord with its November 15, 2016 assessment plan.

REMEDIES

1. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S.Ct. 96] (*Burlington*)). When school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. ALJ's have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at 369-370; 20 U.S.C. § 1415(i)(2)(C)(3).)

2. The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) Although the parents' placement need not be a "state approved" placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child's needs and provide him educational benefit. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361] (*Carter*)). Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c); Ed. Code, § 56175; *Carter, supra*, 510 U.S. 7, 15-16 [114 S.Ct. 361].) The appropriateness of the private placement is governed by

equitable considerations. (*Ibid.*) The Ninth Circuit has held that to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special education service necessary to maximize their child's potential. (*C.B. v. Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d 1155, at 1159.)

3. Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted reasonably with respect to the unilateral private placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.) These rules may be equitable in nature, but they are based in statute.

4. Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallup*)). The purpose of compensatory education is to “ensure that the student is appropriately educated within the meaning of the IDEA.” (*Ibid.*)

5. The remedy of compensatory education depends on a “fact-specific analysis” of the individual circumstances of the case, and the conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d 1489, 1497.) There is no obligation to provide day-for-day compensation for time missed. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1033.)

6. Student requests reimbursement for Parochial School as a remedy for District's denial of FAPE at the start of the 2016-2017 school year and in the September 15, 2016 IEP. In disagreement with District's offer in the September 15, 2016 IEP, Parents notified District of their dissatisfaction and intent to place Student in private school with aide support and seek reimbursement. District provided a prior written notice denying Parents' request for placement and defending District's offer in the September 15, 2016 IEP. Parents demonstrated their desire and willingness to have Student and his brother attend public school and attempted to have Student attend Beacon Park. Parents did not have a secret intention from before their move to Irvine to send Student to private school and attempt to contrive a way to compel District to pay for Student to attend their preferred private school. Parents waited until six weeks into the school year to place Student in a private school, and only after repeated attempts to have Student attend his local public school with appropriate behavior supports and services were unsuccessful. Parents did not send Student to Parochial School out of a preference for religious instruction, as they were not members of the private school's religious denomination. Parents selected Parochial School in disagreement with District's offers for a public school program for Student. Student attended Parochial School with full-time behavior aide support funded by Parents' health insurance and there was no indication Student failed to receive some education at Parochial School. Parents paid \$5,803 in identifiable mandatory fees and tuition for the period of October 2016 through April 2017. It is equitable to award Student reimbursement for Parents' expense in sending Student to Parochial School.

7. Student did not attend school from August 24, 2016, until October 10, 2016, 32 school days. To compensate him for missed instruction, Student is awarded compensatory education in the form of intensive academic instruction by a credentialed special education teacher through a nonpublic agency. Student is also awarded nonpublic agency behavior services consultation to assist the credentialed special education teacher in addressing Student's behavioral needs during intensive academic instruction.

8. School districts often propose to provide a student five hours of individual instruction for every week the student did not receive instruction at school. This "formula" is derived from the statute regarding funding the school district receives from the state based on average daily attendance: "For purposes of computing average daily attendance . . . each clock hour of teaching time devoted to individual instruction shall count as one day of attendance." (Ed. Code, § 48206.3, subd. (c)(1).) Further, state law provides that no pupil shall be credited with more than five days of attendance per calendar week or more than the total number of calendar days regular classes are held in any fiscal year. (*Id.* at subd. (c)(2).) Therefore, districts count one hour of instruction as equivalent to one day of instruction, because that is all they will get paid for by the state. However, Education Code section 48206.3, subdivision (a), specifies that the individual instruction described is for students with temporary disabilities, defined in subdivision (b)(2) as specifically excluding a disability for which a pupil is identified as an individual with exceptional needs under section 56026. It is not appropriate to conflate the average daily attendance payment for students receiving individual instruction while recovering from a temporary disability with the question of what amount of individual instruction is appropriate for a student with a disability who is receiving services under a program of special education and related services. What will appropriately compensate a child with a disability for a denial of FAPE does not depend on the funding formula for average daily attendance.

9. Student's IEP included one hour a week of specialized academic instruction and he did not receive that service during the 32 school days he did not attend. For those six weeks of school, Student is awarded 6 hours of compensatory intensive academic instruction. At a minimum, Student should also receive one hour of instruction per day of school he missed. Student presented no evidence regarding exactly what Student's rate of learning is but there was some evidence that while he has generally average cognitive abilities, he struggled with reading comprehension and mental flexibility about new situations, tasks, and challenges. Therefore, Student is awarded two hours of instruction per day of school he missed, which is 64 hours. Student is awarded a total of 70 hours of intensive academic instruction by a credentialed special education teacher through a nonpublic agency. To assist the credentialed special education teacher in addressing Student's behavioral needs during intensive academic instruction in a manner that is consistent with the behavior plan in effect at the time of the services, Student is also awarded 10 hours of behavior services consultation by a nonpublic agency.

10. Student requested, as compensatory education, a prospective order for a full-time behavior aide from a nonpublic agency for the 2017-2018 regular school year, as a stay put service. Student did receive his education with a full-time behavior aide for much of

the 2016-2017 school year. It is not an appropriate remedy to compel full-time behavior aide service, which might not be necessary by the time of the 2017-2018 school year. However, due to District's inappropriate offers and Parents' appropriate exercise of their right to privately place Student in disagreement with District's September 15, 2016 IEP offer, Student consumed the nonpublic agency behavior support hours provided through Parents' health insurance faster than Student otherwise would have. Student's behavior support was reduced not based on progress and data indicating it was appropriate to reduce his aide support, but due to exhaustion of Student's private insurance resource for behavior support. Student experienced regression as a result of the 10 weeks of decreased behavior support. To compensate Student for missed behavior intervention services, Student is awarded compensatory education in the form of behavior aide and related supervision services from a nonpublic agency for a combined service total of 50 hours.

ORDER

1. Within 45 days of this Decision, District is ordered to reimburse Parents for the cost of Student attending Parochial School from October 2016 through April 2017, in the amount of \$5,803. No further proof of payment is required as sufficient proof was submitted at hearing.

2. Within 30 days of this Decision, Parents will provide District with the name of a certified nonpublic agency to provide Student 70 hours of compensatory, individual specialized academic instruction by a credentialed special education teacher, on a year round basis. Within 30 business days of its receipt of Parents' selection, District shall contract with the certified nonpublic agency. If Parents fail to timely select a nonpublic agency, District may choose one. If the provider cancels a session, the time will be credited back to Student. If Student cancels a session with a least 48 hours' notice, the hours shall be credited back to Student. If Student cancels a session with less than 48 hours' notice, Student will forfeit the hour or hours for the session. Student shall have until December 31, 2018, to access this compensatory education. Any hours not used by that date shall be forfeited.

3. Within 30 days of this Decision, Parents will provide District with the name of a certified nonpublic agency to provide Student 50 hours combined compensatory behavior intervention and supervision services, on a year round basis. Within 30 business days of its receipt of Parents' selection, District shall contract with the certified nonpublic agency and directly pay for behavior services above and beyond what is available to Student under Parents' health insurance. If Parents fail to timely select a nonpublic agency, District may choose one. If the provider cancels a session, the time will be credited back to Student. If Student cancels a session with a least 48 hours' notice, the hours shall be credited back to Student. If Student cancels a session with less than 48 hours' notice, Student will forfeit the hour or hours for the session. Student shall have until December 31, 2018, to access this compensatory education. Any hours not used by that date shall be forfeited.

4. District's request for relief is denied.

