

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matters of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2019030238

v.

MIDDLETOWN UNIFIED SCHOOL
DISTRICT,

MIDDLETOWN UNIFIED SCHOOL
DISTRICT,

OAH Case No. 2018110516

v.

PARENT ON BEHALF OF STUDENT.

DECISION

Middletown Unified School District filed a due process hearing request with the Office of Administrative Hearings on November 14, 2018, naming Parent on behalf of Student (Middleton's Case). OAH granted the parties' joint request for continuance on November 28, 2018. Student filed a complaint with OAH on March 7, 2019, naming Middletown (Student's Case).¹ OAH granted Student's motion to consolidate Student's Case and Middleton's Case on March 11, 2019.

Administrative Law Judge Chris Butchko heard this matter in Middletown, California, on April 30, May 1, 2, and 13-16, 2019.

Betsy Brazy, Attorney at Law, represented Student. Carolyn McTier Makens, Attorney at Law, and Sally Kirk, advocate, assisted counsel at hearing. Parent attended all days of hearing. Student did not attend the hearing.

¹ Middletown filed its response to Student's amended complaint on March 18, 2019, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200 (*M.C.*))

Jennifer Nix, Attorney at Law, represented Middletown. Kaitlyn Schwendeman, Attorney at Law, assisted counsel at hearing. Catherine Stone, Middleton's Superintendent of Schools and Director of Special Education, attended all days of hearing.

On May 16, 2019, OAH granted the parties' joint request for a continuance to allow the parties to file closing briefs. Upon timely receipt of the written closing arguments on June 3, 2019, the record was closed and the matter was submitted for decision.

ISSUES

Middletown's Issues:

1. Did Middletown's individualized education program of September 4 and 27, 2018, offer Student a free appropriate public education in the least restrictive environment, such that Middletown may implement that IEP without parental consent?

2. Were Middletown's psychoeducational and academic assessments appropriate, such that Parent is not entitled to an independent educational evaluation at Middletown's expense?

Student's Issues:

1. In the 2016-2017 school year, did Middletown deny Student a FAPE by failing to assess him for special education?

2. Did Middleton deny Student a FAPE during the 2017-2018 school year, by:

(a) failing to assess Student in all areas of suspected disability, namely, pragmatic language, executive functioning, dysgraphia, attention difficulties, and assistive technology; and

(b) failing to find Student eligible for special education and related services?

3. Did Middleton deny Student a FAPE during the 2018-2019 school year, by:

(a) failing to design an appropriate program, including:

(i) failing to adequately address Student's anxiety and autism;

(ii) failing to place Student in a special day class or non-public school for high-functioning students with autism;

(iii) failing to offer a one-to-one aide; and

- (iv) failing to offer measurable goals;
- (b) terminating Student's home hospital instruction in retaliation for Parent's disagreement with its IEP offer; and
- (c) failing to hold a timely annual IEP team meeting?

SUMMARY OF DECISION

Middletown did not establish that its September 2018 IEP offered Student a FAPE. Middletown did establish that its psychoeducational and academic assessments were appropriately conducted.

Parent did not establish that Middletown denied him a FAPE by failing to assess him for special education in the 2016-2017 school year. Parent established that Middletown denied him a FAPE in the 2017-2018 school year, by failing to assess him in areas relating to his autism and anxiety and by failing to find him eligible for special education services. Parent established that Middletown denied Student a FAPE in the 2018-2019 school year by failing to offer an appropriate program to meet his needs caused by disability.

FACTUAL FINDINGS

Background

1. Student is a 13-year-old male who has resided in Middletown since his family moved there from Santa Rosa in the spring of 2015 following his parents' divorce. At the time of the hearing, Student attended seventh grade at the Anova Center for Education, a private school, having been placed there by Parent in February 2019. Student is intellectually gifted. He consistently met or exceeded state standards in testing and never failed a class. Student was described as having a bright smile and a winning personality with adults.

2. Student had developmental difficulties. He had cardiac and gastrointestinal issues as a child, and had a ventricular septal defect surgically repaired at 7 months of age. Student's motor abilities and speech were slow to develop, and he did not speak until he was five years old. He received services for gross motor delays and feeding issues from the Early Start North Bay Regional Center beginning at the age of one. Student brought an IEP for a speech impairment when he entered Middletown at the end of his third grade year. Student was awkward because of his delayed motor development.

3. Student received speech services at Middletown from Rona Isherwood. In the course of his speech therapy, Ms. Isherwood noticed that Student had a lingual frenulum, which she believed was affecting his speech. Student had surgery to sever the frenulum, and

was no longer tongue-tied. Ms. Isherwood believed that this alleviated Student's articulation difficulties, except for some minor difficulties producing /r/ sounds. After a few months, Ms. Isherwood requested that Parent sign an agreement to end Student's speech services without an IEP team meeting. Parent consented, but believed that Student still had problems that required speech services.

4. Student attended Middletown's Coyote Valley Elementary school for the remainder of his third grade year and most of fourth grade. Parent believed that Student was being teased on the playground and staff told her that Student would observe play and not participate. Student interacted more easily with adults.

The April 2016 Incident on the School Bus

5. On April 11, 2016, Student was riding home on the one school bus serving Middletown's schools, when he was attacked by an older child who also attended Coyote Valley. Student was put in a headlock and punched by the other boy, and had his phone taken. The bus driver did not intervene. Afterwards, both boys were dropped off at the same stop, and the boy had others hold Student while weeds were thrown at him. Finally, the older boy told Student that he was going to get a gun from home and shoot Student.

6. This had a profound and lasting effect upon Student. Student took a butterknife with him to bed and told Parent that he wanted a smaller knife he could take to school. Parent went to Coyote Valley the next day to meet with the Principal, who did not offer to change Student's school or take any other serious action. Parent left and called the police to report the threat.

7. Parent was then called by the Principal, who told her he had walked Student over to the older boy, had the older boy apologize, and told him to stay away from Student. Parent did not think this was an effective or sufficient response, and pushed for more action to be taken. Parent discovered that the attack had been recorded on the bus's security camera, and obtained permission from Superintendent Catherine Stone to view it. Parent was further upset that no school staff felt it necessary to review the tape.

8. Parent did not want Student on the same campus as the other boy. She believed that the teachers would do their best, but that Student would be at risk. Staff at Coyote Valley worked to keep the boys apart, but Parent was not satisfied that they would always be successful. In addition, Student continued to be fearful and fixate on the fight. School psychologist Jessica Morita gave Student two counselling sessions after the incident, but Student declined additional sessions. After initially being told that there was no opening at another school, Parent was informed that Student would be transferred to Minnie Cannon Elementary, another Middletown school.

Minnie Cannon Elementary

9. Student began at Minnie Cannon in April of 2016. Parent drove him to Minnie Cannon each day because, after a week's suspension from the bus, the other boy was once again taking the same bus Student would take to Minnie Cannon. Student asked Parent if he would be safe at Minnie Cannon.

10. Student started at Minnie Cannon during its administration of state standardized testing. Because testing was already underway, Student was tested in the school office by the school's Principal, Shelly Tan. Student was happy and positive, and both Ms. Tan and Brandy Fischer, the Assistant Principal, intended to watch over him because they knew that he had transferred because he had been bullied.

11. Unfortunately, troubles arose for Student at Minnie Cannon. A girl asked Student to be her boyfriend and was upset when he declined. She was part of a group of girls who then began to harass Student. They would taunt and tease him. Student was somewhat overweight, and the girls would pinch and twist his nipples. Parent talked with Student's fourth grade teacher, who said she would talk to the girls to stop it. The teacher was not successful, and the girls continued to harass Student through the following school year. Student was confused about why the girl was angry with him, and asked Parent to write a letter to her for him.

12. Student continued to be academically successful in fifth grade, but Parent continued to have concerns. She could not read Student's handwriting, and Student was demonstrating behaviors that concerned her. He told her that no one wanted him to work on projects with them or be on their teams. Student would wring or shake his hands, squint, and make "pterodactyl" noises. He was not otherwise disruptive in school, but he would read books during instruction, which upset his teacher. In March, Parent asked Tara Parker, Student's teacher, for a second parent-teacher conference.

13. Ms. Parker asked Ms. Fischer to attend because Parent had become emotional at an earlier parent teacher conference in November of 2016. At the second conference, Parent expressed continued concern over Student, particularly because he seemed to have no friends and was acting oddly. Middletown told Parent that Student did have some quirks, but reassured Parent that boys his age were often silly and immature.

14. Ms. Parker left, and Ms. Fischer called in Rachelle German, who Parent believed was a behaviorist. Parent noted that Student was isolated at school and had become remote at home, doing little interaction with family and going into a closet to read. Parent also shared her concerns that Student was being bullied by the group of girls, and Ms. Fischer and Ms. German promised to keep an eye on him. They told Parent that the girl leading the group had difficulties at home.

15. Following the conference, Ms. Fischer and Ms. German occasionally observed Student at lunchtime and at recess. They did not see children teasing Student or reacting

negatively towards Student. Ms. Fischer believed Student was socializing with a group of other students, although she noted he did not participate in sports. Ms. Fischer did not receive any reports from Student or other students that Student was being bullied. Ms. Fischer believed that other students would report bullying even if the victim did not report it.

The Chromebook Incident

16. Minnie Cannon has a program where every student takes an additional class, either as remediation or a challenge. The program is called the Wheel, and teachers meet early in the year to discuss standardized testing reports and pick exceptional students who would benefit from harder work. Sharon Huggins was a second grade teacher at Minnie Cannon who advised the monthly school newspaper, one of the challenge programs on the Wheel. Students chosen for the program must have good behavior and the ability to work independently, and must maintain that good behavior and work completion during their time on the newspaper. Roughly once per year a child is taken out of a Wheel class because of behavior or lack of production.

17. Student was selected for the newspaper. Ms. Huggins knew Student had been bullied at Coyote Valley, but considered him to be “delightful.” Student was interested in the business and technological sides of the newspaper, but Ms. Huggins found that he was a little hard to motivate. Student needed prompting to sign up for articles and to complete his work. For example, Student had an idea to get local merchants to sign up to advertise in the paper, but never took the next step of contacting them. Ms. Huggins became concerned that Student was not working hard and was using the newspaper class to surf the internet.

18. On March 13, 2017, Ms. Huggins discovered that one of the Chromebooks used for the newspaper would not connect to a power supply and seemed to be broken. A group of students who sat at a table near Student’s group reported that Student had been poking at the Chromebook’s ports with a pencil. Student did not deny making a stabbing motion toward the computer with a pencil, but denied that he had broken the Chromebook.

19. Ms. Huggins discussed the incident with Ms. Parker immediately afterwards, and they decided that Student was finished with the newspaper. Ms. Huggins believed that Student was not maintaining active involvement in the paper, and the fact that she believed he had damaged school equipment was sufficient reason to remove him from the newspaper. Student was taken off the newspaper and sent to the “refocus room,” where he was told to write about what he had done. Parent was notified of what had happened.

20. That night, Student had a meltdown at home and said he wanted to die. Parent brought Student to the child psychiatry department at the Permanente Medical Group on an urgent appointment. Parent told Jennifer Brandt, a staff psychologist, that she was concerned that Student was saying that he wanted to die. Dr. Brandt noted that Parent was concerned that Student had autism because he was isolated and had difficulty engaging with others. Parent also told her Student was invasive of others’ personal space, had poor social skills,

and did not understand feelings or emotional reciprocation. Dr. Brandt recorded that Student had eating and textural issues, was rigid about routines, and had a restricted range of interests. Dr. Brandt established that Student did not intend to harm himself. Dr. Brandt spoke with Ms. Parker the next day, who told her that Student was shut off from other children, off-task, disruptive, and had been destructive. Dr. Brandt's records were not shared with Middletown prior to litigation.

21. After Student was removed from the newspaper class, a classmate approached Ms. Huggins and vehemently defended Student. Because he was so convinced of Student's innocence, Ms. Huggins referred the matter to Ms. Fischer for further investigation. Ms. Fischer eventually discovered that the computer was not charging because of a bent prong, and concluded that Student was not to blame.

22. Part of Student's punishment was that a number of recess periods had been taken away from him. Student told Parent that in the "refocus room" Ms. German pressured him to confess to something that he did not do. Before Ms. Fischer cleared him, Student left on a pre-arranged weeklong vacation with his other parent.

23. Ms. Fischer assumed Student would have his lost free time returned to him or be given some other compensation, but did not follow up and forgot to do so herself because Student was on vacation. Ms. Huggins told the class in Student's absence that he did not break the Chromebook, but it does not appear that he was restored to the newspaper. Student was not compensated for his lost time and other punishment, but Ms. Huggins believed she met him in the hallway and apologized to him for the accusation. The newspaper class ended shortly afterwards with the start of state testing.

Worsening Behavior

24. Around the time of the Chromebook incident, Parent's boyfriend moved in with her and brought his 11-year-old daughter. Although Parent believed that Student eventually accepted their presence, she admitted that there were difficulties at first. Student's behaviors at home escalated, and he would stand in the home's hallway and scream at night. He had nightmares about the incident on the bus.

25. Student began seeing a psychologist, who told Parent that Student reported he would hide in the school's restrooms during lunch and recess. Further, Minnie Cannon's afterschool program director told Parent that Student would go into the library after school and isolate himself or play board games with a counselor. Student's grades declined; although he was easily passing his classes, they were below what they had been and below his ability level, particularly in Writing, Science, and Social Studies.

26. On June 13, 2017, Dr. Brandt wrote a letter to Middleton advising the school that Student had been diagnosed with anxiety disorder and was being observed for autism spectrum disorder. Dr. Brandt reported that Student's academic performance had been affected by his autism. She told Middletown that she supported the family in requesting

further evaluation by the school. Parent brought the letter into Minnie Cannon that day, and left it with people in the office. Because the school year had already ended, nothing was done with the letter until August.

27. Over that summer, Student's difficulties continued. Student was in camp in mid-June when he got out of the pool, walked away, and laid down on the sidewalk. The camp called Parent to ask what was wrong. Student had another episode at a family barbecue on June 22, 2017, because Parent did not make corn the right way. Parent called the Permanente Medical Group seeking an urgent appointment and described how Student was sitting at the table laughing out of context. Student was again saying he did not want to be alive. The physician's record of the call was not shared with Middletown prior to litigation.

28. Another record not shared with Middletown reported a visit on July 26, 2017, from which Dr. Teresita Solomon reported clinically elevated scores on the Social Communication Questionnaire and the Social Responsiveness Scale, Second Edition, which are tools for assessing for autism. Student told her that he has difficulties relating to other children and that he tries not to admit his fears and sensory issues.

29. Parent tried to take Student shopping for the new school year. He would not go, and told her if she brought him to school he would smile at the teachers, walk off campus, and walk the six miles to home. He said if she brought him back, he would "run away and kill himself."

30. Parent wrote an email to Dr. Solomon on August 10, 2017, reporting this. Dr. Solomon met with Parent on August 17, 2017, and recorded that Parent said Student continued to obsess over the incident on the bus and the mistreatment by the group of girls. Dr. Solomon concluded that Student was "fearful of returning to a hostile school environment." In a subsequent encounter note on August 23, 2017, Dr. Solomon agreed to write a letter recommending a Home/Hospital Instruction placement for Student. None of these clinical entries were shared with Middleton prior to litigation.

31. Dr. Solomon wrote a letter on August 23, 2017, informing Minnie Cannon school that Student was being treated for anxiety and depression because of emotional duress from being bullied at school. Dr. Solomon recommended that Student be placed on home/hospital instruction for the next three months. Middleton accepted Dr. Solomon's recommendation, and Student began the 2017-2018 school year on independent study and then started home/hospital instruction with instructor Cathy Prather on September 5, 2017, on the California Connections on-line schooling.

32. Ms. Prather was the only home/hospital instruction teacher Student had. Student grew to trust her, and she was the only Middletown school staffer that Student trusted. Ms. Prather observed Parent to be diplomatic and stern but fair with Student. At around the time home/hospital instruction started, Permanente began assessing Student for autism and had already completed an occupational therapy assessment.

Assessments

33. Louise Bobbitt of Permanente assessed Student for occupational therapy needs on August 15, 2017. Her report noted that Student rolled around on the floor during the parent interview and made only intermittent eye contact. Student wore sunglasses indoors and had sensitivities to textures and noise. He displayed well below average fine motor control. Ms. Bobbitt noted that Parent was upset because she believed Student was being assessed for dysgraphia, which Ms. Bobbitt explained she was not qualified to diagnose. Ms. Bobbitt recommended occupational therapy to address Student's deficits in gross and fine motor coordination, help with emotional regulation, and identify sensory strategies.

34. Ms. Stone placed Dr. Brandt's June 13, 2017, letter in school psychologist Jessica Morita's mailbox and directed her to begin the assessment process. Ms. Morita called Parent on August 13, 2017, and informed Parent that a request for assessment had to be made by her in writing. Parent responded with a letter on August 16, 2017, that requested assessment for autism spectrum disorder, dysgraphia, dyspraxia, and speech and language impairment. Ms. Morita met with Parent that day and they jointly drafted an assessment plan for evaluations in academic achievement, health, intellectual development, language and speech, and social and emotional functioning. Parent signed the form that day, but did not check the box indicating consent. Ms. Morita began the assessment timeline, intending to have Parent check the appropriate box at a later time.

35. On September 7, 2017, Parent sent a letter informing Middletown that she would be taking Student to Permanente for an autism assessment and that Permanente had completed an occupational therapy assessment. As a result, Parent wished to place the school's assessments on hold. She promised to bring a copy of the occupational therapy assessment to Middletown as soon as she received a copy.

36. Parent brought the Permanente assessment reports to Ms. Morita on or around October 31, 2017, and they again prepared a new assessment plan. The new plan called for assessments in academic achievement, health, intellectual development, and language and speech. It stated that a school occupational therapist would do a "screening only for now" and did not include evaluation of social and emotional functioning. Parent and Ms. Morita saw no need to repeat testing already done by Permanente and Ms. Morita stated Middletown would accept Permanente's diagnosis of autism "without reservation," so Middletown did not need to test Student's social and emotional functioning. Parent requested that the psychoeducational evaluation be limited to testing cognition, which she believed had not been properly assessed by Permanente.

37. Parent took Student to Middletown schools for the evaluations, and noted that he was very nervous about the speech and language assessment being conducted at Coyote Valley. She had to promise to stay there until the assessment was completed. Ms. Isherwood, who conducted the assessment, did not observe any anxiety in Student during her speech evaluation.

Morita's Intellectual Development Evaluation

38. Ms. Morita evaluated Student's intellectual development, looking at his cognitive ability. Ms. Morita was credentialed as a school psychologist, having received her pupil personnel services credential in 2005. She received a bachelor of arts degree in psychology from Sonoma State University and a master of arts degree in school psychology from Humboldt State University.

39. Ms. Morita worked as a school psychologist for Middletown for approximately 13 years. She conducted 40 to 50 assessments of students each year she worked for Middletown. She had extensive experience administering the main tests comprising her assessment, which were the Naglieri Nonverbal Ability Test, Second Edition; the Southern California Ordinal Scales of Development; the Beery-Buktenica Developmental Test of Visual Motor Integration; Beery VMI Developmental Test of Visual Perception; and the Beery VMI Developmental Test of Motor Coordination.

40. Ms. Morita performed the cognitive assessment through administration of the Wechsler Intelligence Scale for Children, Fifth Edition, and the Universal Nonverbal Intelligence Test, Second Edition. Ms. Morita had extensive experience administering those tests and was trained and experienced in administering standardized assessment instruments. Ms. Morita's education, training, knowledge, and experience as a school psychologist qualified her to assess Student, including the use of informal assessment tools and the administration of standardized instruments.

41. As part of her assessment procedure, Ms. Morita conducted a records review and interviewed people knowledgeable about Student. She reviewed Student's educational records, including his grade reports, attendance, and academic testing results. Because Student was on home/hospital instruction, Ms. Morita could not observe him in a school setting. She administered her testing to Student over three days. She established a rapport with Student prior to testing. Ms. Morita found him warm and approachable, noting that he was at ease in conversation with adults. She did not find him to be unusually anxious, but was aware that he was taking prescribed medication. She found his social communication to be strong, and, despite his statement that he did not miss being at school or being among his peers, believed that he did miss school, but his anxiety surrounding school superseded his desire to return.

42. Ms. Morita administered the most current versions of the Wechsler Intelligence Scale for Children, and the Universal Nonverbal Intelligence Test. The tests were administered in English, Student's primary language. They were reliable and widely accepted assessment tools and were not racially, culturally, or sexually discriminatory. They were administered and interpreted consistent with the publishers' protocols and yielded valid results.

43. The intellectual development assessment found that Student had at least average overall intellectual ability with some scores in the high average and very superior

ranges. Her testing did reveal areas where he scored in the low average range and his overall composite visual spatial index and working memory scores were 23 and 27 points below the median, while his full-scale IQ score was 16 points above. Ms. Morita's report noted that Permanente testing had given Student an autism spectrum disorder diagnosis, "of which [Middletown] accepted without reservation." She then noted that autistic behavior had not been a concern in the school setting.

44. Ms. Morita's report included a summary that discussed Student's eligibility for special education and for accommodations under Section 504 of the Rehabilitation Act. She found that Student was not eligible as a Student with a Specific Learning Disability because he did not demonstrate a severe discrepancy between his cognitive ability and his academic achievement scores. She found that he met the eligibility criteria for special education due to disability due to autism. She accepted that he had autism, as found by Permanente, but found he was ineligible for special education services because his academic achievement was at or above grade level. She then found that Student was eligible for a Section 504 plan because his autism affected his academic performance because it caused anxiety that resulted in school refusal and social withdrawal.

Lipari's Academic Assessment

45. Student's academic assessment was performed by Deborah Lipari. Ms. Lipari received a bachelor of science degree and a general education teaching credential from the State University of New York at Geneseo. She earned a learning handicapped credential from California State University at Hayward and a resource specialist certificate in special education from San Jose State University. She worked for 19 years as a resource specialist and seven years as a special education coordinator for the Palo Alto Unified School District. She has been an intervention specialist and special education mentor for Middletown since 2016. She has done roughly 350 academic assessments of students and was trained and experienced in the use of standardized testing.

46. In addition to reviewing Student's records, Ms. Lipari administered the Woodcock-Johnson Test of Achievement, Fourth Edition. She was trained and had experience in administering the Woodcock-Johnson test. Student scored in the average or above-average range in all academic areas. His weakest area was in sentence writing fluency, which tested at a 5.7 grade equivalent, slightly below his early sixth grade level, due to errors with word usage. Ms. Lipari noted that Student would shake his hand in the air, and when she asked if his hand hurt, he replied "No, I just do that a lot." She did not believe that his hand-waving was self-stimulating behavior. During testing, Student appeared anxious to be at school and did not want his classmates to see him there. Ms. Lipari did not ask why.

47. Ms. Lipari administered the most current version of the Woodcock-Johnson Tests of Achievement. It was administered in English, Student's primary language. It was a reliable and widely accepted assessment tool and was not racially, culturally, or sexually discriminatory. It was administered and interpreted consistent with the publisher's protocols and yielded valid results. Ms. Lipari was qualified to assess student. Although Ms. Lipari

only administered nine of the 11 tests in the standard battery, it did not invalidate the testing results or violate protocol because she gave three tests in each academic area. Ms. Lipari saw no need to give two reading subtests because he was a strong reader. She did not review Student's work samples, as she did not find it necessary to do so for an academic assessment.

48. The academic assessment report also included a conclusion that Student should not qualify for academic support services due to a specific learning disability. The report continued to note that Student demonstrated anxiety related to school and peers. On that basis, and because Student had an autism diagnosis, the report recommended that Student receive a 504 plan of accommodations and individual counseling to help him transition back and address "social issues."

The January 16, 2018 IEP Team Meeting

49. Middleton convened an IEP team meeting for Student on January 16, 2018, to discuss Student's school refusal and the results of the evaluations performed by Permanente and Middletown staff.

50. Ms. Isherwood presented her speech and language assessment report, which found no speech impairment in either sound production or speech pragmatics. She told the team that Student "seemed very comfortable" in being at Coyote Valley for the assessment. Roxanne Nelson, a licensed applicant for occupational therapist, presented her report of Student's screening test.

51. For her screening, Ms. Nelson did not test Student's motor skills because the Permanente report reported deficits. Her report found that Student had definite delays in gross, fine, and visual perceptual motors skills, which were linked to sensory processing and sensory modulation deficits. It recommended 90 minutes per month of academic-based occupational therapy. Although her report was just a screening, and Ms. Nelson recommended at the meeting that a full occupational therapy assessment take place, no further assessment was scheduled.

52. The IEP team then reviewed the Permanente autism spectrum disorder summary and report and Ms. Morita's intellectual development assessment. Ms. Morita presented both to the team. The Permanente report found Student's social and emotional functioning to be deficient and noted that he had a high level of autism spectrum-related symptoms. Based upon observation by the team and reporting by Student and Parent, the report found Student met the criteria for diagnosing autism and referred him to the Pediatric Developmental Disabilities Office in Oakland.

53. In presenting the reports, Ms. Morita noted that Student's autism did not prevent him from satisfactory achievement on standardized tests and in his report cards. She cited the fact that Student's autism was "not currently impeding [Student's] ability to meet grade level standards" and therefore her opinion was that he did not meet the standards for eligibility for special education services, although Student did qualify for supports, services

and accommodations under Section 504 because he was prevented from attending school because of his emotional and social issues.

54. Discussions recounted in the IEP team meeting report state that Student told Morita that he did not want to go back to school because of what his peers may say or because they may be ahead of him. Parent told the IEP team that Student would hide in the bathroom during lunch to avoid the other students in the cafeteria, that he had self-stimulating behaviors, and that some sounds, like the beeping of market price scanners, triggered him. She noted that Permanente looked at some of Student's work samples and said they may indicate dysgraphia.

55. Although Student was not found eligible for special education, the IEP team considered placement options. The team discussed having Student continue with California Connections, moving him to Cobb Mountain, Middletown's third elementary school, or doing a mix of on-line and in-person schooling. Parent mentioned that a Permanente psychologist had suggested Anova as a placement option. Since the team did not find Student eligible for special education, there was no offer of FAPE.

56. Middleton did not offer a Section 504 plan, because the meeting was not held at Cobb Mountain, which was to be Student's placement, and Middletown required Section 504 plans to be developed at the school of attendance. The front page of the IEP team meeting report recommended that Student receive accommodations, individual counseling, and 90 minutes per month of occupational therapy service under any Section 504 plan.

57. At the end of the meeting, Parent had second thoughts about agreeing to the team's decision. She still had concerns about Student and the way he spoke, but felt pressured to sign the IEP. She spoke with Ms. Stone, who considers herself a parent advocate as a Special Education Director. Ms. Stone advised Parent to write in a request for "re-evaluation of speech for articulation." Parent did so, signing that she otherwise agreed with the IEP.

58. Ms. Stone was responsible for compliance and training in special education matters for all students and staff in Middletown. In her view, a student with a disability would not qualify for special education unless that student needed specialized academic instruction. A child, such as Student, who could meet academic grade standards could not qualify for special education because there was no need for a specialized academic program.

59. Middletown intended to offer Student occupational therapy services and counseling, as recommended by Ms. Morita and Ms. Nelson, through a 504 Plan. In addition, although the doctor's prescription for home/hospital instruction had expired, the IEP team meeting report stated that Student would be maintained on home/hospital instruction "pending a doctor's note."

60. About two weeks after the IEP team meeting, Ms. Morita and Ms. Lipari met with Student to go over his assessment results with him. At the meeting, he told them he would refuse to return to any Middletown school.

61. Ms. Stone followed up on the IEP team meeting with a letter on February 15, 2018, which set out that Student had not been found eligible for special education, but was eligible for occupational therapy under a Section 504 plan. It also noted that a new doctor's note for home/hospital instruction had been received and that Middletown was offering an independent educational evaluation in speech for articulation issues only.

62. Parent responded with a letter on February 20, 2018, saying she disagreed with Student's assessment and "the denial of the diagnosis of autism." She disagreed that his disabilities were not affecting his educational performance and requested "an (IEE) done by independent evaluators with the appropriate credentials for [Student] to determine eligibility for special education."

63. Ms. Stone wrote again to Parent on March 19, 2018, asking her to clarify her requests for independent educational evaluations and to sign and return the assessment plan for the articulation-limited independent speech evaluation. Parent did not respond because she did not know specifically what she wanted, other than for Student to get services to help with his autism. There was no meaningful contact between Middletown and Parent for the next several months

Report by Dr. Trichilo

64. Parent was referred to Dr. Diana Trichilo by Permanente when she sought a neuropsychologist to examine student for dysgraphia. Dr. Trichilo has been in private practice since 2008, specializing in developmental neuropsychological assessment of children and young adults. She received a bachelor of arts degree in psychology from the University of California at Berkeley and a master of arts degree in school psychology from Humboldt State University.

65. Dr. Trichilo worked for five years in school psychology and nine years as a marriage and family therapist before returning to school to get a Ph.D. in neuropsychology from the Wright Institute in 1998. She then did postdoctoral work and was given certification in neuropsychological assessment proficiency from the Pacific Graduate School in 2003. She worked as a staff neuropsychologist in the Infant-Parent Program at the Department of Psychiatry of the University of California, San Francisco. She was board certified in Pediatric Neuropsychology in 2016.

66. Dr. Trichilo has done approximately 22 neuropsychological assessments of children each year since her board certification. She was affiliated with Permanente and also did independent educational evaluations for school districts as part of her practice, having done roughly eight independent neuropsychological assessments. She did about 50 psychoeducational assessments per year when she worked in school psychology.

67. The question presented to Dr. Trichilo by Parent was whether Student had learning disabilities, with particular focus on dysgraphia or a specific learning disability. Dr. Trichilo was contacted by Parent in April or May of 2018, and began assessing Student shortly afterward. Dr. Trichilo's report was not an independent educational evaluation. Dr. Trichilo believed that independent educational evaluations must be a neutral assessment of a child, and she understood that Parent was seeking her report to respond to Middletown's finding that Student was not eligible for special education support. Dr. Trichilo's report was paid for by Parent's health insurer.

68. Dr. Trichilo tested Student for dysgraphia by administering the Oral/Written Language test, Third Edition, and the Developmental Neuropsychological Assessment, Second Edition. She also obtained Student's developmental history, reviewed the prior assessments, examined work samples, and spoke with his treating psychiatrist and Parent. She gave rating scales from the Behavior Rating Inventory of Executive Functioning, Second Edition, to Parent and Ms. Prather, the Behavior Assessment System for Children, Third Edition, to Parent, and the Connor's Third Edition to Parent, Ms. Prather, and Student. She tested Student with the Delis Kaplan Executive Functioning System.

69. Dr. Trichilo did not redo the entire Wechsler Intelligence Scale and accepted the earlier testing results by Ms. Morita, but did "spot check" and gave Student the Wide Range Achievement Test, Third Edition. She also administered the Social Language Development Test. She did not contact Student's teachers at Middletown because he had been out of school for nearly a year at that time.

70. Testing revealed that Student was bright but disorganized, and that he had a slower processing speed. He made repetitive gestures and vocalizations. During testing, Student wore sunglasses and asked to roll on the floor once. He said it helped him calm down. She observed that Student's motor control test results were low because he would obsess over trying to do the test perfectly and go slowly. His written work was cramped, disorganized, and littered with random lines and scribbles. Overall, Student displayed average to high average intellectual function with a weakness in tasks requiring graphomotor speed and accuracy.

71. Dr. Trichilo found many attributes associated with autism during testing, such as inability to "mirror" hand positions and pronounced weakness in social language tasks, such as making inferences, problem solving, and social interactions. Mother told Dr. Trichilo that Student was withdrawn and prone to outbursts of aggression and defiance at home. Ms. Prather reported that Student presented commensurate with other children with autism, had speech errors and difficulty understanding social cues, attention issues, and was fixated on having been hurt by peers at school.

72. Dr. Trichilo concluded that Student had autism, a specific learning disability with impairment in written expression caused by difficulties in dexterity and motor planning, impaired balance and coordination, and an adjustment disorder. She found that Student's autism put him at risk of anxiety in situations of sensory or social stimulation overload as

occurred at Middletown. Student had a “persistent irrational belief” that teachers would not keep him safe at school.

73. Despite the limited question presented, Dr. Trichilo’s report contained recommendations, including ones directed to Student’s education. It suggested a mixed home/hospital instruction/partial day program for schooling, a self-contained classroom tailored for high-functioning autistic students, or a private school designed to teach autistic students in a smaller setting. It also recommended he receive support for his handwriting issues, including occupational therapy for handwriting, a full occupational therapy assessment for sensory issues, support for his social pragmatic speech difficulties, articulation support services, and adaptive physical education suited to his gross motor difficulties.

The September 4, 2018 IEP Team Meeting

74. Parent gave Trichilo’s report to Middletown in late summer of 2018, along with a note from Student’s pediatrician reporting that he had been diagnosed with autism and anxiety. Ms. Morita recommended Middletown hold an IEP team meeting to reconsider Student’s eligibility. She believed Student’s needs had increased and it was no longer viable to try to place him on a Section 504 plan. He was “a very different student” than what they had seen, having a higher level of associated symptoms and a greater need for academic support.

75. To Ms. Morita and Ms. Stone, Student’s worsened isolation made it more imperative that Student return to school. Ms. Morita believed that “catering” to school refusal allowed and increased Student’s anxiety. Ms. Stone felt that Student’s diagnosis of autism and his other needs now meant he had a need for specialized instruction in social skills and social pragmatics. She felt Student had been on home/hospital instruction so long that it was contributing to, and not lessening, his anxiety.

76. Middleton held the first of two IEP team meetings on September 4, 2018. Parent attended, accompanied by Rojon Brown, Student’s caseworker from the Redwood Coast Regional Center. Middletown had legal counsel at the meeting. District’s counsel announced that Student would now be found eligible for special education services under the Other Health Impairment category, due to his anxiety. The team offered Student support for his difficulties in handwriting by offering occupational therapy services and a tutorial period. For his sensory processing and gross and fine motor skills deficits they offered adaptive physical education. The team planned to address his attention and executive functioning deficits by instilling self-motivation. They offered counselling and a social skills group for his mental health concerns.

77. Mr. Brown asked how Middletown would help Student make friends and end his isolation. The team responded that Student would be in general education classes which would have aide support, and he could access those aides to help him make friends. In addition, Student could join school clubs during the lunch period. Ms. Stone suggested that

Student could return to school on a modified school day, and the school's principal suggested that Ms. Prather could "shadow" him for a couple of days until he felt comfortable. In addition, safe places could be designated for Student so that he would have somewhere to go if he felt overwhelmed or scared.

78. District members of the IEP team decided Student would return to school "with support." The plan was for Student to visit Middletown Middle School the next day, when there were no other students present, to meet his teachers and a paraprofessional aide who would be providing support. Then, Student would go again to school the next day, a Friday, with Ms. Prather to observe his classes. Thereafter, Student would begin attending school the following Monday, and after Student had attended three days in a row the team would meet again to consider his progress and adjust the plan.

79. The notes report that the IEP team would draft goals for Student and present them to Parent when Student was touring the school. The notes to the September 4th meeting set out that the services to be offered to Student would be 50 minutes per day of specialized academic instruction, 90 minutes per month of occupational therapy, 30 minutes per week of counseling, and 30 minutes per week of "counseling and guidance."

Student's Tour of Middletown Middle School

80. Student was accompanied by Ms. Prather on the tour, and they were joined by Mr. Brown. They arrived shortly before school was dismissed for the day and first went to the school's library, where they met Ms. Morita, the counselor Terri Gonsalves, the school's principal, and the middle school's librarian.

81. Ms. Morita observed that Student was not atypically anxious about being back on a school campus, but believed he was not "vehement" about not returning to school. In his tour, he met another student in special education who was excited to see him and offered to help him find his way around the school once he returned. Mr. Brown thought that Student was excited about going back to school and possibly being a technical expert for computers. Student toured the school and was shown areas that he could pick to be his "safe spots" to go to if he felt overwhelmed or threatened.

82. Ms. Gonsalves was a counselor for students with social or emotional issues at Middletown Middle School. She participated in the tour and watched Student because she knew his background and that she would work with him if he attended the school. She noted that he seemed excited to be there and asked teachers he met if they would challenge him academically. However, she overheard Ms. Prather and Mr. Brown talking about how Parent wanted to extend Student's time in home/hospital instruction, and she thought it was "cruel" to put him through the tour because he was so anxious about being at school.

83. Ms. Prather also thought the tour went well, but did not believe that Student was excited about the prospect of being back at school. She felt that he was saying things

that people wanted to hear. She believed it was hard to say what his real feelings were, but she knew he was afraid of going back to school.

84. Parent did not agree to Student's return to Middletown Middle School. Parent decided after the September 4, 2018, IEP team meeting that she wanted Student to attend Anova because Student had begun to refuse to leave their house and Middletown had no plan to deal with his unwillingness to attend school, his dysgraphia, or his emotional issues. Parent believed that Student could only attend public school was if he was assigned Ms. Prather as a full-time one-to-one aide.

The September 27, 2018 IEP Team Meeting

85. Middleton held the second part of the IEP team meeting on September 27, 2018. Before the meeting, Middleton provided Parent a draft setting out IEP goals for Student. At the meeting, Parent was accompanied by lay advocate Sally Kirk, and Middletown's attorney again attended. Middleton's IEP team members again resisted classifying Student as eligible for special education services due to autism, maintaining that he did "not meet the educational criteria for autism." Parent and Ms. Kirk objected to the draft IEP goals, noting that they did not have present performance levels nor short term objectives to enable Parent to judge Student's progress through the course of the year.

86. The IEP team discussed how to deal with Student's anxiety and social issues at school. Ms. Prather told the team that Student perseverated on certain ideas and topics and that he did not take turns and engage in reciprocal conversation. District members of the team countered that since Student was not in class his baseline performance levels could not be established. The IEP notes reported that a Middletown member of the team asserted that Student would be "assisted by a Special Ed paraprofessional or other special ed [*sic*] professional at all times" so Student would have the same support he would have with Ms. Prather. Middletown would not make Ms. Prather available to be a one-to-one aide for Student.

87. Dr. Trichilo attended by telephone to present her report. She spoke about her report and findings, but there was no back and forth and she was not engaged by the team. They criticized her for not visiting Middletown's schools and disputed the events that Student had told her about. They rejected her conclusion that Student's autism affected his educational performance, did not believe that Student had a specific learning disability, and opposed her recommendation that Student be placed in a private school for children with autism.

88. District members of the IEP team told Dr. Trichilo that Student would be supported in his acquisition of social skills by counseling, a social skills group, occupational therapy, speech services, and adult support. Ms. Stone noted that speech services would only take place once Parent responded to Middletown's offer of an independent speech evaluation and the report was completed and reviewed by an IEP team. She further noted that a private school such as Anova would be a more restrictive placement, which she did not believe

Student needed. District personnel asserted that Middletown Middle School could address Student's needs as comprehensively as Anova, while maintaining his exposure to neurotypical peers.

89. The offer of FAPE made at this meeting included five accommodations. First, Student would have a designated person to check in with at lunch, who would look for him if he did not check in. Secondly, Student would have a designated "safe space," which he could access for a break during sensory or anxiety overload when given permission by a teacher or aide. Third, he would be allowed to retake tests on which he got a grade lower than 70 percent. Fourth, Middleton would allow Student to use a word processor for notetaking. Last, staff would provide Student a copy of the lecture notes before his classes.

90. Student was also offered the following supports. His special education teacher would consult with his general education teachers. He would also be allowed to wear sunglasses and headphones during class, and his classroom participation would be factored into his grade for physical education. Finally, he could wear street clothes to his physical education class.

91. Middletown offered Student four special education services, including 90 minutes per month of occupational therapy service. Middletown would also provide 50 minutes per day of specialized academic instruction by push-in support during English class. Student would receive 30 minutes of individual counselling per week, and 30 minutes per week of a social skills group. The IEP did not have a plan for Student's transition back to a general education placement in middle school after nearly a year on home/hospital instruction, and no supports or services to assist the transition were offered.

92. The meeting ended without securing Parent's agreement to the IEP plan. Middleton sent Parent the draft IEP on October 6, 2018. On October 12, 2018, Parent sent a letter consenting to Student's eligibility for special education services, his use of sunglasses and headphones as needed, and the occupational therapy and individual counseling services offered. Parent asserted that the push-in support and the group counselling were inadequate to meet Student's needs, and did not consent to placement at Middletown Middle School.

93. With her October 12, 2018 letter, Parent included a list of "Parent Concerns for [Student]." The concerns included a discussion of the inappropriateness of the team's proposed placement. Those concerns and her preferences tracked Dr. Trichilo's recommendations for placement, which fit Anova. It also included suggested IEP goal areas, argued that Student's present performance levels should be adopted from Dr. Trichilo's assessment, and requested that Student's eligibility be adjusted to report autism as the primary area of eligibility, and other health impairment as the secondary area of eligibility. Lastly, Parent requested independent educational evaluations in occupational therapy, speech and language, and academics, as well as an unspecified additional psychological evaluation.

94. Middletown believed they had met all of Student's needs. Ms. Stone believed that the check-in person was an adequate response to Parent's concerns that Student would

walk off campus. Having “safe spaces” would allow Student to escape overwhelming situations. Retaking tests would alleviate the anxiety Ms. Prather reported Student felt when he did poorly on testing. Allowing Student the use of a word processor and lecture notes would address his handwriting issues. Although there was no social skills group in place, Ms. Stone, Ms. Morita, and Ms. Gonsalves all agreed that one could be designed and put into place that would meet Student’s needs.

95. Ms. Stone and her team viewed the IEP offer as “fluid” and not finalized. The team was waiting for Parent to respond to the September 27, 2018 offer. Just as they had continued the September 4, 2018 IEP meeting after Student toured Middletown Middle School, Ms. Stone intended to have the team meet again as necessary to work out the details of Student’s IEP. There was no offer of a dedicated paraprofessional in the IEP because Student’s plan was still fluid. Ms. Stone’s believed that Middletown offered Student full-time one-to-one direct support at all times, and that there was a plan to fade out that support as he became comfortable at Middletown Middle School. She believed Parent understood that those services were part of the offer of FAPE even though it was not recorded in the IEP.

96. Ms. Stone believed that partial consent to the IEP changed Student’s status. Because Student was now eligible for special education services, Ms. Stone believed a different standard applied to a request for home/hospital instruction service. Further, because Parent did not accept the goals listed in the IEP team meeting report, Student could not receive any services from Middletown.

97. By letter on October 13, 2018, Ms. Stone informed Parent that Student’s home/hospital instruction would stop because the doctor’s note expired on October 5, 2018. Ms. Stone required that a doctor’s note recommending home/hospital instruction state the diagnosed condition, certify that its severity prevented Student from attending school, and include a projected date of return.

98. Home/hospital instruction nevertheless did continue until Ms. Stone sent a letter on October 25, 2018, stating that it would cease on October 29, 2018. Parent had submitted a new letter from Student’s psychiatrist on October 15, 2018, requesting 8 additional weeks of home/hospital instruction for Student. Ms. Stone rejected the letter’s recommendation because it did not include a definite end date.

99. Ms. Stone’s letter also noted that Anova, Parent’s desired placement for Student, had no space for him. Although Ms. Stone did not believe that Student required such a restrictive placement and that Student’s needs could be met at Middletown Middle School, Ms. Stone was willing to place Student at Anova if there had been space for him.

100. Student received no further educational services from Middletown after the end of home/hospital instruction on October 29, 2018.

101. Middletown filed for a due process hearing to implement its September 27, 2018 offer of FAPE without Parent’s consent and to defend its decision not to grant independent educational evaluations pursuant to Parent’s request on November 14, 2018.

102. At parent’s request, Dr. Trichilo submitted supplements to her report on January 8, 2019, and March 10, 2019. These reports were not paid for by Parent’s health insurer.

103. Parent gave Middletown written notice of her intent to unilaterally place Student in a private school and seek reimbursement from Middletown on January 23, 2019. Parent enrolled Student at Anova on February 8, 2019, and filed her own due process action on March 6, 2019. On April 8, 2019, Parent executed a release allowing Anova to discuss student’s education with Middletown staff in the presence of Parent’s attorney.

104. Middletown granted Parent an independent evaluation in speech and language by the Swain Center, the provider she selected. A report was produced on April 29, 2019.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA²

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)³ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a)) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

4. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases were applied to define the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. The Supreme Court’s decision in *Endrew F. v. Douglas County Sch. Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988] (*Endrew F.*) reaffirmed that to meet its substantive obligation under the IDEA, a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. The Ninth Circuit further refined the standard in *M.C., supra*, 858 F.3d at pp. 1189, 1194, 1200-1201, stating that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so as to enable the child to make progress in the curriculum, taking into account the child’s potential.

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the

issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56 62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Each party bears the burden of proof as to their claims this case.

7. The legal analysis of whether a school district offered a pupil a FAPE consists of two parts. First, whether the local educational agency complied with the procedures set forth in the IDEA, and, second, whether the IEP developed through those procedures was substantively appropriate. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Procedural violations do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*).

Student's Issue One: Failure to assess for special education in the 2016-2017 School Year

8. Student contends that he should have been assessed for special education services in the 2016-2017 school year. Student's school year was unremarkable, other than Student's continued torment at the hands of a group of female students and the Chromebook incident. He attended school and had no academic difficulty or exhibited any behavioral issues of significant severity until late in the year.

9. Student argues that Middletown failed its child find duty because there was a "flurry of activity concerning Student" in March of 2017, referring to the Chromebook incident. That incident was a disciplinary issue with no relation to eligibility for special education. Student further notes that Middletown placed Dr. Brandt's letter requesting assessment in the school psychologist's mailbox without taking action until August of 2018 and that Student was placed on the restrictive placement of home/hospital instruction.

10. The latter events took place after the end of the 2016-2017 school year. Dr. Brandt's letter was given to Middletown on June 13, 2017, and Student began home/hospital instruction in the 2017-2018 school year. Student failed to demonstrate that he had behavioral deficits that required Middletown to assess him until the end of the school year, as the facts he asserts triggered Middletown's obligation to assess occurred after the end of the 2017-2017 school year.

Student's Issue Two: Failing to Assess Student in all Areas of Suspected Disability and Failure to Find Student Eligible for Special Education Services in the 2017-2018 school year

11. The IDEA and California state law impose upon each school district the duty to actively and systematically identify, locate, and assess all children with disabilities or exceptional needs who are in need of special education and related services. (See 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(1)(ii); Cal. Ed. Code §§ 56300, 56301.2.) The Federal and state statutory obligations of a school district to identify, locate, and assess children with disabilities is often referred to as the “child find” obligation. A district’s child find obligation applies to all children who are suspected of having a disability in need of special education, even though they may be advancing from grade level to grade level. (34 C.F.R. § 300.111(c)(1).) A district’s child find obligation toward a specific student is triggered when there is a reason to suspect a disability and that special education services may be needed to address that disability.

12. The requirement to assess may be triggered by the informed suspicions of outside experts. (*N.B. v. Hellgate Elementary School District*, (9th Cir. 2008) 541 F.3d 1202.) A school district may not “abdicate” its responsibilities to evaluate Student’s suspected to have a disability, and may not delegate that responsibility to third parties unless it takes steps to ensure that the assessment is conducted in a manner that complies with the requirement of the IDEA so that it may be used to determine and meet a student’s educational needs. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119 (*Timothy O.*)). A child’s evaluation must be designed not only to determine whether the child has a disability, but also “to gather relevant functional, developmental, and academic information about the child,” that can be used to determine the child’s individual educational needs. (34 C.F.R. § 300.304(b)(1); 20 U.S.C. § 1414(a)(1)(C).)

13. The failure to conduct assessments is a procedural violation. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child’s right to a FAPE; (b) significantly impeded the parent’s opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *Target Range, supra*, 960 F.2d at 1483-1484.) A child shall qualify as an individual with exceptional needs if an assessment demonstrates that the degree of the child’s impairment requires special education. (Cal. Code Regs., tit. 5, § 3030 (b)(4) (2014).)

14. Autism means a development disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (Cal. Code Regs., tit. 5, § 3030 (b)(1) (2014).)

15. Student contends that Middletown failed in its duty to assess Student after being made aware that Permanente had assessed Student for both occupational therapy needs

and for autism spectrum disorder. Although Parent participated in the drafting of the assessment plan, it was not her responsibility to ensure that Middletown met its obligations under the IDEA. Although the assessments Middletown did perform were appropriate for their purposes, they did not meet its full obligation to comprehensively assess Student.

16. Middletown told Parent that Kaiser's psychoeducational and occupational therapy assessments were sufficient for its purposes. They were not. The assessments were not conducted by Middletown and not controlled by them to ensure that they met IDEA's requirements for educational assessments which used "the sound and reliable methods that the Act demands." (*Timothy O.*, 822 F.3d at 1123.)

17. Just as in *Timothy O.*, Middletown's failure to assess Student deprived his IEP team of critical evaluative information about his developmental abilities as an autistic child and prevented an informed discussion with his parents about his specific needs. (*Timothy O.*, *supra*, 822 F.3d at 1119, 1126.) Because Middletown only conducted a screening examination for occupational therapy needs and performed cognitive ability testing in place of a full psychoeducational assessment, it failed in its duty to assess. Because that failure prevented Parent from having information about her son's condition that she needed, she was impeded in her ability to participate in the process of planning his educational program. As a consequence, Student was denied FAPE due to the procedural violation.

18. Ms. Stone testified at hearing that she instructed her staff that children like Student, who have disabilities but maintain grade level performance, do not qualify for special education services because they do not need specialized academic instruction. That view is mistaken.

19. A "child with a disability" is one who has either intellectual disabilities, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A). The term "designated instruction and services" means "such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable an individual with exceptional needs to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation, and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist an individual with exceptional needs to benefit from special education, and includes the early identification and assessment of disabling conditions in children." (Ed. Code § 56363 (a).)

20. There is no requirement that a student with a disability fail to maintain grade level performance before a school district must take action to alleviate the disability's impairment of his ability to make progress appropriate in light of the child's circumstances.

In *County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467 (*County of San Diego*), the Ninth Circuit Court of Appeals specified that educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization. *Timothy O.* held that under the IDEA and California law that school districts are required to provide special education services to a broad category of children, including any child who manifests autistic-like behavior, regardless whether he or she has been formally diagnosed with an autistic disorder. (*Timothy O., supra*, 822 F.23d at 1113; 34 C.F.R. § 300.8(c)(1); Ed. Code § 56846.2(a).

21. Middletown accepted Permanente’s autism diagnosis “without reservation,” but found Student ineligible for special education services because Middletown saw no impact upon his educational performance. Ms. Stone’s belief that Student had ‘medical autism’ but not ‘educational autism’ and therefore did not qualify for special education is not supported in the facts or the law. Student had school refusal, was isolated, and an array of attendant tics and unusual sensitivities. The fact that Student was not attending school because of his fixation on having been assaulted on the bus and abused on the schoolyard is sufficient impact upon his educational performance that establishes Student’s need for special education and related services so he could attend school and receive the educational benefit of social interaction with other students. His belief that he would not be kept safe by teachers and staff was validated by the unjustified accusation that he had damaged a Chromebook and staff’s insistence that he confess.

22. Ms. Stone may have sincerely believed that Student did not have autism and that Parent was pushing him to pretend that he did. That view is contradicted by the contemporaneous medical records of Student’s treatment, but under the “snapshot rule” Middletown is not accountable for information that was not shared with them. They did not have all the information that Parent did, but they had an obligation to assess and sufficient information to know that Student needed assistance.

23. Due to Ms. Stone’s belief that students with disabilities could be denied special education services, Middletown offered to put Student on a Section 504 plan, with services that included occupational therapy and counseling. The services which were to be provided in the Section 504 plan were special education services, not services provided to general education students. (*L.J. v. Pittsburg Unified School District* (9th Cir. 2016) 835 F.3d 1168, 1174-1178.) As set out in Ms. Morita’s assessment and the IEP team meeting notes, Middletown believed Student qualified for a section 504 plan because his autism, which it felt did not confer special education eligibility because there was no effect upon his educational performance, nevertheless did affect his educational performance under Middletown’s Section 504 analysis because it caused anxiety that resulted in school refusal and social withdrawal and impaired his ability to develop peer relationships. Middletown failed to correctly analyze Student for special education eligibility, due to anxiety that caused school refusal and social withdrawal and impaired development of peer relationships, as set forth in *County of San Diego*.

24. A student's disability cannot be said to have no impact when considering eligibility for special education and such significant impact when evaluating eligibility under Section 504. Middletown does not contest that Student was autistic, but asserts that he was not eligible because he did not need academic support classes. Such a view directly conflicts with the Ninth Circuit's holding in *County of San Diego* (*supra*, 93 F.3d 1458). The failure to find a qualified student eligible for special education services is a substantive denial of FAPE. Student is entitled to relief for the violations shown in his Issue Two.

Middleton's Issue One and Student's Issue Three (a): Does Middleton's September 27, 2018 IEP Offer Student an Appropriate Program?

25. Middletown believes that its offer of programs and services developed at the September IEP meetings and as represented in the September 27, 2018 IEP team meeting report constitutes an offer of a free appropriate public education in the least restrictive environment. Parent asserts that Middletown denied Student a FAPE as Middletown's offer failed to meet his needs caused by anxiety and autism, did not have measurable goals, lacked one-to-one support, and offered an inappropriate placement.

26. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*) The IEP must set clearly set forth the services to be provided so that a parent will know exactly what their child will receive and monitor compliance.

27. The IEP team meeting must result in a "formal, written offer [that] creates a clear record that will do much to eliminate troublesome factual disputes ... about when placements were offered, what placements were offered, and what additional education assistance was offered to supplement a placement, if any." (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*)). A parent can "force the District to provide only those services and devices listed in the IEP, not those discussed at the IEP meeting but left out of the IEP document." (*M.C., supra*, 858 F.3d at 1199 (citing *Union, supra*, 15 F.3d at 1526.))

28. The methodology used to implement an IEP is left to the school district's discretion so long as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d 1141 at p.1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology.

29. If appropriate, an IEP must also include a provision for the transition of a child from a special class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day, including a description of the activities provided to transition the child into the regular program. (Ed. Code, § 56345(b)(4); *See T.B. ex rel Brennise v. San Diego Unified School District* (9th Cir. 2015) 806 F.3d 451, 462-463.)

THE SEPTEMBER 2018 IEP

30. Student had been denied eligibility for special education services at an IEP team meeting in January 2018. Middletown stated that it accepted Permanente's autism diagnosis "without reservation," but found him ineligible for special education services because its staff did not perceive that his autism had any impact upon his educational performance.

31. In the time following that IEP team meeting, Student continued on home/hospital instruction. Over the summer, he was assessed by Dr. Trichilo. When the school received Dr. Trichilo's report and a note from Student's physician that he had been diagnosed with autism and an anxiety disorder, Middletown called an IEP team meeting to reconsider his eligibility for services. Ms. Morita thought that Student's situation had significantly worsened since January 2018 and had a heightened need for academic support. Although both Ms. Morita and Ms. Stone believed that Student's anxiety and associated symptoms had been worsened by Parent's decision to put him on home/hospital instruction, they both considered him to be in need of significant support.

32. At the meetings held in September 2018, Middletown had Dr. Trichilo's report. Dr. Trichilo was a board certified and experienced neuropsychologist. Her report detailed how Student's autism affected his ability to do tasks quickly and how his fixation on having been hurt by peers was an aspect of his autism that caused such anxiety as to cause school refusal.

33. Parent explained to the team, as she had done at the prior meeting in January 2018, that Student was unable to understand or relate to his classmates. His inability to do so isolated him. His autism caused him to obsess over what had happened to him, and the constant feedback caused by his disability created in him the "persistent irrational belief" cited by Dr. Trichilo that he would not be safe at school.

34. In response to Student's worsening presentation and enlightened by their greater understanding of his disability, Middletown offered Student substantially the same package of services that it offered as part of a Section 504 plan in January 2018. The differences between the two plans was the addition of thirty minutes in a weekly social skills group that was to be created and 50 minutes per day of push-in support in English class.

35. That plan does not address Student's anxiety about returning to school and his fixation on having been attacked on a bus, teased on the schoolyard, and wrongly accused of by his teachers. The strongest evidence that Student's autism and anxiety were impacting his

ability to interact with his classmates and benefit from his schooling is that fact that he had been completely withdrawn from both for nearly a year.

36. Ms. Stone and Middletown Middle School's principal testified that it was their belief that Middletown offered Student a full-time one-to-one aide so he could feel safe at school and that they believed Parent understood that to be part of Middletown's offer. That is not clear from the discussions of the offer given in testimony or the IEP itself. Middletown members of the IEP team testified that each class that Student was being placed in had an aide assigned to it, so that Student would have "access" to an aide in every class. In addition, Middletown witnesses testified that they or the school guards would be responsible for watching over Student during lunch, recess, and changing periods, something that would be unnecessary if Student had an assigned aide. Likewise, the IEP team meeting reports that Parent was told that there were "two campus security personnel that assist" who would watch out for Student, but no mention of a one-to-one aide.

37. If Middletown staff were not clear on what was being offered, Parent likely was not, as well. The IDEA requires a clear offer of programs and services because parents are entitled to know exactly what they are being offered. The offer presented after the September 2018 IEP team meetings cannot be considered FAPE because of Middletown's intent to do something that is not recorded in the offer of programs and services. Student cannot receive FAPE without some substantial support to help him overcome his fears and fixations and end his school refusal.

38. Similarly, Ms. Stone testified that Student could return to Middletown through the use of a partial school day and Middletown Middle School's principal suggested that Ms. Prather could shadow him for some time to make sure he would be comfortable. These suggestions do not constitute a transition plan for a student who spent the prior school year educated by himself at home that meets the requirements of Education Code, section 56345, subdivision (b)(4), and they are not set out at any place in the offer of FAPE or even in the meeting notes. A parent may not be required to depend upon good intentions or unrecorded promises to get their child access to education. The failure by Middletown to plan and commit to a transition program for Student's return from a lengths stay in home/hospital instruction is further reason to find that its offer of programs and services from the September 2018 team meetings did not provide FAPE.

39. Further, the IEP process as conducted in Middletown is not designed to comply with the IDEA. Describing an IEP offer as "fluid" defeats the purpose of requiring clear, detailed offers of programs and services. Any offer of educational programs and services for a child with a disability that is accompanied by a promise to revise it in short order is an admission that the offer is made without sufficient thought or knowledge. Middletown was in a difficult position because Student had been so long out of school. That does not justify or validate a deficient offer of FAPE. Middletown chose to abdicate its responsibilities and ask Parent to trust that they would work something out later to tweak the IEP. This violates the requirement of a formal and detailed written order, a requirement which the Ninth Circuit has said must be "enforced rigorously." (*Union*, 3 F.3d 15 at 1526.)

40. For the foregoing reasons, Middletown's offer of programs and services contained in the IEP developed at the September 27, 2018 IEP team meeting does not constitute a FAPE and may not be implemented without Parent's consent. Middletown is denied relief on its Issue 1.

41. Parent established that Middletown substantively denied Student a FAPE in the 2018-2019 school year by failing to design a program that meets his needs caused by anxiety and autism because Middletown did not adequately assess Student. The Permanent report which diagnosed Student with autism spectrum disorder did not satisfy Middletown's obligations under IDEA. Further, Middletown failed to make a final IEP offer of supports and services for Student, instead making assurances it would somehow modify the IEP as needed. Consequently, Middleton may not implement the IEP without Parent consent. Because relief is granted to Student for Issues Three (a) (i) and (iii), Student's Issue Three (a) (ii) and (iv), and Student's Issues Three (b) and (c), are moot and will not be decided.

Middletown's Issue Two: Appropriateness of the Psychoeducational and Academic Assessments

42. Middletown contends that its assessments were lawfully and properly administered by qualified assessors. For these reasons, Middletown asserts it is not obligated to fund independent psychoeducational, speech and language, and occupational therapy evaluations for Student.

REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS

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

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

45. Based upon the foregoing authority, Middletown timely filed a request for due process hearing to show that its assessments were appropriate. Middletown provided an independent evaluation in speech and language following good-faith efforts to understand the

nature of Parent’s request. Parent specifically requested independent evaluations in response to Ms. Morita’s intellectual development assessment and Ms. Lipari’s academic assessment by letter dated October 12, 2018. District filed its action slightly more than one month later.

REQUIREMENT FOR ASSESSMENTS

46. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student’s educational needs shall be conducted. (Ed. Code, § 56320.) Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

47. A school district must make reasonable efforts to and obtain informed written consent from a parent before conducting the initial evaluation of a student to determine whether the child is a child with a disability. (34 C.F.R. §§ 300. 9; 34 C.F.R. §§ 300(a)(1)(i), (iii).) A local educational agency must provide written prior notice to the parents of a child whenever it proposes to initiate the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. §§ 1415(b)(3) & (c).)

48. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) Under federal law, an assessment tool must “provide relevant information that directly assists persons in determining the educational needs of the child.” (34 C.F.R. § 300.304(c)(7).) In California, a test must be selected and administered to produce results “that accurately reflect the pupil’s aptitude, achievement level, or any other factors the test purports to measure... .” (Ed. Code, § 56320, subd. (d).)

49. Assessments must be conducted by individuals who are both “knowledgeable of [the student’s] disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).)

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

51. An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a) & (b).)

52. Parent consented to and signed the assessment plan. Responding to Parents' request for assessment, Middletown cooperated with Parents, prepared an agreed-upon assessment plan, and conducted a comprehensive and thorough assessment that assessed Student according to the limitations requested by Parent. Parent did not seek a comprehensive psychoeducational assessment, and requested that Middletown evaluate only Student's cognitive ability because Parent believed Permanente's assessment had not done a thorough job in that area.

53. Middletown's assessments were performed by licensed and credentialed specialists. As to all the assessment instruments used in the intellectual development assessment, Middletown established that the test instruments were validated, properly normed, and not racially, culturally, or sexually biased. The assessor used the instruments for the purposes for which they were designed, she was qualified to administer the assessment tools, she properly did so, and her results were accurate. No single assessment tool or procedure was the sole criterion for any decision or recommendation. Ms. Morita and Ms. Nelson prepared reports summarizing their findings and making recommendations, which were shared with Parents and the IEP team and discussed at the January 16, 2018 IEP team meeting. Accordingly, Middletown's assessments were appropriate.

54. Student contends that the assessments were not appropriately conducted because Middletown's assessors did not observe student in his educational setting. Student has cited no precedent nor presented any expert to say that an academic assessment or a cognitive ability assessment must include an observation of the student in the educational environment. Parent did not request a full psychoeducational assessment because she was satisfied with most of what Permanente's assessment did. Middletown's assessors did not impose limits on the scope of the evaluations; Parent did. Having done so, Parent may not complain that the evaluations were not complete as Middletown should be given the opportunity to complete first a comprehensive psychoeducational assessment. Middletown demonstrated that the evaluations met the ordinary requirement for appropriate assessment, and Parent has not shown that any greater requirements exist. Middletown does not need to provide independent educational assessments to Parent at public expense.

REMEDY

1. Parent seeks reimbursement for the costs for Student to attend Anova Academy and for transportation costs incurred, and reimbursement for the cost of Dr. Trichilo's supplemental assessment reports.

2. Private school tuition reimbursement is available as a remedy under the IDEA where a court or hearing officer finds that the public agency did not make FAPE available to

the student in a timely manner prior to the private enrollment and the private placement is appropriate. (34 CFR 300.148 (c), See also *Letter to Chamberlain*, 60 IDELR 77 (OSEP 2012).) The determination of whether to award reimbursement and how much to award is a matter within the discretion of the hearing officer. (*School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369.)

3. Parents have no obligation to allow a school district to exhaust all possibilities before they make a unilateral placement. As the Ninth Circuit observed in *Seattle School District v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501: “The IDEA does not require [the student] to spend years in an educational environment likely to be inadequate and to impede her progress simply to permit the School District to try every option short of residential placement.” In *Forest Grove Sch. Dist. v. T.A.* (9th Cir. 2008) 523 F.3d 1078, 1087, *affd.* (2009) 557 U.S. 230, the Ninth Circuit held that parents need not seek special education services from a school district at all before they seek reimbursement for a private placement. A contrary rule, the court stated, “would lead to the absurd result that the parents of a child with a disability must wait (an indefinite, perhaps lengthy period) until the child has received special education in public school before sending the child to an appropriate private school... no matter how inappropriate the special education.” (*Id.*, 523 F.3d at p. 1087.)

4. There is broad discretion to consider equitable factors when fashioning relief. (*Florence County Sch. Dist. Four v. Carter by & Through Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361].) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) Factors to be considered when considering the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the school district. (*Target Range*, 960 F.2d at 1487; *Glendale Unified School Dist. v. Almasi* (CD CA 2000) 122 F.Supp.2d 1093, 1109.)

5. Reimbursement for the costs of a private school may be reduced or denied in any of the following circumstances: (1) at the most recent IEP meeting the parents attended before the student was removed from public school, the parents did not provide notice rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (2) the parents did not give written notice to the school district ten business days before removing their child from the public school rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (3) before the parents removed their child from the public school, the school district gave the parents prior written notice of its intent to evaluate the student, but the parents did not make the student available for evaluation; or (4) the parents acted unreasonably. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.)

6. Parent waited for Middletown to respond to student’s autism and school refusal from August of 2017 until February of 2019. During most of that time, Student was

on home/hospital instruction which met his academic needs, but did not have any social component or counselling services that he required due to his autism.

7. Parent placed Student at Anova. Anova, a private school serving students with high-functioning autism, is established, well-known, and a suitable placement for him. Ms. Stone testified at hearing that she had been willing at one point to place Student at Anova if there had been room for him.

8. Middletown argues that Parent acted in bad faith and should have reimbursement reduced. It contends that Parent refused to meet with or correspond with Middletown between the January 16, 2018 IEP team meeting and September 9, 2018.

9. Middletown overstates Parent's withdrawal, which appears to have run between February 20, 2018, to Parent's delivery of Dr. Trichilo's report in late summer. Ms. Stone attempted the last contact by her letter of March 19, 2018, but substantially ceased trying to confer with Parent at that time. Although Parent was effectively out of communication with Middletown for a period of six months, a substantial portion of that was the summer months when Middletown was effectively shut down. Middletown has made no showing that Parent refused to attend or schedule IEP team meetings or otherwise was obstructive or acted in bad faith.

10. Bad faith is also asserted by Middletown on Parent's part because she has refused to allow staff at Anova to communicate with Middletown staff without the presence of Parent's attorney. No showing has been made as to how Middletown is detrimentally affected by this condition or how this requirement constitutes bad faith. The issue appears to have arisen after the filing of these actions and has not been fully presented. Without ruling on whether the condition imposed is reasonable, this decision declines to reduce Parent's reimbursement on that basis.

11. Parent's placement of Student is appropriate and reimbursable. Student is receiving an appropriate education and services to assist with his autism, anxiety, and social/emotional issues. Parent shall be reimbursed for the cost of tuition at Anova through the date of this order, including required fees, upon submission of proof of payment, in the amount of \$237.11 per day of attendance. In addition, Parent shall be reimbursed upon submission of proof of payment for psychological services incurred at Anova in an amount not to exceed \$142.50 per month, representing a maximum of 1.5 hours of psychological services as reported on the invoice of March 31, 2019.

12. Anova is located near Parent's place of employment. As a result, she does not have to make two roundtrips each day to transport Student. As a result, if reimbursed to transport Student, Parent's commute cost would be partially offset by Student's transportation. However, because Parent does work nearby, Middletown does not need to compensate Parent for two roundtrips each day. That outcome is equitable and beneficial to both sides. Parent shall receive reimbursement for transportation of Student of one roundtrip from Parent's residence to Anova for each day of attendance at the IRS mileage rate.

13. In balancing the conduct of both parties, Middletown acted in bad faith in ending Student's home/hospital instruction in October 2018 despite Parent's proffer of a prescription for home/hospital instruction by a medical doctor. Although this decision declines to find the action retaliatory, it did leave Student without instruction for a period of nearly four months. Accordingly, Middletown shall fund Student's placement at Anova for a period of four months as compensatory education after the date of this order on such terms as set forth above, adjusted for any increase in the cost of tuition or counseling services at Anova.

14. Student was denied FAPE from January 16, 2018, through the date of hearing. Student has been granted reimbursement for costs associated with his private school placement and for the failure to provide any educational services after October 2018. Student has not been compensated for the period of time that he was without support for his emotional and social deficits from January 16, 2018, through February 8, 2019, due to Middletown's failure to find him eligible for special education services. Accordingly, it having been found that Anova is a proper place at which Student can receive support for his issues, Middletown is directed to fund Student's summer placement at Anova or other similar program offering social skills support to autistic students, for a period up to two months at a cost up to the cost of two months' tuition and psychological services at Anova as compensatory service for the failure to provide social skills support.

15. Dr. Trichilo's initial report was paid for by Parent's insurer. Dr. Trichilo's subsequent reports, like her initial report, were not independent educational evaluations intended to aid the IEP team in constructing Student's educational program. The two later reports in particular are more like expert reports prepared for litigation purposes, which are not recoverable in remedy. Reimbursement of the cost of the Trichilo reports is denied.

ORDER

1. Within 45 days of receipt of proof of payment to Anova, Middletown shall reimburse Parent up to \$17,736.21 (\$3082.43 plus \$3793.86 plus \$3793.76 plus \$5216.42 plus \$5216.42 plus \$142.50, plus \$142.50 plus \$142.40) for attendance at Anova through May 31, 2019, and psychological services in the Months of March, April and May. Within 45 days of proof of payment, Middletown shall reimburse Parent for attendance at Anova in the amount of \$237.11 per day of attendance and up to \$142.50 for psychological counseling from June 1, 2019 to the date of this order.

2. As compensatory education, Middletown shall fund Student's placement at Anova for four additional months at the then-prevailing tuition rate and including 1.5 hours of psychological services per month. In addition, Middletown shall fund a summer program at Anova or other similar program offering social skills support to autistic students, for a period up to two months at a cost up to the cost of two months' tuition and psychological services at Anova.

3. Parent shall be reimbursed for mileage for each actual day of attendance at Anova up to the date of this decision and for every actual date of attendance at Anova or the summer program for the four following months at the IRS mileage rate for travel one roundtrip from Parent's residence to Anova.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on his Issue Two and Three (a) (i) and (iii) and on Middletown's Issue One. Middletown prevailed on its issue Two and on Student's Issue One. No ruling was made on Student's Issue Three (a) (ii) and (iv) and Student's Issues Three (b) and (c) due to mootness.

RIGHT TO APPEAL

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

DATED: June 14, 2019

DocuSigned by:
Chris Butchko
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CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings