

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

HERMOSA BEACH CITY SCHOOL
DISTRICT.

OAH Case No. 2017060038

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on May 31, 2017, naming Hermosa Beach City School District. District served Student with its response to Student's complaint on June 10, 2017. The matter was continued for good cause on July 5, 2017.

Administrative Law Judge Christine Arden heard this matter in Hermosa Beach, California, on December 5, 6, 7, 12, 13, 14, 18, 19, and 21, 2017, and January 3, 4, 8 and 9, 2018.

Rosa Hirji and Briana Banayan, Attorneys at Law, represented Student. Mother attended the hearing on all hearing dates. Student did not attend the hearing.

Diane Willis, Attorney at Law, represented District. Patricia Escalante, Superintendent, attended the hearing on behalf of District on all days except for December 19 and 21, 2017. Kim Taylor, Principal, attended the hearing on those two days on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until February 26, 2018. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision. Both parties also filed reply briefs, which were considered.

ISSUES

- A. Whether District denied Student a free appropriate public education through the end of the extended school year of 2016 with regard to Student's unique area of need in behavior by:
1. Use of illegal behavior interventions¹ to address disability related behavior; and/or
 2. Use of unwarranted emergency behavior interventions; and/or
 3. Use of interventions that caused Student humiliation and emotional trauma; and
 4. Failing to provide behavior interventions to allow Student access to speech and language services.
 5. For all actions in Issues A (1)-A (4), above, where the facts occurred prior to May 31, 2015, did Parent reasonably know or should Parent have reasonably known about the behavior interventions at issue, within the statute of limitations; or
 6. For all actions in Issues A (1)-A (4), above, where the facts occurred prior to May 31, 2015:
 - a. Did District misrepresent to Parent about the behavior interventions it was using; and/or
 - b. Did District withhold information from Parent that it was required to provide regarding the behavior interventions?
- B. Whether District denied Student a FAPE through the end of the extended school year of 2016 by failing to:
1. Develop goals that were reasonably calculated to provide Student with educational benefit at the June 9, 2015 IEP; and/or
 2. Implement the June 9, 2015 behavior support plan?

¹ This Decision will refer to what Student alleged in the complaint as "illegal behavior interventions" as the failure to use appropriate behavior interventions.

C. Whether District denied Student a FAPE through the end of the extended school year of 2016 with regard to Student's unique needs in the area of toileting by:

1. Failing to develop an appropriate toileting goal; and/or
2. Failing to implement Student's toileting goal; and/or
3. Subjecting Student to inappropriate intervention in his unique need in toileting?
4. For all actions in Issues C(1) – C(3), above, where the facts occurred prior to May 31, 2015, did Parent reasonably know or should Parent have reasonably known about the actions forming the basis of the complaint within the statute of limitations; or
5. For the time period prior to May 31, 2015:
 - a. Did District misrepresent to Parent about the interventions being used for toileting needs; and/or
 - b. Did District withhold information from Parent that it was required to provide regarding the interventions being utilized for Student's toileting needs?

D. Whether District denied Student a FAPE through the end of the extended school year of 2016 by failing to place Student in an educational environment that conferred educational benefit?

1. For the time period prior to May 31, 2015, did Parent reasonably know or should Parent have reasonably known about the (a) behavior and (b) toileting interventions at issue that were interfering with Student's educational progress within the statute of limitations; and/or
2. For the time period prior to May 31, 2015:
 - a. Did District misrepresent to Parent about the (i) behavior and (ii) toileting interventions District was using; and/or
 - b. Did District withhold information from Parent that it was required to provide about the (i) behavior and (ii) toileting interventions District was using?

SUMMARY OF DECISION

Student, who was eligible for special education services for autism and speech and language impairment, had severe behavioral issues and very limited speech. Student was also intellectually disabled and cognitively functioning at a level comparable to a preschool child or younger in certain areas. District placed Student in a special day class for severely disabled students at Switzer Learning Center, a nonpublic school,. Student attended Switzer for two and one-half years from sixth grade through half of eighth grade.

While at Switzer, Student's toileting skills regressed and he began to wear diapers at school and home. His behaviors interfered with his ability to focus on academic instruction. Student left Switzer in the middle of eighth grade because he developed tremendous anxiety and fear related to school. Four months after Student left Switzer, Mother discovered that emergency behavior interventions in the form of physical transport holds had been used on Student. Switzer had not disclosed this fact to either Mother or District earlier. In fact, Switzer misrepresented that no physical interventions had been used on Student. Mother also obtained information after Student left Switzer that made her suspect Student had not been taken to the bathroom for long intervals, exacerbating his toileting problems. The two year statute of limitations accrued with respect to some of the behavioral claims and one toileting claim at the time of discovery, because Parents had not previously known information which was the basis for the claims.

District is legally responsible for all of Switzer's conduct and omissions. Student prevails on issues concerning improper and unwarranted behavior interventions being used on Student, and District's failure to disclose this information to Parents and the IEP team. With respect to toileting, District prevails with respect to the development and implementation of a toileting goal.

Student is awarded compensatory education in the form of specialized academic instruction and behavioral services to be provided by nonpublic agencies at District's expense.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is a 16 year old male who resided with his Parents within District at all relevant times. He was eligible for special education under the primary category of autism.
2. District is an elementary school district, providing public education for grades kindergarten through eighth. District was responsible for Student's education through his completion of eighth grade on July 22, 2016, the last day of the 2016 extended school year. District students completing eighth grade elect to attend public high school at either the Manhattan Beach High School District or the Redondo Beach High School District for ninth through twelfth grade.

3. Student was severely impacted by his autism, speech and language impairment and intellectual disability. He had significant developmental delays. He first became eligible for special education when he was approximately three years old.

4. Student had a seizure disorder. In 2012 he started regularly taking a high dose of Depakote, an anti-seizure medication, which is also a mood stabilizer. Despite taking medication Student continued to have occasional seizures. Depakote had some negative side effects, including increased hunger. Incontinence was not a side effect of Depakote.

5. Before January 2012, Student had been mostly home-schooled during his elementary years. Since at least 2012, Student suffered from anxiety at school in various degrees at different times. His anxiety, along with his other disabilities, made it very difficult for him to attend to academic tasks. His inability to attend and focus for all but brief periods of time thwarted his academic progress.

6. Student had significant sensory needs. He received occupational therapy services throughout all time periods relevant to this dispute.

7. Student was initially toilet-trained for urine when he was four or five years old. He was initially toilet-trained for bowel movements when he was six years old.

8. Student had very limited verbal language. He was often not verbal, or spoke only in single words. He rarely spoke in three- or four-word phrases. Student had difficulty expressing his needs. His receptive language was slightly better, but it was unclear how many words Student understood. He did not use appropriate eye contact, and did not initiate, participate in, or maintain conversations. He also had intelligibility problems, which were exacerbated by a very soft (low volume) speaking voice. In responding to a statement he frequently echoed the word or phrase spoken to him. Occasionally he made loud, seemingly involuntary noises.

Student Attends Center for Learning Unlimited in Fourth and Fifth Grade; January, 2012 – June, 2013

9. Student attended the Center for Learning Unlimited (CLU) starting in January, 2012, when he was in fourth grade, through the end of the 2012-2013 school year, when he completed fifth grade. He had occasional toileting accidents at CLU, but he did not usually wear a diaper at school. At CLU Student received speech therapy and occupational therapy and he had a full time one-to-one aide. In January, 2013, Student's long term aide was let go from CLU. The aide's departure was difficult for Student and Student's behavior deteriorated.

10. At a March 22, 2013 IEP meeting CLU staff team members reported Student had recently regressed in his toileting and developed new disruptive behaviors. He had to use the bathroom frequently and had numerous toileting accidents both at school and home.

His pants were frequently wet with urine. At least once at CLU Student defecated in his pants or diaper, dug into his pants with his fingers and grabbed feces and smeared it on his hand while in the classroom. CLU team members informed Mother and District at the IEP meeting that CLU was not equipped to deal with these behaviors.

Student Attends Switzer in 2013-2014 School Year

11. Mother and District superintendent, Patricia Escalante, together observed local available nonpublic school programs in Spring, 2013, as possible placements for Student for the 2013-2014 school year, including the Spectrum autism program at Switzer Learning Center, a nonpublic school. Spectrum is a program primarily for autistic children. It is based on “relationship development therapy” methodology, not applied behavioral analysis therapy. The Spectrum program director, Wendy White, Psy.D., held a doctorate in clinical psychology.

12. Student started at Switzer at the beginning of the 2013-2014 school year pursuant to District’s placement. He was in a special day class for severely disabled students taught by special education teacher, Lisa Ryan. Each child in Ms. Ryan’s class, including Student, was assigned a full time one-to-one aide. Ms. Ryan had an adult teacher’s assistant. Student was provided a functional curriculum.

13. Student had significant behavior issues, such as: lack of attention; eloping; repetitive/ritualistic movements, such as spitting (sometimes at others), hand and arm flapping, irregular involuntary head movements; accumulating a large amount of saliva in his mouth and playing with it; making loud noises; putting his hands down his pants, digging out feces from his anal area and smelling the same or sometimes smearing it; slapping others on top of their heads; having toileting accidents; and maniacal laughing. Student used some of these behaviors to avoid nonpreferred tasks. Student sometimes forcefully pulled hair of others.

14. There was only one unlocked gate at Switzer. Student was never in danger of injury when he eloped from class or a treatment session at Switzer.

15. Student was subjected to new structural and new academic demands at Switzer. He was anxious at school. His anxiety was the antecedent condition to certain maladaptive behaviors. He needed sensory activities before, after, and sometimes in the middle of academic tasks. He was on a sensory diet at school, designed by occupational therapist, Christine Soria. Ms. Soria provided direct service to Student and consulted with Ms. Ryan and Student’s aides regarding proper application of his sensory diet throughout the school day. Student took both scheduled and unscheduled sensory breaks. Sometimes he asked for sensory breaks, which were intended to calm him and provide him with the sensory input he frequently sought.

16. Mother and Ms. Ryan communicated regularly about Student’s progress, activities, behaviors, problems and other information through a written communication log

sent back and forth between them daily via Student's backpack. Through this communication, Ms. Ryan informed Mother about significant details regarding Student's school days. If Student had problem behaviors, Ms. Ryan mentioned them in the log. Later the written log segued into communications via text messages and sometimes emails. Ms. Ryan did not inform Mother in these communications that Switzer staff occasionally physically intervened in behavioral emergencies with Student by using "transport holds" to move him from one location to another. A transport hold is a specific physical emergency intervention that involves two adult staff members holding a child while the child walks or is moved to another location. Both staff members use their two hands to hold the child by his wrists and under his armpits while he is being transported to another location. Switzer also did not inform District that it occasionally physically intervened in Student's behavior emergencies.

October 4, 2013 IEP

17. At an IEP meeting on October 4, 2013, District offered Student the following placement and services: a full time one-to-one aide; individual language and speech therapy one hour, five times weekly; language and speech consultation 30 minutes weekly; individual occupational adapted physical education for six monthly thirty minute sessions. A Behavior Support Plan was attached to the October 4, 2013 IEP. The Behavior Plan addressed Student's anxiety, which was manifested by his hand biting, elopement, and hitting/banging on furniture. The October 4, 2013 IEP did not include behavior or toileting goals. The IEP notes stated: Student "... toilets independently (for the most part, occasionally needing help to wipe.) He is at times prompted to wash his hands." An amendment dated November 13, 2013, corrected the IEP to indicate that Switzer, instead of CLU, was Student's placement. Mother gave District her written consent to the IEP on November 13, 2013.

18. In November, 2013, Student's rigid ritualistic behaviors increased at home. He perseverated on toys and clothes of certain colors. He wanted his Father to wear a black shirt and Mother to wear a white ponytail holder. He wanted to play with beads only in a black colored bin. He cried occasionally at school because he did not want to complete lessons, and sometimes for no apparent reason.

19. In December, 2013, Student started exhibiting significant involuntary ticks at school. The tics were jerky movements of his head, neck, arms and hands, which interfered with his ability to focus on tasks. Student was anxious at school, in the taxi travelling to school, and at home in the morning when getting ready for school. The tics were likely caused by anxiety. About the same time Student's morning rituals increased in intensity and length. Student developed an unusual set of movements and things he did before transitioning to school. He insisted on executing multiple steps in the same manner each morning before school.

2014-2015 School Year

20. Student returned to Switzer and Ms. Ryan's special day class for seventh grade in the 2014-2015 school year. He was functioning at a level of a two- or three-year old child (and younger than that in certain areas, such as expressive language). Since Student's language skills were very limited, he had difficulty expressing himself. He had difficulty labelling things. For example, he could say food, but was unable to label a specific kind of food. His listening skills were also very limited. He had limited ability to follow instructions. He needed to be prompted multiple times when addressing a task. It was very difficult for Student to follow multi-step instructions. He could follow a two-step instruction if the task was very preferred or routine for him.

21. In fall of the 2014-2015 school year, Student's toileting regressed and he had accidents two or three times per day. He urinated in his pants every morning when he was dropped off at school, as well as at other times in the day, usually when he was transitioning between activities. In about November, 2014, Student started wearing pull-up diapers to school and throughout the school day. He defecated in his diaper at Switzer. He was also having toileting problems and wearing a diaper at home.

22. Switzer staff was instructed to follow a toileting protocol with Student requiring them to take Student to the bathroom every 30 minutes. The plan was that, as he toileted successfully, he could be taken to the bathroom less frequently. Staff was further instructed to collect data on his toileting accidents and successes. Collected data indicated that Student was not taken to the bathroom every 30 minutes throughout the day as called for in the protocol. Records also indicated that on some days Student was taken to the bathroom as infrequently as once in three or four hours. Aides probably took Student to the bathroom more frequently than recorded. Student made little progress on toilet training as he continued to have accidents and wear a diaper at school and home.

October 1, 2014 IEP and Behavior Support Plan

23. The IEP team had multiple meetings from October 1, 2014 through November 6, 2015. Mother consented to the IEP and Behavior Plan² dated October 1, 2014 on November 6, 2015. The October 4, 2013 Behavior Plan, remained in effect until November 6, 2015, when Mother gave her written consent to the IEP and revised Behavior Plan dated October 1, 2014.

24. The October 4, 2104 IEP included a toileting goal for Student. The goals stated that Student would verbally request the toilet when he felt the urge to urinate in four out of five trials. This goal, as with the rest of the October 1, 2014 IEP, could not be implemented until Mother gave her written consent to the IEP on November 6, 2015. The

² The documents titled Behavior Support Plan and Behavior Intervention Plan are both referred to as Behavior Plans.

short term objectives provided that Student would use a picture card to request to use the bathroom for the first two-quarters of the year. By the end of the third and fourth quarters he would verbally request to use the bathroom. Student was capable of making short verbal requests, so this goal was reasonably within his reach.

25. In December, 2014, Parent requested a social-emotional functioning assessment to determine if Student needed educationally related mental health services (ERMHS). Anita Robles, Marriage and Family Therapist intern, conducted an ERMHS assessment of Student in early 2015. She concluded Student's behaviors negatively impacted his overall functioning, but that intensive mental health counseling services were not indicated. She recommended a behavioral approach be developed to address Student's problems, and a functional behavior assessment.

26. District behaviorist, Nicole Bullard, Board Certified Behavior Analyst (BCBA), conducted a functional behavior assessment (FBA) of Student from April through June, 2015.

June 9, 2015 IEP Meeting

27. The IEP team met on June 9, 2015 to review and discuss the results of the FBA conducted by Ms. Bullard. The report on the FBA recommended a number of positive strategies, and noted that the school was presently appropriately managing Student's behaviors. The report did not make any recommendations for revisions to Student's Plan due to new information learned from the FBA.

28. Ms. Bullard noted that because Student's behaviors were complex his Behavior Plan should be supervised by a behavior specialist. Dr. White stated she was authorized to do so and that she would supervise the implementation of Student's Behavior Plan. No evidence was presented at hearing regarding how much time Dr. White devoted to supervising the implementation of Student's Behavior Plan. Dr. White and Ms. Ryan collaborated on the development of Student's Behavior Plan, with Ms. Ryan drafting the behavior goals.

29. District's software program for generating IEP documents, called special education information system, was not operating when the IEP meeting was held on June 9, 2015. No IEP document dated June 9, 2015, was ever generated. Dr. White took notes at the June 9, 2015 IEP meeting. Such notes did not appear on a form IEP, customarily generated on the special education information system form, but instead consisted of a one and one-third page narrative of what had occurred at the meeting. Dr. White's notes do not state that the team developed a new Behavior Plan for Student at the meeting on June 9, 2015. A new behavior intervention plan or behavior support plan was not developed at the June 9, 2015 IEP meeting. There was no Behavior Plan dated June 9, 2015.

30. At the June 9, 2015 meeting Mother expressed her concern about Student's toileting accidents. At that meeting District verbally offered Student a block of five

consultation hours from a behaviorist to develop protocols for toilet training. Over the summer of 2015, Mother asked District for updates as to when the behavioral recommendations from the FBA and toileting protocols would be implemented.

2015-2016 School Year

31. Student returned to Switzer and Ms. Ryan's special day class in the beginning of the 2015-2016 school year for eighth grade. Student became increasingly resistant to attending school. It was very difficult for Student to get to school in the mornings. District offered to send a nonpublic agency aide to Student's home at 6:30 a.m. each school day to assist Mother in getting Student out of the house and on his way to school. Mother refused the offer because it was an inconvenient time to have a stranger in the home.

32. Student's toileting accidents became very frequent in fall, 2015. He wore pull-up diapers all the time both at school and home. Ms. Ryan reminded Mother at times she needed to bring more pull-up diapers to school. District was concerned about Student's anxiety and possible medical causes for his toileting problems.

October 7, 2015 Annual/Triennial IEP, Reconvened on November 6 & 19, 2015

33. At Student's annual/triennial IEP meeting originally scheduled for October 7, 2015, and reconvened on November 6 and 19, 2015, the team addressed Student's progress, his heightened anxiety at school and maladaptive behaviors. By the end of October, 2015, Student had met four out of five of his academic goals and he had partially met one of his academic goals. By this measure Student had made academic progress over the subsequent year. The team discussed new proposed goals, including four behavior goals, one being in the area of toileting.

34. The toileting goal was for Student to ultimately verbally request to use the toilet when he felt the need to urinate in four out of five trials. The first short term objective toward reaching that goal provided that Student, with the use of a picture schedule, would be taken by staff to the bathroom every 30 minutes throughout the school day. The progress report dated October 27, 2015 indicated Student had to be prompted to go to the bathroom. He was still wearing diapers in school and having toileting accidents in October, 2015.

35. At the November 6, 2015 IEP meeting District made an offer in writing of 300 minutes of behavior intervention consultation services. This was documented on an Amendment to IEP, which revised Student's IEP dated October 1, 2014, the last IEP that Mother had consented to as of November 6, 2015. The amendment documented the five hour block of behavior consultation services that District initially verbally offered to Mother at the June 9, 2015 IEP meeting for the purpose of developing a protocol for toilet training Student. Mother gave her written consent to the IEP Amendment on November 6, 2015.

36. Notes of the reconvened IEP meeting held on November 19, 2015, indicate Student was "showing growth in his toileting goals" even though Student continued to wear

diapers at school all day every day. Student played with his saliva throughout the school day and spit on Switzer staff about once every two weeks.

Quiet Room and Exercise Used to Regulate Student

37. Student frequently became dysregulated at Switzer. In those instances he was unable to sit quietly and focus; he paced and swore. Student needed sensory deprivation or exercise at these times to get regulated. Ms. Ryan often sent Student with his aide to one of two classrooms used as “quiet rooms” to calm down. These rooms were plainly decorated to diffuse sensory stimulation. Sometimes the lights were turned off to promote serenity. One quiet room had a desk in it. Student sometimes received his academic lessons in this room because it was relatively free of distractions.

38. Switzer staff also often sent Student to either the occupational therapy room or the weight room to use the sensory equipment (large therapy ball, swing), and exercise equipment (treadmill, stationary bike, elliptical). Exercise helped Student get regulated. Student sometimes exercised by walking or running outdoors. He was physically active and sometimes asked to use the treadmill or to go on a walk. The quiet room and exercise were used as positive behavioral interventions, not as punishment.

39. There was a two day period in late 2015 or early 2016, that Student was kept in the quiet room with his aide the entire day because Switzer was concerned a rash on his face might be contagious. Student remained in the quiet room until Switzer received a medical clearance from Student’s doctor. Later-produced records of toileting data on those dates did not include any notations of times Student was taken to the bathroom. Notes indicated his aide brought him new diapers that day.

40. Some other toileting data sheets also indicated Student was not taken to the bathroom often. Ms. Ryan testified that such toileting data was not accurate, and that Student’s aides had simply forgotten to make notations on the toileting data sheets when Student was taken to the bathroom. She testified that all the children in her classroom, including Student, were taken to the bathroom often, at least between three to four times per day. Ms. Ryan’s testimony on this issue was credible. Ms. Ryan noted that when Student went to the quiet room he usually stayed there from five to 30 minutes until he calmed down.

Toileting Protocol Started in January, 2016

41. Ms. Bullard designed a protocol to toilet train Student. It called for use of an enuresis alarm called the “Dry Buddy,” which was attached to Student’s underwear. Student wore underwear underneath his pull-up diaper. The alarm went off when it detected moisture. It emitted a mild sound when Student urinated in his underwear. The goal was for Student to learn to communicate to Switzer staff either verbally or nonverbally when he had to use the bathroom.

42. This toileting protocol was first implemented about January 18, 2016, because Ms. Bullard and Switzer staff were not available until after the winter break. Mother's request to be at school on the day when the alarm was first used on Student caused a delay of a few days.

43. The toileting protocol required Student to be taken to the bathroom every half hour. The protocol provided that, as Student's toileting progressed successfully, he would be taken to the bathroom less frequently. The enuresis alarm procedure was not successful, so it was abandoned.

January 19, 2016 IEP Meeting

44. On January 19, 2016, District reconvened Student's annual/triennial IEP meeting to review the Behavior Plan, goals and services. During the meeting, the team addressed Student's Behavior Plan, maladaptive behaviors, toileting regression, and elopement. Student habitually spit in faces of others, banged on walls, and touched other people.

45. At the January 19, 2016 IEP meeting, Mother asked if Crisis Prevention Intervention (CPI) techniques were used on Student since CPI was mentioned as a potential intervention in the proposed Behavior Plan. CPI is a series of nonviolent physical holds and physical techniques used by trained staff to safely intervene in behavioral emergencies. CPI transport holds involved two staff members closely walking adjacent to Student while strongly holding Student with both hands (on Student's wrists and upper arms), while moving him from one location to another. CPI certification requires annual training by a CPI certified trainer. Ms. Ryan responded to Mother's inquiry by stating that CPI techniques were never used on Student because physical interventions were not needed with Student. She also stated that the reference to CPI on Student's proposed Behavior Plan merely satisfied a requisite formality and CPI techniques had not actually been used on Student. Ms. Ryan further stated it was very rare she even put Student's arm under her arm when she escorted him. No use of CPI transport holds was disclosed to Mother at this meeting and, in fact, any use of CPI or physical interventions was specifically denied.

46. At the January 19, 2016 IEP meeting Mother also inquired about the amount of time Student spent in the quiet room. She also asked if he was masturbating while he was in the quiet room. Ms. Ryan explained that Student's aide was always inside or at the doorway of the quiet room when Student was in there and the door was left open. She further stated that when Student was in the quiet room Student sometimes lay prone on a mat and pushed his pelvis into it, while pressing his hands on his "private area." This usually lasted for about five minutes. Staff had not allowed Student to put his hands down his pants. Student usually spent between five minutes to a half hour in the quiet room, depending on how long it took him to calm down.

47. In January, 2016, Student's anxiety escalated regarding Switzer. He became very upset at the mention of Switzer or school. He cried and screamed "no school" or "no

Switzer” when he was in a car anywhere near Switzer or at the mention of school. He appeared fearful of Switzer. It became extremely difficult for Mother to get Student into the taxi to go to school in the morning. Mother wondered if something frightful had occurred to Student at Switzer that he was unable to tell her about. On one day in January, 2016, Mother hid a recording device on Student when he went to school in an effort to find out why Student was so frightened about Switzer.

48. Mother stopped sending Student to school in February, 2016 because Student was tremendously anxious and fearful about attending Switzer. Neither Parents, nor Switzer, notified District that Student had stopped attending school. Eventually the taxi cab driver informed District he had not recently driven Student to Switzer because Student was sick.

49. On February 23, 2016, Mother requested District to provide Student with home hospital instruction by submitting a note to District from Student’s pediatrician, Carl Muchnick, M.D. His note stated Student was suffering from extreme anxiety at school and needed home hospital instruction until a new appropriate placement was determined. Dr. Muchnick had examined Student on February 23, 2016, but had never observed Student at Switzer. A few weeks later District superintendent, Patricia Escalante, left five messages for Dr. Muchnick, but was never able to speak with him.

Home Hospital Instruction - May 9, 2016 through July 22, 2016

50. On about May 18, 2016, District started Student’s home hospital instruction consisting of: five hours a week of individual academic instruction; 30 hours a week of individual behavior services provided by Behavior Learning Network; three hours a week of Board Certified Behavior Analyst (BCBA) supervision of behavior services; three hours a week of speech therapy; and two hours a month of occupational therapy.

Parents’ Requests for Educational Records

51. Parents, through their attorney, requested Student’s educational records from both District and Switzer about March 23, 2016. District/Switzer sent records to the attorney, which he received on March 31, 2016. At the April 12, 2016 IEP meeting District/Switzer produced further educational records which included Behavior Emergency Reports (BERs), In House Incident Reports (IRs), and collected behavior and toileting data. On April 14, 2016, Student’s attorney asked for a number of specific records which were missing from District’s/Switzer’s production of Student’s educational records.

52. The produced documents disclosed Student had experienced a number of behavior emergencies and during some of these emergencies Switzer staff used a physical intervention called a “transport hold” on Student. Before this production, Parents did not know transport holds had been used to physically control Student while moving him from place to place.

53. Dr. White instructed staff to complete a BER form only if a physical restraint had been used on a student in a behavior emergency. If a physical escort or a “transport hold” had been used staff was supposed to complete an IR form. Both forms asked if parent had been contacted about the behavior emergency. Ms. Ryan completed all the BERs and IRs for behavior emergencies involving students in her class, even in instances when an aide or teacher’s assistant, rather than Ms. Ryan, had witnessed the emergency. Ms. Ryan submitted the completed BERs and IRs to Dr. White.

54. During the 2013-14 school year and the 2014 extended school year (between November 4, 2013 and August 25, 2014), Switzer staff completed more than 11 behavior emergency forms regarding Student on a combination of BERs and IRs. Some of these incidents involved use of a CPI transport hold on Student. Copies of these forms were not provided to Parents at the time the behavior emergencies occurred. Even though some forms noted that Parent had been contacted about the emergency behavioral incident and that transport holds had been used on Student, neither Ms. Ryan, nor any other Switzer staff member, informed Parents that physical emergency behavior interventions had been used on Student.

55. Eleven behavior emergency forms were produced to Parents in response to their request for educational records, although more than 11 behavior emergency forms (either BERs or IRs) about Student had been completed by Ms. Ryan for the 2013-2014 school year.. The additional missing BERs and IRs were not reasonably accounted for by Ms. Ryan, Dr. White, or anyone else from Switzer or District.

56. During the 2014-2015 school year a CPI transport hold was used on Student by Switzer staff more than five times. Only two BER and/or IR forms about Student for the 2014-2015 school year were produced in response to Student’s request for educational records, even though Ms. Ryan had completed more emergency behavior forms than that regarding Student for that school year. These additional missing BERs and IRs were not reasonably accounted for by Ms. Ryan, Dr. White, or anyone else from Switzer or District.

57. Dr. White claimed no additional behavior emergency forms existed because Student’s behavior had improved so much that there had not been any further behavior emergencies. This was contradicted by Ms. Ryan and Mr. Donald Lee, teacher’s assistant in Ms. Ryan’s class in the 2014-2015 school year, who both had first-hand knowledge of further behavior emergencies and forms documenting them. Ms. Ryan could not recall how many more behavior emergency forms she had completed about Student than the 11 produced, but she was sure she had completed more than 11. Dr. White did not directly participate in any interventions during Student’s behavior emergencies. Dr. White’s credibility in general was undermined by her testimony on this issue, which was not believable.

58. Dr. White stated that CPI transport holds were not required to be reported on BERs. She cited no specific and/or binding authority (other than the Education Code in general) in support of that opinion. This testimony was conclusory and not believable. She minimized the invasiveness of the physical transport holds used on Student by referring to

them as escorts. Mr. Lee's very credible testimony established the holds used on Student were of medium or strong hold. At least once Student had escaped a transport hold, so a strong hold had to be firm.

59. Mother credibly testified neither Ms. Ryan, nor anyone else, had told her that staff used CPI transport holds or any sort of physical interventions in Student's behavior emergencies. Ms. Ryan said "she was sure" she had told Mother that transport holds were used on Student, but she could not remember when or what she had told Mother. She was very hesitant when testifying and could not remember many details, was sometimes inconsistent and lacked candor. Mother's testimony on this issue was far more credible than Ms. Ryan's contradictory testimony.

60. Ms. Ryan's communication logs and texts to Mother did not mention that CPI transport holds had been used on Student, even though Ms. Ryan had completed BERs and IRs for the same time period. Some of those BERs and/or IRs specifically mentioned that CPI transport holds had been used. It was Ms. Ryan's practice to complete behavior emergency forms as soon as possible after incidents occurred so she could accurately record details of the behavioral emergency. Ms. Ryan did not explain why she failed to mention the BERs and IRs in her communication logs, emails and texts to Mother. No one from District or Switzer explained why the emergency interventions forms had not been provided to Parents on or close to the date the problem had occurred.

61. Switzer's policy was that a BER form was supposed to be completed if a physical restraint, including a transport hold, had been used on a child in a behavioral emergency. If the child had been simply escorted to another location, an IR was supposed to be completed instead. Switzer staff, including Ms. Ryan, frequently mistakenly reported behavioral emergencies on the wrong form. Dr. White was aware staff repeatedly made this reporting error.

Mother's Discovery of Facts Regarding Behavior Interventions Used and Toileting Data

62. Until April 12, 2016, Mother was not aware Switzer staff had used CPI transport holds on Student. Neither Ms. Ryan, nor any other Switzer personnel, informed Parents that CPI transport holds had been used on Student. Mother relied upon information provided to her by Switzer staff, mostly Ms. Ryan, about Student's behaviors and interventions used. CPI transport holds had been used on Student at least twice (and possibly more since completed BERs and IRs were missing) in behavior emergencies, as early as November 4, 2013.

63. On April 12, 2016, when BERs and IRs and toileting data were produced to Student at the IEP meeting, Mother learned for the first time that Switzer staff: had used transport holds on Student during behavioral emergencies since November 4, 2013; and Student might not have been taken to the bathroom every 30 minutes and, sometimes may not have been taken to the bathroom for unreasonably long intervals. Due to Parents' late

discovery of material information the statute of limitations regarding the behavior interventions used, and regarding one of the toileting claims accrued on April 12, 2016.

IEP meeting on April 12, 2016

64. An IEP meeting was held on April 12, 2016, as a continuation of the December 12, 2015 IEP, and to address Parent's request for interim home hospital instruction until a new placement was agreed upon. The team addressed proposed revisions to the Behavior Plan. Mother's attorney informed the team that Student's lack of progress in all areas and toileting regression was unacceptable and immediate changes to Student's program were necessary. Representatives of both District and Switzer, including Ms. Ryan and Dr. White, attended the meeting.

65. At the April 12, 2016 meeting District agreed to provide Student with home hospital instruction and to hire Behavior Learning Network, a non-public agency specializing in applied behavior analysis services, to observe Student and advise the team what interim behavioral services Student needed right away. Shortly thereafter Gregg Elsky, the director of Behavior Learning Network, observed Student in his home. Dr. Elsky has a doctorate in clinical psychology, and is also a licensed marriage and family therapist. He also is a Board Certified Behavior Analyst. He has extensive experience conducting functional behavior assessments; designing behavior intervention plans; consulting with teachers, service providers, parents and IEP teams; training behavior intervention therapists and aides; and supervising BCBAs, therapists and aides in the implementation of behavior plans. His testimony at hearing was credible. His testimony was candid, knowledgeable, forthright and appeared to be very sincere.

April 29, 2016 IEP Meeting

66. An IEP meeting was held on April 29, 2016. Dr. Elsky reported to the team regarding his observations of Student and his recommendations for immediate behavior services. Dr. Elsky had observed Student: touching other people; masturbating in public areas of the home; throwing brief, low intensity tantrums; eating ketchup directly from the bottle; and hiding under a table to avoid tasks. He observed Student habitually putting objects in his mouth. Student caught and juggled balls skillfully. He was not able to accurately state his last name. He was able to give his address. He had very limited verbal communication. He gave a few one to two word requests after being prompted. He often gave echolaic responses. Student spoke very quietly and had articulation problems. He often cried and whined. He wore a pull-up diaper. He loved water and participated in a lot of water-play.

67. Dr. Elsky told the team Student needed to master: table manners; toilet training; learning to make a purchase; some basic sight reading; basic object counting. Student also needed to learn to tolerate when his request for something was denied. Dr. Elsky further opined it was particularly important for Student to learn not to touch other people.

68. Dr. Elsky recommended Student be given a functional behavior assessment and a standardized verbal behavior assessment known as the Verbal Behavior Milestones Assessment and Placement Program. For interim services, while the assessments were pending, Dr. Elsky recommended: 30 hours a week of direct behavior service, with three hours a week of supervision by a BCBA. District agreed to hire Behavior Learning Network to provide the interim behavioral services and assessments recommended by Dr. Elsky.

69. Also at the April 29, 2016 meeting, the team continued to work on finalizing the IEP draft they had first addressed on October 7, 2015. Many of Student's goals were not met. District offered home hospital placement consisting of the following: specialized academic instruction one hour a day, five days a week (to be taught by an itinerant special education teacher from the Los Angeles County Office of Education); speech therapy one hour, three times a week (provided by a District speech therapist); and occupational therapy one hour, twice a month (provided by District occupational therapist). Adaptive physical education services were added to Student's program a few weeks later.

70. Student's academic instruction was provided at a local community center close to Student's home. The other services were provided in therapy rooms at District schools. The behavioral services were provided during Student's academic instruction and therapy services, in the home and community.

71. Student's home hospital instruction and services were supposed to start on April 25, 2016, but could not because Mother had not yet returned the required medical emergency contact form. Once Mother returned that completed form to District, Student's home hospital instruction and related services started about May 18, 2017.

72. During home hospital instruction Student's behaviors improved. He was able to focus. He made academic progress, and progress in speech therapy.

June 17, 2016 IEP Meeting

73. The IEP team met on June 17, 2016 to review the results of the Functional Behavior Assessment and Verbal Behavior Milestones Assessment and Placement Program assessments of Student conducted by Behavior Learning. Dr. Gregg Elsky, Jo Mullins, BCBA, and Ryan Pablico, BCBA, reported to the team on the assessments. The Milestones results revealed that most of Student's language related skills in 16 separately measured areas were comparable to those of an approximately 18 month old child. A few of his skills were comparable to the skills of preschool age children. His self-care skills were in the range of an approximately three to four year old child.

74. Behavior Learning Network staff made the following recommendations for Student's behavioral program: use a visual schedule, a token economy, reinforcing stimuli and cue cards. Behavior Learning Network proposed the following behavioral goals: reduce Student's mouthing of objects and pica; reduce his disruptive behaviors; reduce stereotypy;

increase his ability to request things; increase his vocabulary; improve his listening/responding skills; increase his visual perception of matching objects; increase his ability to draw shapes; increase his ability to answer who/what/where questions; and improve his self-help (hygiene) skills.

75. Behavior Learning Network recommended that Student receive 40 hours a week of one-to-one support from someone with training and expertise in applied behavior analysis (ABA). Behavior Learning Network further recommended this program be supervised by someone with expertise in designing and implementing ABA programs for children. Behavior Learning Network also recommended that Parents meet nine hours a month with the ABA service providers, and that Student's teachers and service providers meet with the ABA service providers once a month.

76. Pursuant to District's instruction, Behavior Learning Network developed a behavioral treatment plan for Student shortly after it completed the Functional Behavior Assessment and Verbal Behavior Milestones Assessment and Placement Program. Behavior Learning Network continued to provide treatment to Student through the hearing date.

77. The team had planned to also address Student's transition to high school at the June 17, 2016 IEP meeting. However, this did not occur because District was unable to invite representatives from the appropriate high school district, since Parents had not yet decided if Student would attend high school at the Redondo Beach High School District or the Manhattan Beach High School District in fall 2016.

78. The last day that the home hospital instruction and related services were provided to Student was the last day of the 2016 extended school year, which was July 22, 2016.

Student's Behavior Plans

79. Student's IEP and Behavior Plan dated October 4, 2013 was in place and should have been implemented at Switzer from November 13, 2013, when Mother gave her written consent, through November 6, 2015.

80. On November 6, 2015, Mother gave her written consent to the October 1, 2014 IEP and Behavior Plan. Therefore, the October 1, 2014 IEP and Behavior Plan should have been implemented starting on November 6, 2015.

81. There were no significant differences between the October 4, 2013 Behavior Plan, and the superseding Behavior Plan dated October 1, 2014. There was no explanation provided as to why Student's Behavior Plan was not revised significantly even though Student's behaviors had deteriorated starting in the 2014-2015 school year and his behaviors were preventing Student from being able to focus on the academic instruction and speech therapy provided to him.

82. Student's Behavior Goal #1 in his October 1, 2014 IEP stated that, by October 1, 2015, Student would decrease the production of saliva held in his mouth and his spitting and drooling throughout his daily routine instead of spitting or drooling on himself to gain control over a situation in four out of five trials as measured and recorded by staff. This goal was partially met by October 7, 2015 because he only made small progress toward reaching it.

83. Student's Behavior Goal #1 in his October 1, 2014 IEP stated that by October 1, 2015, Student would complete a lesson up to five trials without spitting at the face of the person engaging in the lesson with him as measured and recorded by staff. This goal was partially met by October 27, 2015. He was still spitting in faces one to three times every two weeks, especially when overstimulated or with a non-preferred task.

84. Student's toileting goal (Behavior Goal #3) in his October 1, 2014 IEP stated: "By October 1, 2015, [Student] will verbally request to use the toilet or urinal when he feels the urge to urinate in 4 out of 5 trials as measured by staff." Student was wearing diapers at school frequently starting in October, 2014, and continued to do so until he left Switzer in February, 2016. Student's toileting goal in his October 1, 2014 IEP was not met by October 27, 2015. By October, 2015 Student was having frequent accidents at school and not asking to go to the bathroom. He was wearing pull-up diapers at school most of the time throughout the second half of 2015.

85. Student's Behavior Goal #4 in his October 1, 2014 IEP stated that Student would stop eloping from class by October 27, 2015. By October, 2015 Student still tried to elope from class. The goal progress report indicated that his aide used "... compliance techniques to improve on his referencing and staying with the adult guide." It is unclear what these techniques were, but they did not appear to be working since Student continued to elope from class.

Dr. Robert Rome, Student's expert school psychologist

86. Dr. Robert Rome, who had been a licensed school psychologist since 1984, assessed Student and reviewed his records going back to kindergarten. He observed Student while being instructed by a special education teacher, during behavioral therapy, and at home. Dr. Rome conducted standardized assessments of Student's intellectual abilities and academic skills. Dr. Rome also gave Mother the Behavior Assessment System for Children III rating scale and the Autism Diagnostic Observation Schedule), module 2, which is for individuals who have very limited verbal skills.

87. Dr. Rome noted Student had many repetitive behaviors, but Student would stop such behaviors when he is prompted. Student's social communication was severely limited. He usually gave a one or two word response to a question. Student's academic function was comparable to that of a four or five year old child.

88. Dr. Rome observed that Student needed to use the toilet about every hour and 15 minutes. Student needed some toileting assistance with wiping after bowel movements, but he was able to urinate independently.³ Dr. Rome opined that Student did not need a toileting goal.⁴

89. Dr. Rome also opined that Student's frequent urinary accidents were triggered by the stress Student experienced at Switzer. Some of Student's IEP goals, both academic and behavioral, were impossible for Student to achieve due to his cognitive delays, severe autism and speech impairment. Some of his goals were not appropriate for a primarily nonverbal child such as Student. As a result, Student was frustrated and anxious. Dr. Rome believed stress caused Student's toileting regression. Dr. Rome also opined that Student was frustrated because he could not communicate his needs to school staff. These frustrations were manifested in Student's maladaptive behaviors.

90. Dr. Rome opined that Switzer's practice of putting Student in the quiet room for a brief "time out" was appropriate. However, some records indicated Student stayed in the quiet room too long, which could be perceived by Student as a punishment. Dr. Rome noted that Student's major behavioral problems at Switzer were spitting, toileting and eloping, and that these impeded Student's progress at school. These behaviors increased during his time at Switzer, yet his Behavior Plan was not revised. Dr. Rome also disagreed with the extensive use of exercise with Student as a behavioral intervention. Student may have perceived the exercise as punishment on occasion.

91. Dr. Rome believed Switzer inappropriately used transport holds on Student. He stated if Student was cooperative, as some Switzer witnesses noted, then a transport hold was not necessary. The emergency behavior reports Dr. Rome reviewed did not indicate how long the transport holds were used on Student. Dr. Rome concluded that Student was not provided with systematic positive behavior interventions at Switzer.

92. Dr. Rome believed Student would benefit most from compensatory services which are provided in a one-to-one setting. Dr. Rome recommended Student receive two

³ Dr. Rome reviewed the toileting data collected by Switzer staff on Student. He found the data collection to be irregular and inconsistent. Some of the collected data indicated Student was taken to the bathroom about three times a day and sometimes less. Dr. Rome opined this was not frequent enough for Student to be taken to the bathroom, resulting in toileting accidents. Dr. Rome's opinion was based on the faulty assumption that Switzer staff did not take Student to the bathroom frequently enough based on the toileting data. However, Ms. Ryan credibly testified that Student was taken more frequently than indicated on the data because the aides forgot to mark the data chart every time Student was taken to the bathroom.

⁴ Dr. Rome opined that Student's accidents at school occurred because he was not taken to the bathroom as often as necessary. However, this opinion was based on the incorrect assumption that all bathroom trips were recorded in the toileting data.

hours of academic instruction for each day he missed, and that Student receive one hour a day in behavior services, three to five times a week, as compensatory education.

93. After reviewing Student's IEPs Dr. Rome concluded that Student had made, nominal progress to no progress in all areas (academic, speech, behavior) during the time he attended Switzer. Dr. Rome also opined that Student made more steady progress academically and behaviorally when he later (starting in May, 2016) left Switzer and received instruction and related services through a home hospital program.

94. Dr. Rome further opined it was totally inappropriate for Switzer staff to have physically intervened with Student by using transport holds on him when he eloped from class, spit or otherwise behaved negatively, because Student's maladaptive behaviors had not created a danger to others or himself. Moreover, Student was likely to deescalate in a short time if Switzer staff had merely observed Student until he calmed down, rather than physically intervening.

95. Dr. Rome's extensive experience included work as a school psychologist and a supervisor of other school psychologists. He has worked for about 40 school districts conducting assessments of students. For the last eight to ten years he has conducted independent educational evaluations on behalf of school districts. He has also assessed individuals for both the courts and a regional center. He was one of eight psychologists who developed best assessment practices for the Los Angeles County Department of Mental Health. He used to attend about 20 IEP meetings a year. Currently he attends about 15 IEP meetings per year. He has extensive experience in both treating and assessing children with special needs. In addition, Dr. Rome supervised other school psychologists for many years. He also had extensive experience assessing children on behalf of school districts and a regional center. Dr. Rome's testimony was very credible. While testifying Dr. Rome was confident, knowledgeable, candid and reasonable.

Dr. Barbara Silton, psychologist and learning specialist

96. Student was treated, on and off over a few years by Dr. Barbara Silton, a psychologist and learning specialist, at Dr. Silton's educational clinic in Woodland Hills, California. Dr. Silton credibly opined that Student was hyperactive, anxious and very sensitive to distraction, making it very difficult for him to focus on academic tasks. Dr. Silton's approach with Student was to first teach Student to calm himself, and then later introduce him to pre-academics.

97. Dr. Silton opined that Student did not make academic progress while he attended Switzer. When Student went to Dr. Silton's clinic he left Switzer about an hour before the end of the school day. There was no evidence that Student's progress at Switzer was negatively impacted by his early departures from school to receive services at Dr. Silton's clinic.

98. Dr. Silton had extensive experience dealing with autistic children and nonverbal children who had experienced trauma. Dr. Silton's expertise was in the relationship between learning and emotion. She has assessed and treatment many children who have trouble learning. She developed a five phase program with specific protocols designed to create positive feelings through success at small tasks, resulting in calming Student. The calm attitude enabled him to be attentive long enough to address academic challenges. Student made progress in Dr. Silton's program. However, his progress was slow. He reached the third phase of Dr. Silton's program after a few years.

99. In November, 2014 Student stopped attending Dr. Silton's clinic regularly because his behaviors in the car during the long commute to Woodland Hills became unmanageable. Student sometimes pulled feces out of his pants and smeared it on car surfaces and himself. These behaviors were particularly difficult for Mother to manage when driving on the freeway.

100. Dr. Silton's testimony was credible, although she had not observed Student at Switzer. Her testimony confirmed that Student suffered from severe anxiety related to academic tasks and that when Student was able to make academic progress that such progress was slow.

Lisa Ryan, Student's Teacher at Switzer

101. Ms. Ryan appeared nervous and lacking confidence when testifying at hearing. Her testimony lacked credibility largely because she was unable to answer many relevant questions at hearing because she claimed to not remember what occurred. Also, many of her responses were vague, creating the impression she was avoiding direct detailed honest responses. Ms. Ryan's responses to questions were also inconsistent on multiple occasions. When confronted as to which of her contradictory answers was the accurate response, she was not able to respond with clarity. Ms. Ryan was unable to give substantive responses to questions that a teacher should be able to reasonably answer. She did not appear to answer questions posed to her at hearing with candor. Also, numerous times when Ms. Ryan was able to give a substantive answer, she took a very long time to respond. Also on a few occasions her answers to questions were contradicted by other credible evidence. Consequently, her testimony did not appear to be candid.

102. Ms. Ryan's verbal and nonverbal responses appeared to be those of a witness who was trying to avoid answering questions directly, fully and honestly. For example, she was unable to answer the ALJ's inquiry regarding approximately how many children in her classroom, on average for a specified time period, had been physically restrained. Moreover, Ms. Ryan was curiously unable to recall much material information about Student's behavioral episodes, even when presented with documents she had drafted at the time of certain these significant events. Sometimes she could not even identify if handwriting on documents was hers. Ms. Ryan's credibility was further undermined because, on some dates which Ms. Ryan had completed either a BER or IR about a CPI transport hold being used on Student, Ms. Ryan failed to mention that a transport hold had been used on Student that day

in the daily communication logs to Mother, which were intended to apprise Mother as to how Student's day had gone. This omission undermined her testimony at hearing that she told Mother that transport holds were used on Student at Switzer. Ms. Ryan attempted to contradict Mother's testimony. Mother's testimony was more credible than Ms. Ryan's testimony.

103. The communication log between Mother and Ms. Ryan for June 2, 2014 did not mention that a CPI transport hold had been used on Student at Switzer that day even though a BER documented that a CPI transport hold had been used on Student at school that day. Also on July 15, 2014 a BER documented that a CPI hold had been used on Student that day at school, but the communication log between Mother and Ms. Ryan did not mention that a CPI hold had been used on Student at school that day.

104. Ms. Ryan testified that she told Mother that CPI transport holds were used on Student. Mother testified that neither Ms. Ryan, nor any other Switzer staff member informed Mother while Student attended Switzer that CPI transport holds or other CPI holds were used on Student at school. A recording of an IEP meeting established that Ms. Ryan told the team Student had not been physically restrained at Switzer as a behavioral intervention. Mother's testimony is more credible than Ms. Ryan's testimony on this issue.

Dr. Wendy White, Director of Spectrum Program at Switzer

105. Dr. Wendy White is a licensed school psychologist and director of Switzer's Spectrum program, which is primarily for autistic students. She has been at Switzer in that capacity for approximately six years.

106. Dr. White was on Student's IEP team. Dr. White and Ms. Ryan jointly developed drafts of Student's Behavior Plans. Student's Behavior Plan in effect for seventh grade was almost identical to Student's Behavior Plan in effect for sixth grade. Dr. White supervised the development and implementation of Student's Behavior Plan.

107. Dr. White hired and trained the student aides in the Spectrum program. Because there was a high turnover of aides, Student had a number of different aides. It was difficult for Student to change to different aides.

108. Dr. White testified that Switzer staff, including Ms. Ryan, often mistakenly reported use of CPI transport holds on BER forms, instead of on IR's. The BERs were supposed to be promptly provided to District, but they were not.

109. According to Dr. White, the law did not require Switzer to report its use of CPI transport holds on Student to District. However, Ms. White acknowledged that CPI stationary holds, used to hold a child in place, rather than to physically move him from one location to another, were events that the law required Switzer to report to District. The differences in circumstances that determined when a BER, rather than an IR form, should have been completed were so subtle that some Switzer staff members were confused as to

which behavior emergency form to complete. Ms. Ryan acknowledged that the circumstances recorded on BER forms and IR forms all constituted behavioral emergencies.

110. Dr. White testified that there were no BERs or IRs for Student after December, 2014, because Student's behavior improved significantly after that date. This testimony was contradicted by Ms. Ryan and teacher's assistant, Mr. Lee. Ms. Ryan stated that she completed BERs and/or IRs about Student pursuant to Student's request for educational records in spring, 2017, and she had given the reports to Ms. White. Ms. Ryan did not know why the documents had not been produced by Switzer to Parents. In light of other evidence Dr. White's statement that no further BERs and IRs existed because Student's behavior had improved was unbelievable, or at the very least based on insufficient knowledge about what was happening with Student at this time.

Mr. Donald Lee, Teacher's Assistant at Switzer

111. Donald Lee was Ms. Ryan's teacher assistant during the 2014-2015 school year. In that position he frequently assisted Student. He brought Student to the bathroom in the morning when he arrived at school in the taxi. Student usually had a urine accident before he went to class in the morning. Student would then get cleaned up and changed and go to class. Student's toileting regressed over the 2014-2015 school year. The reasons for this regression were not established. Mr. Lee, who is presently completing course work toward his teaching credential, was an extremely credible witness. He testified candidly, and knowledgably and he appeared to be very sincere, open and forthright.

112. Mr. Lee, participated in multiple transport holds of Student, which required two adult staff members. The transport holds used on Student at Switzer involved two adults (one on each side of Student). Each adult had one hand under Student's armpit, and the other hand holding Student's wrist, while they guided Student to a different location (i.e., the quiet room). Some students escaped transport holds, so a reasonable amount of strength and firmness was necessary. Mr. Lee noted that the level of force used on Student during transport holds was comparable to either "medium-level holding" or "higher-level holding" as depicted in CPI materials. The holds used on Student were not comparable to a "lower-level holding," which required only one, rather than two adults and a light hold. The transport holds used on Student were executed firmly, but not so tightly to cause Student harm. Student walked voluntarily when transport holds were used on him. The circumstances of the transport holds described by Mr. Lee were more than a mere escort of Student to another location. These physical interventions were subject to the legal restrictions, conditions, reporting and follow-up required by law.

113. CPI transport holds were used on Student more than five times during the 2014-2015 school year. Five BER's or IR's, documenting staff use of transport holds on Student were produced by Switzer to Parents on April 12, 2017, in response to their request for educational records. Neither Ms. Ryan, nor Dr. White credibly explained why the additional BERs or IRs documenting all the transport holds used on Student in the 2014-2015 school year had not been produced to Parents. Either the required emergency

BERs or IRs had not been completed by Ms. Ryan, or they were misplaced, or simply not produced in response to Parents request for educational records.

Patricia Escalante, District Superintendent

114. Patricia Escalante, District's Superintendent, was responsible for the ultimate supervision of District's special education program. No District employee held the position of special education director. Ms. Escalante attended most of Student's IEP meetings as the District's administrative representative. She was a credible witness and had been involved with the administrative end of Student's placement. She had observed Student at Switzer, but otherwise did not have first-hand knowledge of Student's behaviors and progress at school.

115. Ms. Escalante was the District representative during most of the due process hearing. The first time that Ms. Escalante was informed that CPI transport holds had been used on Student at Switzer was when she heard testimony of certain Switzer staff members at hearing.

116. Switzer did not provide any of the BERs regarding Student to District. Switzer did not inform District it had used CPI transport holds on Student, or that Student was kept in the quiet room for the entire day on at least two occasions.

Speech Therapy

117. Cheryl Marsh, one of the two speech therapists providing speech therapy to Student, provided Student with two hours a week of speech therapy. Ms. Michelle Thermos, the other speech therapist, provided Student with three hours a week of speech therapy.

118. On occasion Ms. Marsh had to stop Student's speech therapy before the hour session was completed due to Student's uncooperative behavior. On one occasion Student knocked Ms. Marsh's glasses off of her face. Ms. Marsh made up the speech therapy time which Student missed in such interrupted sessions by working with Student on the playground or in other locations on the Switzer campus. Ms. Marsh did not record such "make-up" speech therapy services that she provided to Student on her service registers.

119. Student was cooperative in his speech therapy sessions with Ms. Thermos and he made appropriate progress in his speech therapy in light of his circumstances. Student's behaviors did not interfere with his progress toward his goals during his speech therapy sessions with Ms. Thermos.

120. In about March, 2015, the IEP team reduced Student's speech therapy time to three hours a week from five hours a week because Student was acting out in Ms. Marsh's sessions and not benefiting from five hours of individual speech therapy per week. Student behaved better in Ms. Thermos' speech therapy sessions. After that Student only received speech therapy from Ms. Thermos three times per week. Student made progress in his

speech therapy sessions with Ms. Thermos. The team thought that three hours a week of speech therapy was the maximum amount which would benefit Student.

121. No credible evidence established that either Ms. Marsh or Ms. Thermos failed to implement Student's speech therapy services by providing less than the amount of speech and language therapy called for in Student's IEP.

Dr. Carl Muchnick, Student's Pediatrician

122. Student was examined by his pediatrician, Carl Muchnick, M.D., on about February 23, 2016. Shortly thereafter Dr. Muchnick wrote a medical note stating that Student was suffering from extreme anxiety at school and recommended District provide him with home hospital instruction until a more appropriate placement for Student was determined. Dr. Muchnick testified that Student's toileting accidents at school were not likely caused by Student's anti-seizure medication (Depakote), or another medical reason apart from Student's autism.

Allegations of Masturbation in the Quiet Room

123. When in the quiet room Student often laid prone on a mat on the floor and pressed his pelvis into the mat. Mother opined that this behavior was masturbation. Ms. Ryan disagreed with that characterization of Student's behavior. Patricia Escalante, District superintendent, observed Student lying prone in the quiet room and opined Student was not masturbating in that position.

124. Student sometimes tried to put his hands down the front of his pants when he was lying down in the quiet room. Switzer staff stopped Student by telling him he was not allowed to put his hands down his pants at school. Student complied with this instruction. Student failed to establish he was permitted by Switzer staff to masturbate in the quiet room or that staff failed to appropriately intervene and stop Student if he put his hands into his pants in the quiet room.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁶ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational

⁶ All subsequent references to the Code of Federal Regulations are to the 2006 version.

benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.) In a unanimous decision, the United States Supreme Court declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’ ...” (*Endrew F. v. Douglas School Dist. RE-1* (2017) 137 S.Ct. 988, 1000 (*Endrew F.*)). The Supreme Court in *Endrew* stated that school districts must “... offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” (*Id.* at p. 1002.)

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

5. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student is the filing party and has the burden of persuasion on all issues.

District Is Liable for Switzer’s Conduct/Omissions Regarding Student

6. Student contends District is liable for Switzer’s conduct and omissions. District contends that, pursuant to the provisions of the contract between District and Switzer, Switzer, not District is liable for Switzer’s conduct and omissions.

APPLICABLE LAW: DISTRICT’S LIABILITY FOR NONPUBLIC SCHOOL PLACEMENT

7. A local education agency responsible for a child’s education cannot avoid its legal obligations under the IDEA by contracting with another entity. California Education Code § 56383 states that, even if a nonpublic, nonsectarian school implements a child’s individualized education program, responsibility for compliance with applicable portions of the Education Code, and with the IDEA (20 U.S.C. § 1400 et. seq.) remains with the local educational agency.

ANALYSIS: DISTRICT'S RESPONSIBILITY

8. In this case District place Student at Switzer, which acted as District's agent as to many of District's obligations to Student. Additionally District had an obligation to monitor Switzer. District remained responsible for all of Switzer's acts and omissions with regard to Student. The terms of a contract between Switzer and District with regard to Student's education and services do not obviate District's responsibility to Student under the IDEA and the Education Code. Consequently, Switzer's acts and omissions will be deemed to be District's acts and omissions in this matter.

Issues A (5) and (6) and D (1)(a), D(2)(a)(i) and D(2)(b)(i): Statute of Limitations With Regard to Behavioral Intervention Claims

9. Student contends, with regard to behavioral interventions, where the facts occurred prior to May 31, 2015, that Parent did not know or have reason to know about the behavior interventions at issue, and that exceptions to the statute of limitation apply because District misrepresented to Parent the nature of behavior interventions it was using with Student, and withheld information from Parent that it was required to provide to Parents regarding the behavior interventions. District contends that behavior interventions which occurred prior to May 31, 2015, are barred by the statute of limitation and no exception applies.

APPLICABLE LAW

10. A due process complaint: "must allege a violation that occurred not more than two years before the date the parent or public agency *knew or should have known about the alleged action* that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law." (34 C.F.R. § 300.507(a)(2) (emphasis added).)

11. California implements the IDEA through its special education implementing statutes. (*Miller ex rel. Miller v. San Mateo-Foster City Unified School Dist.* (N.D. Cal. 2004) 318 F.Supp.2d 851, 860.) Similar to the federal statute, Education Code section 56505, subdivision (l) provides that any request for a due process hearing shall be filed within two years from the date the party initiating the request *knew or had reason to know of the facts underlying* the basis for the request.

12. A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.M. v. Lafayette School Dist.* (N.D. Cal., Feb. 7, 2012, No. 10-04223 SI) 2012 WL 398773, at *17 – 19 (*M.M.*, was affd.in part and revd. in part on other grounds by *M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842, 859; see also, *M.D. v. Southington Board. of Educ.* (2d Cir. 2003) 334 F.3d 217, 221.) In *M.M.*, the District Court made an evidentiary finding that "parents had sufficient knowledge of the educational goings-on inside and outside of the classroom to be put on notice of their

underlying claims.” (*M.M., supra*, at *18) In other words, the statute of limitations begins to run when a party is aware of the underlying facts that would support a legal claim, not when a party learns that the action was wrong. (*M.M. supra*, at *18.)

13. The “‘knowledge of facts’ requirement does not demand that the [party] know the specific legal theory or even the specific facts of the relevant claim; rather the [party] must have known or reasonably should have known the facts underlying the supposed learning disability and their IDEA rights.” (*Miller ex rel. Miller, supra*, 318 F.Supp.2d at p. 861 [citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111]; *Ashlee R. ex rel. Russell v. Oakland Unified School Dist. Financing Corp.* (N.D. Cal., Aug. 23, 2004, No. C 03-5802 MEJ) 2004 WL 1878214, at *5.)

14. The statute of limitations for special education claims in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) However, title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (l), establish exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency’s withholding of information from the parent that was required to be provided to the parent.

15. The Ninth Circuit recently reaffirmed the “discovery rule” exception to the statute of limitations. (*Avila v. Spokane School Dist.* 81 (9th Cir. 2017) 852 F.3d 936, 941.) The exemption from the statute of limitations is narrow and applies where misrepresentation or concealment of facts regarding a pupil’s disability prevents him from understanding underlying facts. Student contends that in this case his claims are exempt from the two year statute of limitations because District misrepresented or concealed facts regarding the behavioral techniques and toileting practices actually implemented with regard to Student at Switzer.

ANALYSIS

16. Evidence established that Parents were not aware Switzer staff had used transport holds or any other kind of physical behavior interventions on Student at any time before April 12, 2016, when Switzer produced BERs and IHs to Student pursuant to a records request. Mother had specifically inquired if CPI techniques were used on Student and was told by Ms. Ryan that they were not, which was a misrepresentation. There was no evidence which suggested Parents had reason to know about the behavior interventions being used on Student at Switzer.

17. Prior to April 12, 2016 Parents were not aware of the facts underlying Student’s claims regarding improper behavior interventions: use of illegal behavior interventions (Student’s issue A(1)); use of unwarranted emergency behavior interventions (Student’s issue A(2)); use of interventions that caused Student humiliation and emotional trauma (Student’s issue A(3)); and failure to provide behavior interventions to allow

Student access to speech and language services (Student's issue A(4).) Therefore, the exceptions to the statute of limitations apply to this case. Student had two years from April 12, 2016, the date he first learned the facts underlying Student's causes of actions in his issue A, to file his claims regarding Switzer's behavior interventions with Student. Since Student filed this action with OAH on May 31, 2017, Student's claims regarding improper behavioral interventions are not barred by the statute of limitations.

18. Although exceptions to the statute of limitations are irrelevant where, as here, the claim has first accrued within the two year statute, Student also met his burden of proof on sub-issue A(5) because the evidence established that, where the facts regarding District's/Switzer's behavior interventions occurred prior to May 31, 2015, Parents did not know and had no reason to know about the behavior interventions at issue within the statute of limitations.

19. Student also met his burden of proof on sub-issue A(6) because the evidence established that where the facts occurred prior to May 31, 2015: District/Switzer misrepresented to Parents the nature of the emergency behavior interventions being used on Student (sub-issue A(6)(a)); and District/Switzer withheld information from Parents about emergency behavior interventions that had been used on Student that District was required to provide to Parents (sub-issue A(6)(b).)

20. For the same reasons, Student also met his burden with respect to Issues D(1)(a), D(2)(a)(i) and D(2)(b)(i).

Issues A (1) through (4): Behavioral Interventions

21. Student contends District denied Student a FAPE through the end of the extended school year of 2016 with regard to Student's unique area of need in behavior by use of illegal behavior interventions to address disability related behavior; use of unwarranted emergency behavior interventions; use of interventions that caused Student humiliation and emotional trauma; and/or failing to provide behavior interventions to allow Student access to speech and language services. District contends it did not deny Student a FAPE because the behavior interventions it used with Student were appropriate and warranted.

APPLICABLE LAW

22. If a child's behavior interferes with his or her learning or the learning of others, the IDEA requires that the IEP team, in developing the IEP, "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) A behavior intervention is the systematic implementation of procedures that result in lasting positive changes in the individual's behavior. Children with disabilities who exhibit serious behavioral challenges are entitled to timely behavioral assessments as well as development and implementation of positive behavioral interventions and supports. 200 U.S.C. § 1400(c)(5)(F); Ed. Code § 56520(b).

23. The U.S. Supreme Court standard for determining FAPE is whether a district's plan is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Endrew F. supra*, at 137 S.Ct. 988, 1002.) To meet the Supreme Court's FAPE standard, a behavior intervention plan should be tailored to the unique needs of the particular child and appropriately ambitious in light of the child's circumstances. (*Ibid.*) The "reasonably calculated" standard means district should consider the effectiveness of specific strategies and supports it has provided to the child in the past, including the behavior interventions. The student's progress does not have to be considered "ideal" to meet FAPE requirements. The IDEA does not guarantee positive substantive outcomes. (*Rowley, supra*, at p. 192.)

24. The IDEA requires IEP teams to consider the use of positive behavioral interventions and supports, and other strategies to address behaviors that impede a student's learning or that of others. (20 U.S.C. § 1414 (d)(3)(B)(i); 34 C.F.R. § 300.324 (a)(2)(i).) IEP teams should consider the behavioral needs of students in the development, review, and revision of IEPs when necessary to provide FAPE. Teams must consider and include appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs of children whose behavior impedes their own learning or the learning of their peers. (*Questions and Answers on Endrew F. v. Douglas County Sch. Dist. RE-1*, [71 IDELR 68, question 16](#)) (EDU 2017).)

25. A district's failure to develop positive behavior interventions can amount to a denial of FAPE. (*See Rialto Unified Sch. Dist.*, [48 IDELR 296](#) (SEA CA 2007) [ordering a district to provide 250 hours of compensatory education to a sixth-grader who was expelled because of his escalating behavioral problems]; *Neosho R-V Sch. Dist. v. Clark*, (8th Cir. 2003) 315 F.3d 1022, 1028, 1029. [Any slight academic benefit the student received was lost because of ongoing behavior problems that interfered with his ability to learn]; *C.F. ex rel. R.F. v. New York City Dept. of Educ.* (2d Cir. 2014) 746 F.3d 68, [56 IDELR 212](#) (E.D.N.Y. 2011), *aff'd*, [59 IDELR 241](#) (2d Cir. 2012).) A district may also deny a child FAPE by developing an inappropriate behavior plan. See, *C.F. v. New York City Dep't of Educ.*, (2d Cir. 2014) 46 F.3d 68, 80. [District liable for developing an inappropriate BIP].)

26. The IDEA does not directly address the use of restraint and seclusion in school. However, if such methods are permitted by state law, and necessary for a particular child to receive a FAPE or to enable the child to participate in extracurricular and non-academic activities, they should be incorporated into the child's IEP or behavior plan. (*Letter to Anonymous*, 57 IDELR 49 (OSERS 2010).) "This does not mean, however, that school districts are free to implement aversive behavioral interventions with abandon." (*Letter to Trader*, 48 IDELR 47 (OSEP 2006).) A physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purposes of inducing a student who is acting out to walk to a safe location. (*U.S. Dept. of Education Restraint and Seclusion: Resource Document*, p. 10.)

27. Emergency interventions may only be used to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the individual with exceptional needs, or others, and that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. (Ed. Code, § 56521.1,(a).) Emergency interventions may not be used as a substitute for a systematic positive behavior plan which is designed to change, replace, modify, or eliminate a targeted behavior. (Ed. Code, § 56521.1,(b).)

28. The law requires that an emergency intervention shall not be used for longer than is necessary to contain dangerous behavior posing serious harm to others or self. Further, a situation requiring a prolonged emergency intervention requires staff to seek the assistance of a school administrator or law enforcement agency. (Ed. Code, § 56521.1, (c).) Emergency interventions shall not use an amount of force exceeding that which is reasonable and necessary under the circumstances. (Ed. Code, § 56521.1,(d)(3).)

29. In order to prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions, parents must be notified within one school day if an emergency intervention is used or serious property damage occurs. A behavior emergency report must be immediately completed by the school where the intervention occurred; kept in the student's file; and provide all of the following information:

- a. The name and age of the individual with exceptional needs.
- b. The setting and location of the incident.
- c. The name of the staff or other persons involved.
- d. A description of the incident and the emergency intervention used, and whether the individual with exceptional needs is currently engaged in any systematic behavior intervention plan.
- e. Details of any Injuries sustained by the Individual with exceptional needs, or others, including staff, as a result of the incident. (Ed. Code, § 56521.1,(e).)

30. An emergency behavior report must be immediately forwarded to, and reviewed by, a designated school administrator. (Ed. Code, Section 56521.1(f).)

31. If a behavior emergency report is written regarding an incident concerning a student eligible for special education with a behavior intervention plan, involving either a previously unseen serious behavior problem, or where a previously designed intervention has been ineffective, there will be a referral to the IEP team to review and determine if the incident constitutes a need to modify the student's behavior intervention plan. (Ed. Code, § 56521.1,(h).)

ANALYSIS:

32. Student met his burden of proof on Issues A(1) and A(2) for the period from November, 2013 (when the first transport hold was documented) until the end of January, 2016, when Student left Switzer. Switzer failed to comply with multiple sections of the Education Code which specifically address emergency behavior interventions and a student's rights to a positive, systematic plan for behavior interventions. Switzer failed to report to Parents and/or District within one school day when CPI transport holds were used on Student in violation of Education Code, section 56521.1(e). The emergency behavior reports (BERs and IRs) completed by Ms. Ryan about transport holds used on Student during behavior emergencies were not provided to Parents or District when those events occurred. Moreover, the fact that a number of emergency behavior intervention reports completed by Ms. Ryan about Student were missing and not accounted for, as well as the testimony of both Ms. Ryan and Mr. Lee established that Switzer continued to regularly use transport holds on Student starting at least in November, 2013, when the first transport hold was documented on an emergency behavior intervention form, and throughout his tenure at Switzer. Furthermore, Switzer concealed this information from Parents and District in violation of the Education Code.

33. The transport holds were not mere escorts since medium to higher level holds were used on Student by two staff members to execute this CPI technique. Physical interventions of this sort should have been promptly reported to Parents, District and the IEP team and used only in unexpected situations. Student's maladaptive behaviors (eloping, spitting, slapping walls and tables) were predictable. The IEP team should have developed less intrusive and more effective techniques to address Student's predictable maladaptive behaviors. Instead Switzer continued to treat Student's repeated maladaptive behaviors as unpredictable behavior emergencies by using CPI transport holds, when other less aversive techniques should have been tried.

34. The evidence established that when CPI transport holds were used on Student, he was escalated, but not violent or creating a danger to himself or others. He was also not destroying property. When Student eloped from class he was not in danger of exiting the Switzer campus. Student's behaviors were disruptive, mainly to himself and his academic tasks, but were not violent. Therefore, less intrusive means could and should have been used to address these behavior emergencies. Education Code, section 56521.1(d)(3) forbids schools from using an amount of force exceeding that which is reasonable and necessary under the circumstances. Switzer, and therefore, District, failed to comply with this important protection for disabled students. Dr. Rome's testimony established that, if staff would have merely kept an eye on Student while waiting for him to deescalate he would have done so after a brief time. Therefore, less intrusive means than CPI transport holds should have been used on Student.

35. Switzer's failure to disclose the multiple transport holds used on Student also kept valuable information from the IEP team and probably deprived Student of necessary revisions to his Behavior Plan. Student's Behavior Plan was not materially revised while he was at Switzer, even though his maladaptive behaviors continued and even worsened in the 2014-2015 school year, and further deteriorated in the 2015-2016 school year.

36. Education Code, section 56521.1(b) forbids the use of emergency interventions as a substitute for a systematic positive behavior plan which is designed to change, replace, modify, or eliminate a targeted behavior. Switzer failed to comply with this Education Code section by continuing to use the emergency intervention of transport holds on Student when it should have instead revised his Behavior Plan with a plan designed to change his maladaptive behaviors. Due to Student's severe developmental delays it is impossible to know if revised strategies would have worked to change his behaviors, but Student was entitled to a materially revised Behavior Plan which applied different techniques that may have worked to change, replace, modify or eliminate his disruptive behaviors which impeded Student's ability to access his academic instruction. Emergency interventions may only be used to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the individual with exceptional needs, or others, and that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. Switzer continued to use the emergency behavior intervention of transport holds on Student instead of providing him with a revised Behavior Plan. (See, Ed. Code, § 56521.1,(a).) Emergency interventions may not be used as a substitute for a systematic positive behavior plan which is designed to change, replace, modify, or eliminate a targeted behavior. (Ed. Code, § 56521.1,(b).)

37. The weight of the evidence proved that Switzer/District failed to comply with many of the express requirements of the Education Code limiting a school's use of emergency behavior interventions and requiring a school to develop a systematic positive behavior plan designed to change, replace, modify, or eliminate targeted behaviors. Therefore, Student met his burden of proof on Issues A(1) and A(2) for the period from November, 2013 (when the first transport hold was documented) until the end of January, 2016, when Student left Switzer.

38. Student failed to meet his burden of proof with respect to Issue A(3). There is an inference from the evidence that there was a correlation between Switzer's use of emergency behavior interventions and Student exhibiting emotional trauma about going to Switzer. In January, 2016, Student's anxiety increased to the point where he was very upset at the mention of Switzer or school or when the car he was riding in was near the school. Although he was mostly non-verbal, he cried and screamed "no school" or "no Switzer." He was fearful and resisted getting into the taxi to go to school in the morning. Mother wondered why Student was so frightened. She was concerned that Student might be unable to tell her why he was so resistant about going to Switzer.⁷ While the evidence raised a

question of whether there was a correlation between Switzer's conduct and Student's anxiety, there was no direct evidence that the emergency behavior interventions used at Switzer caused Student humiliation and emotional trauma. Dr. Rome observed from his records review that Switzer inappropriately used transport holds on Student and did not provide systematic positive behavior interventions. He did not offer an opinion that the use of the holds or the failure to provide positive interventions caused humiliation and emotional trauma to Student.

Unfortunately, Student cannot speak for himself and no medical or psychological expert opined that the inappropriate transport holds caused Student to be humiliated or emotionally traumatized. Also, Student failed to prove that Switzer allowed Student to masturbate in the quiet room. The credible testimony of Mr. Lee established that Switzer staff corrected Student by directing him to stop if he put his hands inside his pants when he was lying prone on the mat in the quiet room.

39. With respect to Issue A(4), the weight of evidence did not establish that Student was deprived of access to speech and language services due to the lack of appropriate behavior interventions. Speech therapist, Ms. Thermos, testified that Student's behaviors during speech therapy sessions did not prevent him from accessing the service and that he made progress toward his goals. Even when his behaviors did interrupt a session with speech therapist, Ms. Marsh, she made up the lost minutes of service by serving Student at another time and sometimes another location on campus.

40. For reasons stated above Student met his burden with respect to Issues A (1) and (2). Student failed to meet his burden of proof with respect to Issues A(3) and A(4).

⁷ Mother's attempt to obtain information by way of a hidden recording device sheds no light on the subject. Pursuant to District's motion the ALJ ruled on the second day of hearing that this unlawful recording was excluded from evidence, except for the purpose of impeachment. It is a crime to intentionally audio record a confidential communication without the consent of *all* parties, and evidence obtained in violation of Penal Code section 632 is inadmissible in any administrative proceeding. (Pen. Code, § 632,(d).) The exclusionary rule of Penal Code section 632 effectuates privacy rights, deters future violations and preserves judicial integrity by denying the wrongdoer the fruit of the illegally obtained evidence. (*Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1490.) Nonetheless, the right to privacy is not a shield for perjury and does not permit a witness to lie with impunity. (*Id.* at p. 1497.) Therefore, a witness may be impeached with illegally obtained evidence that was not admissible in the party's case-in-chief. (*Ibid.* citing *U.S. v. Havens* (1980) 446 U.S. 620, 627–628.) Such evidence is admissible for the limited purpose of impeaching the witness, and only if that witness makes a specific statement inconsistent with the illegally obtained evidence. (*People v. Taylor* (1972) 8 Cal.3d 174, 182.) The evidence is not admissible for any other purpose. (*Ibid.*) The recording was not admitted into evidence to impeach a witness.

Issue B (1): Behavior Goals

41. Student contends District denied Student a FAPE through the end of the extended school year of 2016 by failing to develop goals that were reasonably calculated to provide Student with educational benefit at the June 9, 2015 IEP. District contends it did not deny Student a FAPE because no new goals were warranted or requested at the June 9, 2015 IEP.

APPLICABLE LAW

42. School districts are required to have an IEP in place for each eligible child at the beginning of each school year. (34 C.F.R. § 300.323(a); Ed. Code, § 56344, subd. (c).) An IEP must be reviewed at least annually to determine whether the annual goals are being met, and at that time, the school district must revise the IEP as appropriate to address any lack of expected progress, new assessments, information provided by parents, the child's anticipated needs, or any other matter. (34 C.F.R. § 300.324(b)(1); Ed. Code, § 56343, subd. (d).) The IEP must contain a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (34 C.F.R. § 300.320(a)(3) (2006); Ed. Code, § 56345, subd. (a)(3).)

ANALYSIS

43. The June 9, 2015 IEP meeting was held for the purpose of reviewing the functional behavior assessment that Ms. Bullard had completed shortly before the meeting. It was not an annual or triennial IEP meeting. Ms. Bullard's report on the functional behavior assessment did not suggest new goals. No one at that meeting suggested or requested new goals be developed for Student in any area. Moreover, no evidence was introduced to suggest that Student needed new goals as of June 9, 2015, and District was not required to develop new goals at this meeting.

44. For reasons stated above Student failed to meet his burden of proof on sub-issue B(1).

Issue B (2): Implementation of the June 9, 2015 Behavior Support Plan

45. Student contends District denied Student a FAPE through the end of the extended school year of 2016 by failing to implement the June 9, 2015 behavior support plan. District contends it did not deny Student a FAPE because there is no June 9, 2015 behavior support plan, so District did not fail to implement a nonexistent Behavior Plan.

APPLICABLE LAW

46. A school district violates the IDEA if it materially fails to implement a child's

IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822.) However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*) The *Van Duyn* court emphasized that IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, and "not to decide on its own no longer to implement part or all of the IEP." (*Ibid.*)

47. The failure to properly or consistently implement the behavioral interventions identified in a student's behavior plan can amount to a denial of FAPE. (*See Guntersville City Bd. of Educ.*, [47 IDELR 84](#) (SEA AL 2006) [A district failed to implement a teenager's behavior plan by taking disciplinary action in response to certain incidents of misconduct while allowing other outbursts and disruptions to be ignored]; *Stroudsburg Area Sch. Dist. v. Jared M.*, [28 IDELR 284](#) (Pa. Commw. Ct. 1998) [A district's failure to implement an appropriate behavior plan required it to reimburse the parent for the costs of the student's out-of-state residential placement].)

ANALYSIS

48. The evidence established that there was no behavior support plan or behavior intervention plan dated June 9, 2015. The IEP meeting on June 9, 2015 was held for the purpose of discussing the recently completed Functional Behavior Assessment. No changes were made to Student's then current Behavior Plan on that date.

49. For the reasons stated above Student failed to meet his burden of proof on sub-issue B(2).

Issues C(4), C (5), D(1)(b), D(2)(a)(ii) and D(2)(b)(ii): Statute of Limitations With Regard to Toileting

50. Student contends, with regard to his toileting goal, implementation of that goal and appropriate interventions used to address his toileting needs, where the facts occurred prior to May 31, 2015, that Parents did not reasonably know or reasonably should have known about the facts forming the basis of the complaint within the statute of limitations (Issues C(4) and D(1)(b)). Student also contends that for the time period prior to May 31, 2015, District misrepresented to Parent about the interventions being used for Student's toileting needs (C(5)(a) and D(2)(a)(ii) and that District withheld information from Parent that it was required to provide regarding interventions being used for Student's toileting needs (C(5)(b) and D(2)(b)(ii)). District contends that it timely and accurately provided all material and required information about interventions being used to address Student's toileting needs and that Parents should have known all facts underlying Student's claims about Student's toileting goal, implementation of the goal, and toileting interventions prior to May 31, 2015, and, the exceptions to the statute of limitations do not apply.

APPLICABLE LAW

51. The law set forth in paragraphs XX through paragraph XX herein, which addressed the law on statute of limitations and exceptions thereto, are hereby incorporated by reference.

ANALYSIS

51. Evidence established that Mother first learned that Switzer may not have taken Student to the bathroom for lengthy periods of time (3 or four hours, to all day) on April 12, 2017, when collected toileting data, and other documents were produced to Mother pursuant to a records request. Before that Mother was under the impression that Student was taken to the bathroom frequently. No evidence suggested Parents knew or should have known that Switzer *may* not have taken Student to the bathroom at reasonable intervals prior to April 12, 2016. For these reasons Student prevails on Issues C(4) and D(1)(b), such that Student's claims with regard to Issues C(2) and (3) accrued on April 12, 2016, and the claim was timely filed within two years from the date Parents learned of the underlying facts. However, the evidence revealed that the toileting data Mother received on April 12, 2016, which suggested Student was not taken to the bathroom for long periods of time, was incomplete. Student was taken to the bathroom far more frequently than the toileting data indicated because aides failed to record all bathroom trips on the data collection forms.

52. Parents were aware that Student did not have a toileting goal in his October, 2013 IEP, and that he had a toileting goal in both his October, 2014 IEP and his October, 2015 IEP. For these reasons Student's claims in Issue C(1) with regard to each of these IEP goals accrued on the date of the IEP in question. Student's claims were, therefore, timely filed with respect to the allegations concerning the toileting goal in each of the October 2014 and 2015 IEPs, but not with respect to allegations concerning a lack of a toileting goal in the 2013 IEP.

53. Student failed to establish through evidence and legal authority that District was required to provide Parents with toileting data at the time it was collected. Student did not meet his burden of proof on either Issues C(5)(a) or D(2)(a)(ii) because he failed to establish that for the time period prior to May 31, 2015, District misrepresented to Parent about the interventions being used for toileting needs. Student also failed to meet his burden of proof on either Issue C(5)(b) or D(2)(b)(ii) because he failed to establish that District had withheld information from Parents that it was required to provide to them regarding the interventions being utilized for Student's toileting needs.

Issue C (1): Toileting Goal

54. Student contends District denied Student a FAPE education through the end of the 2016 extended school year with regard to Student's unique needs in the area of toileting by failing to develop and implement an appropriate toileting goal. District contends it offered Student an appropriate toileting goal for the applicable time period.

APPLICABLE LAW: GOALS

55. In each area that a special education student has an identified need, the IEP team must develop measurable annual goals based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345.) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988).) The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.)

56. An IEP must include annual goals designed to meet the needs that result from the child's disability to enable the child to be involved in and make progress in the general curriculum, and that meet the child's other education needs that result from his or her disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) An IEP must include services, supplementary aids, modifications, or supports that will allow the student to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum, and to be educated and participate with other students with disabilities and those who do not have disabilities. (20 U.S.C. § 1414(d)(1)(A)(IV); Ed. Code, § 56345, subd. (a)(4).)

ANALYSIS

57. The weight of the evidence did not support Student's contention that District failed to develop an appropriate toilet goal for Student. The toileting goal in the October 2014 IEP and in the October 2015 IEP stated that Student would verbally request the toilet when feeling the urge to urinate. Even though Student had limited cognitive abilities and a severe speech and language impairment, he was able to make verbal requests consisting of single words or short phrases. Therefore, Student could attain these goals. Also, the short term objectives to reaching the toileting goal in both the 2014 and 2015 IEP provided for Student to first express his need (for the first several two quarters) to use the bathroom with a picture card. Moreover, Student had previously been toilet trained, so it was within his ability to master this essential skill again. The toileting goal in each of the October, 2014 IEP and the October, 2015 IEP was appropriate. Therefore, Student has failed to meet his burden on Issue C(1).

Issue C (2) and (3): Implementation and Interventions

58. Student contends that District denied Student a FAPE by failing to implement Student's toileting goal and by subjecting Student to inappropriate toileting interventions. District contends it appropriately implemented Student's goals using appropriate interventions.

APPLICABLE LAW

59. A failure to implement an IEP will constitute a violation of a pupil's right to a FAPE only if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP, and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled pupil fall significantly short of the services required by the IEP. (*Van Duyn ex rel. Van Duyn, supra*, 502 F.3d at p. 822.) A party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and instead, must demonstrate that the school district failed to implement substantial and significant provisions of the IEP. (*Ibid.*) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*)

ANALYSIS

60. The weight of evidence did not establish either that District/Switzer failed to implement Student's toileting goal or that District/Switzer subjected Student to inappropriate toileting interventions. Student attempted to rely on certain bathroom data collection records to prove that Switzer did not take Student frequently enough to the bathroom. The collected toileting data was inconsistent, but it did not establish that Student was not taken to the bathroom for extended time periods. Ms. Ryan credibly testified that Student was taken to the bathroom frequently throughout the day. When asked to explain why the toileting data sometimes showed few (or no) trips to the bathroom, she explained that the aides were likely to have not marked the trip to the bathroom on the data collection sheet, but that she was sure Student was taken to the bathroom regularly. Ms. Ryan credibly testified that the toileting data produced to Mother on April 12, 2016 was inaccurate because aides did not record all bathroom trips and that Student was taken to the bathroom on regular reasonable intervals. Student did not introduce any evidence that undermined Ms. Ryan's testimony on that issue.

61. Student started wearing pull-up diapers to school in the 2014-2015 school year and continued to do so in the 2015-2016 school year. However, there was no evidence that Student was not taken to the bathroom because he was wearing pull-up diapers, which function similarly to underwear as they can be pulled up and down easily. Student was also wearing diapers at home during that same time period.

62. It became clear very soon after the protocol using the enuresis alarm was first tried in January, 2016, that the alarm would not be a successful tool in toilet training Student. The use of the alarm was stopped promptly once it became clear that the enuresis alarm would not be effective.

63. Student failed to introduce any evidence that established Switzer materially failed to implement Student's toileting goal, or subjected him to inappropriate toileting interventions. For these reasons, Student failed to meet his burden of proof on sub-issues C(2) and (3).

Issue D: Educational Environment

64. Student contends District denied Student a FAPE through the end of the extended school year of 2016 by failing to place Student in an educational environment that conferred educational benefit. District contends that it provided Student with an educational benefit, including a behavioral and toileting program.

APPLICABLE LAW

65. California's implementing regulations define a "specific educational placement" as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs." (Cal. Code Regs., tit. 5, § 3042, subd. (a).) A school district "must ensure that [t]he child's placement...[i]s as close as possible to the child's home." (34 C.F.R. § 300.116(b)(3).) The school district "must ensure that...[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." (34 C.F.R. § 300.116(c).)

66. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann on Behalf of Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) This is often referred to as the snapshot rule.

67. The U.S. Supreme Court standard for determining FAPE is whether a district's plan is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 137 S. Ct. 988, 1002. To meet the Supreme Court's FAPE standard, a behavior intervention plan should be tailored to the unique needs of the particular child and appropriately ambitious in light of the child's circumstances. (*Id.*) The "reasonably calculated" standard means district should consider the effectiveness of specific strategies and supports it has provided to the child in the past, including the behavior interventions. The student's progress does not have to be considered "ideal" to meet FAPE requirements. *Questions and Answers on Endrew F. v. Douglas County Sch. Dist. RE-1*, [71 IDELR 68](#) (EDU 2017), question 10. The IDEA does not guarantee positive substantive outcomes. (*Rowley, supra*, at p. 192.)

ANALYSIS

X. Here, the preponderance of the evidence established that when District first placed Student in a severe special day class at Switzer for the 2013-2014 school year, the offered program was designed to meet Student's unique needs and was reasonably calculated to provide Student with some educational benefit under *Rowley, supra*, in the least restrictive environment. Therefore, the evidence did not establish that District failed to place Student in an environment that conferred educational benefit on Student for the 2013-2014 school year.

68. However, as analyzed above with respect to Issue A (1)-(4), if District had adequately monitored the Student's program and progress during the 2013-2014 school year it would have known that Switzer had not complied with a number of material requisites set forth in the Education Code regarding Student's behavioral emergencies and behavioral interventions. These deficiencies are addressed specifically above in paragraphs 32 through 36 of this section of this decision. If District had properly monitored Switzer during the 2013-2014 school year, it would have known that the Switzer program was not designed to meet Student's unique behavioral needs and, therefore, it was not reasonably calculated to provide Student with some educational benefit. Applying the snapshot rule, District denied Student a FAPE by offering Student placement at Switzer for the 2014-2015 and the 2015-2016 school years because that program was not designed to address Student's serious behavioral issues.

REMEDIES

1. Student prevailed on Issues: A(1); A(2); A(5); A(6)(a); A6(b); D, only for the 2014-2015 school year and the 2015-2016 school year; D(1) as to behavior interventions only; D(2)(a) as to behavior interventions only; and D(2)(b) as to behavior interventions only ((D(2)(b)(i)). As a remedy, Student requests compensatory education in the areas of specialized academic instruction from a nonpublic agency and behavior supervision services from Behavior Learning Network or another comparable nonpublic agency. Student also seeks an order that District will amend its offer of behavioral services in an IEP dated

June 17, 2016.⁸ District disagrees, and contends that Student is not entitled to any compensatory education because his needs were met and he made progress on his academic goals while he was at Switzer.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*) The amount recommended by Dr. Rome, while credible, was not practical and not likely to be completed within a reasonable time frame.

3. Student is awarded three hours a week of compensatory specialized academic instruction for two and one-half years (from approximately November, 2013, when the first transport hold was used on Student, through the implementation of the home hospital instruction on or about May 18, 2016.) Based on District’s school calendars, there are 35 weeks during the regular school year, and four weeks for the extended school year. The total number of weeks for two and one-half years equals 95.5 weeks. When 95.5 weeks are multiplied by three hours per week, the total compensatory specialized academic instruction Student is awarded amounts to a total of 286.5 hours. This compensatory education shall be provided by a certified nonpublic agency that meets District’s criteria.

4. Student is further awarded two hours per week of behavioral services from a trained behavioral aide for two and one-half years (from approximately November, 2013, when the first transport hold was used on Student, through the implementation of the home hospital instruction on or about May 18, 2016.) Based upon 35 weeks for the regular school year and four weeks for the extended school year, the total number of weeks for two and one-half years equals 95.5 weeks. Multiplying 95.5 weeks by two hours per week, the total behavioral aide services Student is awarded is a total of 191 hours. Student is also awarded 19.1 hours of behavioral supervision by a BCBA (one hour for every ten aide service hours). Both the behavioral aide services and the BCBA supervisory behavioral services shall be

⁸ In Student’s closing brief he also requested an order that District amend its offer of behavioral services in an IEP dated June 17, 2016. However, this relief was not sought in Student’s complaint, was not addressed at hearing, and the IEP of that date which was entered into evidence was not an authentic IEP, but merely an erroneously generated document per testimony of Ms. Escalante. No evidence disputed Ms. Escalante’s contention about that document.

provided by either Behavior Learning Network, or a comparable certified nonpublic agency specializing in applied behavioral analysis services.

5. Within 45 days of the date of this Order, District shall make arrangements with Parents and a certified nonpublic agency under contract with District or that meets District criteria, to provide for 286.5 hours of specialized academic instruction to be provided to Student.

6. Within 45 days of the date of this Order, District shall make arrangements with either Behavior Learning Network, or a comparable certified nonpublic agency under contract with District or that meets District criteria, specializing in behavioral services to provide for 191 hours of behavioral aide services from a trained behavioral aide and 19.1 hours of behavioral supervision services from a BCBA.

7. District shall provide a list of certified nonpublic agencies under contract with District that provide the services described in paragraphs 3 and 4 above, or the criteria for the provisions of non-public agency services within 15 days of the date of this Decision. Parents shall, within 15 days of receiving the list and criteria, select from the list or propose a non-public agency that meets District criteria.

8. Student shall use the above awarded compensatory education services within three years from the date of this order. Services not used within three years from the date of this order are forfeited.

ORDER

1. Within 45 days of the date of this Order, District shall make arrangements with Parents and a certified nonpublic agency that meets District criteria, to provide for 286.5 hours of specialized academic instruction to be provided to Student.

2. Within 45 days of the date of this Order, District shall make arrangements with either Behavior Learning Network, or a comparable certified nonpublic agency that meets District criteria, specializing in applied behavioral analysis services to provide for 191 hours of behavioral aide services from a trained behavioral aide and 19.1 hours of behavioral supervision services from a BCBA.

3. Student shall use the above awarded compensatory education services within three years from the date of this order.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issues A(1); A(2); A(5); A(6)(a); A(6)(b); D, only for the 2014-2015 school year and the 2015-2016 school year; D(1)

as to behavior interventions only (D(1)(a)); D(2)(a) as to behavior interventions only (D(2)(a)(i)); and D(2)(b) as to behavior interventions only (D(2)(b)(i)).

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: March 23, 2018

DocuSigned by:
Christine Arden
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CHRISTINE ARDEN
Administrative Law Judge
Office of Administrative Hearings

DECLARATION OF SERVICE

OAH No. 2017060038

I, Aleecia Alvarado, declare as follows: I am over 18 years of age and am not a party to this action. I am employed by the Office of Administrative Hearings. My business address is 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833. On March 23, 2018, I served a copy of the following document(s) in the action entitled above:

DECISION

to each of the person(s) named below at the addresses listed after each name by the following method(s):

Ethan and Eva Laden
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(courtesy copy mailed)

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Secure e-File (Email) Transmission. Based upon agreement of the parties to accept service by Secure E-File System, I caused the document(s) to be sent to the person(s) at the email address (es) listed above.

United States Mail. I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above, and placed the envelope or package for collection and mailing, in accordance with the Office of Administrative Hearings' ordinary business practices, in Sacramento, California. I am readily familiar with the Office of Administrative Hearings' practice for collecting and processing documents for mailing. Correspondences are deposited in the ordinary course of business with the United States Postal Service in a sealed envelope or package with postage fully prepaid. [by certified mail].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed at Sacramento, California on March 23, 2018.

DocuSigned by:



Aleecia Alvarado, Declarant

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