

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

DEHESA SCHOOL DISTRICT AND  
COMMUNITY MONTESSORI CHARTER  
SCHOOL,

v.

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2016090241

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PARENTS ON BEHALF OF STUDENT,

v.

DEHESA SCHOOL DISTRICT AND  
COMMUNITY MONTESSORI CHARTER  
SCHOOL.

OAH Case No. 2016080384

**DECISION**

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on July 28, 2016, naming Dehesa School District and Community Montessori Charter School. On September 7, 2016, Dehesa and Montessori filed a due process hearing request with OAH, naming Student. On September 9, 2016, OAH consolidated these cases. On September 29, 2016, OAH continued the consolidated matter.

Administrative Law Judge Paul H. Kamoroff heard this matter in San Diego, California, on November 1, 2, 3, 8, 9, 16, 17 and 18, and December 8, 2016.

Cararea C. Lucier and Helen O. Ghio, Attorneys at Law, appeared on behalf of Student. Student's mother and father attended the hearing. Student did not attend the hearing.

Deborah R. G. Cesario and Jimmy D. Sanft, Attorneys at Law, appeared on behalf of Dehesa and Montessori. Terri Novacek, the Executive Director of Element Education, a non-profit organization that operates Montessori, attended the hearing. Brandi Rodrigues,

Element Education's Director of Special Education, attended the hearing to testify and attended on the last day of hearing. Nancy Hauer, the Superintendent of Dehesa, attended the hearing the morning she testified.

At the request of the parties, OAH continued this matter for closing briefs. The record closed on December 22, 2016, upon receipt of written closing briefs from the parties.

## ISSUES<sup>1</sup>

### *Student's Issues:*

1. Did Dehesa and Montessori Charter deny Student a free appropriate public education during the 2014-2015 school year and extended school year, by failing to:
  - a. Offer and provide services comparable to those described in Student's previous individualized education program, when he transferred to Dehesa and Montessori at the beginning of the 2014-2015 school year;
  - b. Offer and provide appropriate behavioral support, such as an individual aide, a behavioral support plan, behavior goals, or counseling in the IEP's dated October 1, 2014, and June 1, 2015;
  - c. Offer appropriate measurable goals in all areas of need in the IEPs dated October 1, 2014, and June 1, 2015, and specifically failing to offer goals in the areas of social skills, behavior, pragmatic language and communication, counseling, and by failing to provide progress reports on goals;
  - d. Offer an appropriate placement with supports in the IEPs dated October 1, 2014, and June 1, 2015;
  - e. Implement the IEPs dated October 1, 2014, and June 1, 2015, as to the accommodations, modifications, and goals, including the provision of progress reports; and,
  - f. Make a specific written offer of FAPE at the IEP team meetings held on October 1, 2014, and June 1, 2015?
2. Did Dehesa and Montessori Charter deny Student a FAPE for the 2015-2016 school year and extended school year, by failing to:

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<sup>1</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- a. Offer and provide appropriate behavioral support, such as an individual aide, a behavioral support plan, or behavior goals, until March 1, 2016, in the IEPs dated June 1, 2015, March 1, 2016, and May 19, 2016;
- b. Offer appropriate measurable goals in all areas of need in the IEPs dated June 1, 2015, March 1, 2016, and May 19, 2016, and specifically failing to offer goals in the areas of social skills, behavior, pragmatic language and communication, and counseling;
- c. Offer an appropriate placement with supports in the IEPs dated June 1, 2015, March 1, 2016, and May 19, 2016;
- d. Implement the IEPs dated June 1, 2015, March 1, 2016, and May 19, 2016; as to accommodations, modifications, and goals, including the provision of progress reports;
- e. Make a specific written offer of FAPE at IEP team meetings on June 1, 2015, March 1, 2016, and May 19, 2016; and,
- f. Timely file for due process hearing with OAH, after Parents refused to consent to Dehesa and Montessori Charter's proposed IEPs dated March 1, 2016, and May 19, 2016?

3. Did Dehesa and Montessori deny Student a FAPE for 2015-2016 school year, by failing to provide Student's parents with a complete copy of Student's educational records within five business days of their May 20, 2016 request?

*Dehesa and Montessori Charter's Issue:*

4. Did Dehesa and Montessori Charter's May 19, 2016 IEP offer Student a FAPE in the least restrictive environment, such that Dehesa and Montessori Charter may implement it in its entirety without Parents' consent?

### SUMMARY OF DECISION

Student had delays in writing, math, emotion, behavior, and attention. Dehesa was not involved in the development of Student's IEP's, and instead relied on Montessori Charter to meet his special education needs. Yet, the school's Montessori instructional approach lacked the structure Student required to learn. Montessori Charter placed its policies and teaching philosophy over Student's individual needs. As a result, the IEPs Montessori Charter offered Student were not appropriate. Accordingly, the Decision finds that Dehesa and Montessori Charter denied Student a FAPE on various grounds.

## FACTUAL FINDINGS

### *The Student*

1. Student was a 13-year-old boy who resided with his parents within Dehesa's boundaries during the applicable time frame. He received special education under the eligibility categories other health impairment, due to an attention deficit hyperactivity disorder, and specific learning disability.

2. Attention deficit hyperactivity disorder is a neurodevelopmental disorder characterized by difficulties with executive functions that cause attention deficits, hyperactivity, or impulsiveness. As a result of his disability, Student had difficulty with attention, initiating and completing school work, task completion, planning, and organization.

3. Specific learning disability is a disorder characterized by a severe discrepancy between ability and achievement to a degree that the pupil cannot be adequately served in regular classes without the provision of special education or related services. Student's specific learning disorder correlated to delays in attention processing. As a result of his processing weaknesses, Student had difficulty in written expression and mathematics.

4. Student also demonstrated an anxiety disorder, depression, and emotional difficulty. In class, he was often withdrawn, off-task, self-negative, and was reluctant to seek help from adults.

5. Since 2011, Student received IEPs that consisted of general education with accommodations and specialized academic instruction. Student took medication daily for anxiety, depression and attention.

### *Montessori Charter*

6. Student transferred from Escondido Union Elementary School District to Dehesa during the 2014 summer. Parents quickly placed Student at Montessori Charter, a charter school authorized by Dehesa. Parents selected Montessori Charter because they did not feel that Student was making adequate progress in traditional general education classrooms, even with accommodations and specialized academic instruction. They believed that the smaller class sizes and reformed teaching approach found at Montessori Charter would be a better fit for Student.

7. Montessori Charter was one of several charter schools run by Element Education, Inc., a non-profit corporation. Although authorized by Dehesa, Montessori Charter was located outside of Dehesa's geographic boundaries. At hearing, Terri Novacek, the Executive Director of Element Education, and Brandi Rodrigues, Element Education's Director of Special Education, explained the Montessori instruction philosophy. Education

was child-centered. The goal was for children to be independent in their work. The child picked the work or assignment he or she wished to work on from available projects, rather than a teacher directing the assignments.

8. Ms. Novacek and Ms. Rodrigues informed Mother of how Montessori Charter functioned. The parent was called the “parent-teacher,” and the classroom teacher was called an “educational facilitator.”

9. Student’s educational facilitator was Allison Doig. Ms. Doig was a credentialed general education teacher who had received significant training in Montessori instruction. She was Student’s classroom teacher for core academic subjects during his 2014-2015, and 2015-2016 school years. Montessori Charter’s general education classes consisted of approximately 19 students and were less structured than traditional classrooms. Students would self-select projects and work, uninterrupted by the teacher, until he/she chose to transition to a different project. Students were encouraged to socialize during class, self-select classmates to work with, and could sit anywhere they wanted, including on desks or the floor. Teachers provided some direct teaching, but less than what was provided in a traditional classroom. During hearing, Ms. Doig testified that she normally provided 10-20 minutes of direct instruction per week.

10. For its IEP eligible students, when appropriate, Montessori Charter offered a resource specialist program where it delivered specialized academic instruction, based upon the individual pupil’s level of service. Johnny Pontecorvo was Student’s resource specialist program teacher. Mr. Pontecorvo was a credentialed special education teacher with experience delivering specialized academic instruction.

11. Dehesa authorized Montessori Charter as an independent study program. It was therefore limited in the services it could provide its special education students. For example, it was a violation of the school’s charter to provide any student an individual aide. Dehesa provided no oversight of Montessori Charter’s special education program and was not involved in the development of students’ IEPs. Dehesa Superintendent Nancy Hauer testified that she placed that responsibility in the hands of the Element Education’s director of special education, Ms. Rodrigues. During testimony, Ms. Novacek confirmed that a contractual relationship existed between Dehesa and Element Education that obligated Element Education, and Montessori Charter, to be solely responsible for Student’s IEPs.

12. As a condition of enrollment, each student’s parent was required to sign a master agreement with Montessori Charter governing basic aspects of their relationship. In all documents related to a child’s attendance at Montessori Charter, including a parent handbook and a child’s IEPs, the parent is referred to as the “parent-teacher.” This definition was confusing. Students attended a classroom daily, Monday through Thursday, and a half day on Friday. Each day, the classroom teacher, who was a credentialed teacher employed by Montessori Charter, not the parent, led the class, took roll, and was solely responsible for assigning grades. School attendance, Monday through Thursday, was mandatory. Titling the classroom teacher “educational facilitator,” the parent “parent-teacher,” and the school site

“learning center,” did not transform the program from a regular school placement, albeit with a private school philosophy, to a home study, virtual, or independent learning program.

### *The Interim IEP*

13. When a student with an IEP, in effect, moves to a new school district in the same state within the same school year, the new school district must provide services comparable to those the student received in the old school district until it either: adopts the prior IEP; or develops, adopts, and implements a new IEP.

14. Student transferred from Escondido to Montessori Charter between school years, during the 2014 summer. Student’s last IEP, prior to the dispute, was offered by Escondido on June 11, 2014, the last day of the school year. Parents consented to the IEP, but it was never implemented by Escondido. The IEP offered Student four goals, one each in writing, math, attention, and self/management/organization. To meet those goals, the IEP offered Student 150 minutes weekly of individual specialized academic instruction.

15. Montessori Charter promptly offered Student an interim IEP, on September 2, 2014. No IEP team meeting was held. Montessori Charter selected Ms. Rodrigues to solely develop the interim IEP. Although the June 11, 2014 IEP offered 150 minutes weekly of individual specialized academic instruction, Montessori Charter offered 60 minutes weekly of unspecified specialized academic instruction in the interim IEP, a 60 percent decrease. Ms. Rodrigues mistakenly believed that Escondido’s June 11, 2014 IEP was Student’s existing IEP. Yet, she elected to reduce the level of services for Student’s interim IEP, based upon the mistaken belief that 60 minutes of specialized academic instruction at Montessori Charter was comparable to 150 minutes of specialized academic instruction at a traditional school.

16. Notwithstanding Ms. Rodrigues’s mistakes, the June 11, 2014 IEP was not Student’s effective IEP, because Escondido did not have an opportunity to implement that IEP, as it was offered on the last day of the school year. Student failed to provide as evidence his last existing and implemented IEP, which was the last agreed upon IEP, preceding the June 11, 2014 IEP. Student also failed to provide evidence describing what services were specifically included in his last implemented IEP.

### *The October 1, 2014 IEP*

17. Montessori Charter held its first IEP team meeting for Student on October 1, 2014. Student was 11-years-old and in the sixth grade. Mother attended the IEP team meeting, along with Ms. Rodrigues, Ms. Doig, and Mr. Pontecorvo.

18. The IEP team continued to find Student eligible for special education and related services under other health impairment and specific learning disability. The team reviewed Student’s present levels of performance. Although bright, Student was delayed in math and writing. He was emotional and quickly became overwhelmed, especially in math,

or when faced with adversity. He routinely demonstrated a negative self-image and engaged in negative self-talk. Student had difficulty starting assignments, completing assignments, and planning. He was anxious around adults, and reluctant to ask for teacher assistance. Student suffered from an anxiety disorder, withdrawal, and depression. Those disabilities were prominent when dealing with daily school challenges, such as managing tasks. The team agreed that Student had problems in the areas of written language, math, behavior/attention, and vocational/work habits.

19. Student's behavior impeded his learning and that of others. In class, he was inattentive, fidgeted with items, squirmed, disturbed his peers, and eloped from the classroom. For the fidgeting, school staff allowed him to use a sensory device, including a stress ball. The IEP did not offer a behavior support plan, behavior services, or an assessment plan to assess Student's behavioral needs.

20. Montessori Charter offered student three goals, one each in written language, math, and vocational work/habits. The first goal required Student to write a three paragraph composition, providing details and transitional expressions, using a writing rubric in two of three trials, measured by work samples. Goal two required Student to solve 20 math problems of varying type, with 80 percent accuracy in three of four trials. Goal three required Student to independently maintain a planner or calendar, and to prioritize tasks, for all assignments and due dates, 85 percent of the time, measured by the teacher. Each goal delineated the persons responsible for implementing the goals as the resource specialist program teacher; the classroom teacher, identified as "educational facilitator," and; Parents, identified as "parent-teacher." To meet those goals, the IEP team offered Student 60 minutes per week of specialized academic instruction. That instruction was not identified as an individual or group service.

21. The IEP offered the remainder of Student's education in general education with various accommodations. Accommodations included modified assignments; graphic organizers; extra time for assignments; preferential seating; 30 minutes per month of consultation by the resource specialist teacher to Parents; movement breaks; breaking down assignments into smaller parts; use of a stress ball and fidget toy; a timer for independent work; an assistive technology device, including a word processor for written assignments and the use of speech-to-text software.

22. In writing, the IEP offered Student placement at Montessori Charter. The IEP document correctly described the placement as a regular classroom in a public day school, for 96 percent of the school day, with 4 percent of the school day outside of regular class. Mother consented to the October 1, 2014 IEP.

#### *The 2014-2015 School Year*

23. Montessori Charter did not implement the October 2014 IEP. As Student's resource specialist program teacher, Mr. Pontecorvo was responsible for implementing the weekly specialized academic instruction. He had discretion to implement the service

individually or in a small group. Mr. Pontecorvo elected to provide Student's specialized academic instruction in a small group in the school's resource special program classroom. However, Student was not receptive to his instruction. Student was inattentive, withdrawn, and non-responsive. Adults, including Mr. Pontecorvo, made him anxious and uncomfortable. Mr. Pontecorvo and Ms. Doig each testified that Student was not yet at the comfort level where he could receive instruction from an adult. Based upon Student's emotional difficulty, Mr. Pontecorvo was unable to consistently provide him any specialized academic instruction.

24. Montessori Charter also failed to implement Student's classroom accommodations. For example, Mr. Pontecorvo did not consult with Parents for 30 minutes each month as called for in the IEP. On occasion, he would briefly talk with Mother when he happened to come across her at school, but testified that did not constitute a monthly meeting. Student was unable to use graphic organizers and failed to use a timer for assignments, although a timer was located someplace in the classroom. Ms. Doig had intermittently taken away Student's assistive technology device, stress ball and fidget toy, along with recess breaks, as punishment for Student being off-task or for failing to finish assignments. Ms. Doig testified that, like all students, Student could sit anywhere he liked in the classroom, including on desks or the floor, or even outside of the classroom, which she erroneously considered preferential seating.

25. Finally, Montessori Charter did not implement the IEP goals. Ms. Doig did not attempt to implement the specific IEP goals or to measure progress on those goals. Mr. Pontecorvo attempted to implement the goals, but Student was not receptive to his instruction. Parents testified they were not aware that they were the "parent-teacher" identified on the IEP document or responsible for implementing the IEP goals. Parents did not understand how they could implement IEP goals, given that each worked full time and were not teachers. Parents were not directly familiar with the goals and had not received training from Montessori Charter to provide the goals. During testimony, Ms. Novacek, Ms. Rodrigues, and Ms. Doig emphasized Parents' failure to implement the IEP goals. In particular, Ms. Novacek testified that the master contract Parents had signed obligated them, as "parent-teachers," to educate Student and implement his IEP. This testimony illustrated that the school district did not understand that it, and not Parents, had an affirmative obligation to provide Student a FAPE.

26. Student did poorly during the 2014-2015 school year. Student's anxiety, inattention, and withdrawal impeded his ability to receive instruction and to benefit from his educational placement. Student was not cooperative and was overwhelmed during class. Ms. Doig estimated that he was unable to complete 70 percent of his classroom assignments, and completed less homework. The Montessori instructional approach, while likely beneficial for some children, was not sufficiently structured for Student. The Montessori instructional method gave pupils a great deal of freedom to structure their own education, but this approach required a certain level of independence and self-motivation on the pupil's part. Students chose which lessons to work on, and when to work on them, and went to their teachers for instruction when they needed it. At that time, Student was withdrawn, reluctant

to seek help from teachers, inattentive, and off-task. This did not bode well in an environment that lacked structure, direct instruction, and required self-advocacy to complete any assignment. Mr. Pontecorvo's testimony that Student received "no academic benefit" during the 2014-2015 school year was persuasive evidence of the inappropriateness of Student's educational placement.

*The June 1, 2015 IEP*

27. Montessori Charter held an annual IEP team meeting for Student on June 1, 2015. Student was 12 years old and completing the sixth grade. The purpose of the IEP team meeting was to offer Student a FAPE for the following, 2015-2016 school year. Mother and Father attended, along with Ms. Rodrigues, Ms. Doig, and Mr. Pontecorvo.

28. Student's eligibility remained unchanged. Work samples showed that he had not met the requirements for the three October 2014 goals. Student still struggled in writing, math, and planning.

29. Ms. Doig, who was responsible for grading Student's work, provided passing grades for most of Student's assignments, including for incomplete and unresponsive work. Student received passing grades, "C's" and "B's," in each subject on each report card during 2014-2015, and 2015-2016 school years. However, Student's grades were not a reliable indication of his knowledge or progress in any subject area. Rather, grades at Montessori Charter were subjective and based on the teacher's perception of the Student's attitude toward learning. Ms. Doig testified that an "A" for one student was not the same grade as an "A" for a different student. For these reasons, Student's passing grades were given little evidentiary weight

30. The IEP team considered adding consultation, or an assessment, by an educational marriage and family therapist. Ms. Rodrigues, Mr. Pontecorvo, and Ms. Doig, along with Ms. Novacek, each testified that Student required the intervention of a marriage and family therapist during his tenure at Montessori Charter. Student had friends but had serious emotional problems. He experienced anxiety, depression, a significantly low self-image, and chronic stress each day. In math, Student was completely overwhelmed. In each class and during resource specialist program, Student demonstrated anxiety, inattention, and poor impulse control that impeded instruction. He had poor planning, organization, and difficulty initiating or completing tasks. Given these needs, each of the school district's witnesses believed that Student needed counseling to be able to access his educational program. Yet, the IEP team did not offer Student counseling, or an assessment plan. Montessori Charter mistakenly failed to offer Student counseling or an assessment plan because Parents had requested an individual aide, in lieu of counseling, during the June 2015 IEP team meeting.

31. The IEP team also recommended that an occupational therapist consult with parents and teachers, and observe Student in the classroom to determine recommendations to address his sensory seeking needs. Yet, the IEP failed to offer this service or an assessment for this service.

32. The IEP team continued to recommend an assistive technology device, including speech-to-text software.

33. Student continued to demonstrate behavioral problems that impeded his learning and that of others. He disturbed his peers, squirmed, fidgeted, and left class without permission. Yet, the IEP failed to offer a behavior support plan, behavior services, or an assessment plan to determine Student's behavioral needs.

34. The IEP team failed to consider a continuum of placement options. School staff mistakenly believed that, because Montessori Charter was a parent-choice school, it was not appropriate to consider other placement options. Additionally, Montessori Charter had a one-size fits all philosophy. Its teachers and administrators believed that its child-centered teaching philosophy was appropriate for all pupils and, if it was not, than parents were to blame. Each Montessori Charter witness was wed to the Montessori instruction philosophy. Per this philosophy, there were only two possible educational placements; a Montessori instruction learning center, like Montessori Charter, or home instruction. Home instruction was reserved for children who had serious behavior challenges and not ready for school-based instruction. Special day classes were not considered appropriate for any student because they were incongruent with Montessori instruction. For these reasons, Montessori Charter failed to consider a continuum of placement options during each of Student's IEP team meetings. School staff went into each IEP team meeting with a predetermined offer for placement at Montessori Charter or home instruction. On occasion, school staff would consider another, similarly operated independent charter school run by Element Education, such as Dehesa Charter School. Traditional schools and special day classrooms, even those located in Dehesa School District, were not discussed or considered.

35. The IEP team also predetermined what services it would offer Student. For example, Ms. Novacek testified that it would be a violation of the school's charter, as an independent study resource site, if the school offered an individual aide to any pupil. Montessori Charter therefore predetermined its rejection of Parents' requests for an individual aide.

36. The IEP team offered Student three goals, one each in writing, math and vocational/work habits.<sup>2</sup> The first goal required Student to write a two-paragraph expository essay, with 80 percent accuracy in four of five trials, measured by the teacher. Goal two required Student to complete 10 calculation problems, with 80 percent accuracy in four of five trials, measured by the teacher. Goal three required Student to create one performance

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<sup>2</sup> The IEP document mistakenly included three counseling goals, which were not offered to Student until March 1, 2016.

goal to achieve daily during independent study time, with 80 percent accuracy, measured by the resource specialist program teacher. Similar to the prior annual IEP, the persons responsible for implementing the goals included the resource specialist program teacher; the classroom teacher, identified as educational facilitator, and; Parents, identified as parent-teacher.

37. The June 2015 IEP offered identical accommodations to those included in the October 2014 IEP. The IEP team offered Student the same level of services, 60 minutes per week of unspecified specialized academic instruction.

38. The IEP document offered Student placement at Montessori Charter. Student would receive 96 percent of instruction in a regular classroom, and 4 percent of instruction outside of regular class. In one place, the IEP mistakenly described Montessori Charter as home school, in an independent or virtual charter school. Ms. Novacek persuasively testified that designation was a mistake, and that placement was at Montessori Charter, a brick and mortar learning site that Student attended Monday through Thursday, and a half day on Friday. Parents similarly testified that they understood the placement offer was Montessori Charter. Parents consented to the June 1, 2015 IEP.

#### *The 2015-2016 School Year*

39. Montessori Charter did not implement the June 1, 2015 IEP. Mr. Pontecorvo was unable to implement the specialized academic instruction because Student continued to be reluctant to work with adults. Adults, including Mr. Pontecorvo, continued to make Student anxious and uncomfortable. At some point during the school year, Mr. Pontecorvo gave up on small group instruction in the resource specialist program room, and attempted to push-in the service into the general education classroom. Student did only mildly better using this modality. Per Mr. Pontecorvo's service logs for the 2014-2015, and 2015-2016 school years, Student did not receive a significant amount of his specialized academic instruction sessions. When he was provided the service, Student was distracted, withdrawn, and unreceptive to instruction.

40. School staff continued to fail to implement Student's classroom accommodations with fidelity. Mr. Pontecorvo did not consult with Parents for 30 minutes each month, as called for in the IEP. Student was unable to use graphic organizers, failed to use a timer for assignments, and could sit anywhere during class. Ms. Doig intermittently took away Student's assistive technology device, stress ball and fidget toy, along with recess breaks, as punishment for Student's behaviors.

41. Montessori Charter, again, failed to implement the IEP goals. Ms. Doig testified that she addressed "areas" of goals, meaning that classwork included math and writing subject areas. However, she did not implement or measure the specific IEP goals. Mr. Pontecorvo attempted to implement the goals, but Student was not receptive to his instruction. Parents were not aware that they were responsible for implementing IEP goals,

and were not capable to do so. During testimony, Montessori Charter teachers and administrators, again, placed blame on Parents for their failure to implement the IEP goals.

42. Although Student continued to receive passing grades during the 2015-2016 school year, those grades were an unreliable indication of his abilities or progress. Classroom teachers did not base Student's report card grades on curriculum content standards or measureable achievement. Teachers based Student's report card grades on their subjective opinion that Student's attitude toward learning had shown improvement. Ms. Doig modified Student's work so it was less than what his peers received. Even with modifications, Student was unable to complete 50 percent of his classroom work, less for homework.

43. On May 27, 2016, Student took the i-Ready, a diagnostic test of his math and reading abilities. Student scored average in reading, with an overall score at his seventh grade level. Student's math abilities were scattered. Overall, he scored at the fifth grade level, two years delayed. Student scored at the third grade level in geometry, and at the second grade level in numbers and operations, four and five years delayed, respectively.

44. The California Assessment of Student Performance and Progress was a state-wide performance test that measured some areas of Student's math and writing, during his sixth and seventh grades. Student showed modest improvement, from a below standard level during sixth grade, to a near standard level in seventh grade, in some areas of math. In writing, he showed no improvement and was at a below standard level in seventh grade.

45. Student did not meet his annual goals, nor did he make any progress towards those goals. By the end of the school year, Student had not made any progress towards the first goal, in writing. Student began and ended the school year at a 50 percent baseline for that goal. Student made no progress on goal two, in math. When the goal was offered in June 2015, his baseline for that goal was at 40 percent. By the end of May 2016, Student demonstrated the same 40 percent baseline. Similarly, for goal three, in vocational/work habits, Student made no progress.

46. Throughout the 2015-2016 school year, Student's anxiety, inattention, and withdrawal impeded his ability to receive instruction and to benefit from his educational placement. Montessori Charter's emphasis on a lack of structure, nominal teacher-directed teaching, and child-centered leaning, was inconsistent with Student's unique needs. Student's reluctance to seek help from teachers, inattention and off task behavior, made it difficult for him to complete any assignment at a Montessori instruction based school. Mr. Pontecorvo persuasively testified that Student received "no academic benefit" during the 2015-2016 school year.

#### *The Educationally Related Mental Health Assessment*

47. On October 28, 2015, Montessori Charter developed an assessment plan to assess Student in the areas of social and emotional development. Parents signed the

assessment plan on December 10, 2015. Montessori Charter selected Julia Maushart, an independent, licensed marriage and family therapist to complete the assessment. During hearing, Ms. Maushart credibly testified in support of her report.

48. In February 2016, Ms. Maushart interviewed Parents, Student, Student's teachers, observed Student at school, and reviewed his school records. On March 1, 2016, Ms. Maushart placed her findings in a written report, entitled Educationally Related Mental Health. Student was 12 years, 11 months old, and in the seventh grade.

49. Ms. Maushart found that Student felt inadequate and had low self-esteem. He manifested physical symptoms of anxiety and distress. Student struggled significantly with staying focused and sitting still in the classroom. He struggled to begin tasks. Student struggled to use proper communication and ask for help from teachers. When help was offered, he had difficulty accepting the assistance. Overall, Ms. Maushart found that Student had emotional and behavioral challenges that impeded his performance in the educational setting. She recommended that Student be provided goals in the areas of emotional regulation, focus/attention, and self-advocacy. To meet those goals, she recommended that Student be provided sixty minutes per week of special education based individual counseling.

#### *The Addendum IEP*

50. On March 1, 2016, and April 4, 2016, Montessori Charter held an addendum IEP team meeting, to review Ms. Maushart's report. Along with Parents, the following people attended the addendum IEP team meetings: Ms. Novacek; Ms. Rodrigues; Mr. Pontecorvo; general education teacher Earl Otte; Montessori Charter Director Roland Yung; and, Ms. Maushart. The IEP team reviewed Ms. Maushart's report. Like each previous IEP team meeting, Parents actively participated during the meeting to the extent that they asked questions about the program and services offered at Montessori Charter. Parents again requested that Student be provided an individual aide during class. The school's administration denied this request and explained that assigning Student an aide would change the Montessori Charter environment.

51. School staff agreed with Ms. Maushart's description of Student and the IEP team adopted her report findings. Montessori Charter amended Student's IEP to add three new goals, one each in emotional regulation, focus/attention and task initiation, and self-advocacy. The emotional regulation goal called for Student, when faced with feelings of inadequacy or anxiety, to select a self-regulating strategy, in four of five opportunities, measured by observation and documentation. The next goal required Student, when working at school or home, to work on assigned tasks using self-regulation and organizational strategies, and refrain from off task behavior, three of five times, measured by observation and documentation. The self-advocacy goal required Student, when confronted with a difficult task or problem, to use assertiveness and communication skills to self-advocate for his needs in the classroom. When approached by a teacher, Student would refrain from shutting down or deflection and accept assistance, in four of five opportunities, measured by

observations and documentation. The persons responsible for implementing the goals included Parents, identified as “parent-teacher,” and Ms. Maushart, identified as “MFT.” To meet those goals, the IEP team offered Student sixty minutes per week of individual counseling, provided by a nonpublic agency, Ms. Maushart. No other changes were made to Student’s IEP.

52. During hearing, Ms. Maushart testified that the counseling goals were flawed because they did not include the classroom teacher as a responsible party. Ms. Maushart was independently contracted by Montessori Charter and not familiar with Montessori instruction or the school’s vernacular. She did not know that “parent-teacher” referred only to the parents. Although Ms. Maushart could work on developing coping strategies during her individual counseling sessions with Student, implementation and monitoring of those strategies, and each goal, required the assistance of the classroom teacher. Ms. Maushart would not be working with Student in the classroom or observing him outside of the therapy sessions. Therefore, absent teacher intervention, observation and documentation, it was not possible to implement or to measure progress on the goals.

53. Parents did not consent to the addendum IEP. Parents did not oppose counseling for Student, but desired to have an individual aide assigned to Student during class. They believed it was important to have an aide redirect Student during class and assist him with completing tasks. Without the addition of an aide, Parents were unwilling to provide their consent to the IEP. Each Montessori Charter witness who testified and was familiar with Student, believed that he required counseling to receive a FAPE. Yet, Dehesa and Montessori Charter failed to request a due process hearing when Parents refused to consent to the addendum IEP.

#### *The May 19, 2016 IEP*

54. Montessori Charter convened its last IEP team meeting for Student on May 19, 2016. Student was 13 years old and finishing the seventh grade. The purpose of the IEP team meeting was to offer Student an educational program for the remainder of the 2015-2016 school year, and for the 2016-2017 school year, Student’s eighth grade. Student’s mother and father attended the IEP team meeting, along with Ms. Rodrigues, Ms. Doig, and Mr. Pontecorvo.

55. Student remained eligible for special education under other health impairment due to an attention disorder, and specific learning disability in math and writing. The team reviewed his present levels of performance. Reading was an area of strength for Student. In writing, with prompting and help, Student had the ability to write narrative paragraphs. He had difficulty writing expository pieces and struggled with organizing information. Student demonstrated difficulty in the area of fine motor skills, which impacted his ability to handwrite. Student was not receptive to help from the resource specialist program, which impeded his receipt of specialized academic instruction. In math, Student had various areas of difficulty and was unable to retain previously learned concepts. In each area, Student had failed to meet, or make progress towards, his prior IEP goals.

56. Student had friends, but still demonstrated inattention, anxiety, and impulsivity. He struggled initiating and completing tasks, avoided work, and usually did not complete assignments. He fidgeted, walked around the classroom and excessively left the classroom without teacher permission.

57. His behaviors impeded the learning of himself and others. He talked out in class, disturbed others, squirmed, left the classroom without permission, and was not receptive to help from teachers or staff. The IEP failed to offer a behavior support plan or behavior services.

58. The May 2016 IEP offered six goals: three new goals and the same three counseling goals that were offered in the May and April 2016 addendum IEP. The three new goals included one each in written expression, vocational/work habits, and vocational task initiation. The written expression goal called for Student, with prompting and using a graphic organizer, to write an expository essay, with 80 percent accuracy, in three of five trials, measured by the teacher. Goal two was for Student to create a performance goal, and complete that goal, with 80 percent accuracy. Goal three required Student to, when given any task, initiate and complete the task within five minutes, and complete the task with 80 percent accuracy in four of five trials. The persons responsible for implementing the first three goals were identical to the prior IEPs: the resource specialist program teacher, the educational facilitator, and, the parent-teacher. For the three counseling goals, the marriage and family therapist and parent-teacher were solely responsible. Although Student had a specific learning disability in math, and had failed to meet prior math goals, the school IEP team elected to forego a math goal. The school's teachers did not believe that Student was emotionally ready to begin working on academic goals in the area of mathematics. Montessori Charter teachers and administrators believed that Student first needed emotional remediation through counseling, before he could benefit from academic instruction.

59. The May 2016 IEP offered similar accommodations to those included in the past two annual IEPs. For services, the IEP offered 60 minutes per week of unspecified specialized academic instruction, and 60 minutes per week of individual counseling by a nonpublic agency, Ms. Maushart.

60. The IEP team failed to discuss a continuum of placement options and again offered Student placement at Montessori Charter. Student would receive 92 percent of instruction in a regular classroom, and eight percent of instruction outside of regular class. Parents did not consent to the May 19, 2016 IEP.

#### *Montessori Charter's Behavior Interventions*

61. Each of Student's IEPs described that Student's behaviors impeded his learning or the learning of others. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior.

62. Montessori Charter did not consider positive interventions and strategies to address Student's behavior problems. The school did not offer behavior goals, a behavior support plan, or behavior services. Ms. Novacek testified that it was the policy of Montessori Charter to not consider positive behavioral interventions or strategies for its pupils. Such interventions would change the Montessori instruction learning environment and were therefore unacceptable. Moreover, she could not recall an instance where a pupil had required a behavioral support plan. Ms. Novacek opined that, if that situation arose, school staff would address the student's behavior needs by educating the parents on how to support the student at home.

63. Rather, the school relied exclusively on a progressive discipline system that was part of the Montessori instruction philosophy and applied to all students. Ms. Novacek referred to the master contract and to the parent handbook as evidence of the behavior system. The parent handbook contained this program under a section entitled "Learning Center Discipline." Instructions stated that each student had to follow written and verbal instructions, clean work areas, and show respect for others. Students were also prohibited from running, yelling, smoking, or use of profanity. In sum, students were to comply with standard rules set forth by Montessori Charter.

64. The discipline page of the parent handbook also included steps for action by Montessori Charter if a student did not follow these rules. If a student took an action that was not safety related, the student would receive a verbal warning. Actions compromising the safety of the learning environment could result in immediate expulsion.

65. If a student's behavior did not improve, Montessori Charter could adjust the student's schedule, including a mandated break from attending classes, or asking the student's parent to assist at school to help the student participate. If a student's behaviors persisted, the school district would unilaterally remove the student from the classroom placement, and the student would be home-schooled.

66. Notwithstanding the rules set forth in the parent handbook, there was no evidence that Montessori Charter used any consistent behavior interventions for Student. Rather, teachers employed ad-hoc and punitive measures to attempt to change Student's off-task and disruptive behavior, or for failing to complete assignments. As punishment, teachers removed Student's assistive technology device, his stress or fidget ball, and deprived him of recess. In addition, school staff exploited Student's aversion to close contact with adults. Staff would stand near Student to intentionally make him feel anxious and uncomfortable, as punishment for negative behaviors. There was no evidence provided that this punitive approach worked, was developed by qualified personnel, or was designed to meet Student's unique needs.

#### *The Educational Records Request*

67. On May 20, 2016, Parents requested a copy of Student's educational records, including his cumulative and special education files. When a parent of a disabled student

requests educational records, the local educational agency shall provide parents a copy of the student's educational records within five business days.

68. Dehesa and Montessori Charter failed to timely provide Parents a copy of Student's educational records. Various records were provided, at various times, more than five days following the May 2016 request, up to and including during the due process hearing, in November 2016. During hearing, Ms. Novacek admitted that educational records were not timely provided to Parents, which she blamed on a recent change in the manner the school kept educational records, to digitalization.

69. Some of Student's educational records were never provided to Parents. During hearing, Mr. Pontecorvo testified that he was responsible for maintaining some of Student's educational records, along with other students' records. He had kept those records in a box in his garage, where they were destroyed by a nesting rat. Mr. Pontecorvo had not received any training regarding the maintenance of educational records.

70. Dehesa and Montessori Charter's failure to timely provide and maintain Student's educational records seriously infringed on his parents' ability to determine the appropriateness of the May 19, 2016 IEP, and to prepare for the due process hearing.

#### *The Proposed Assessment Plan*

71. Following the May 19, 2016 IEP team meeting, staff from Montessori Charter mailed Parents an assessment plan dated May 19, 2016. Montessori Charter proposed to assess Student in the area of adaptive/behavior, by a behavior specialist. Following this assessment plan, staff from Montessori Charter mailed Parents a revised assessment plan, also dated May 19, 2016. The revised plan included the behavior assessment and added a special circumstances instructional assistance assessment, by a school psychologist. Parents signed the assessment plan on June 20, 2016, and Ms. Rodrigues signed her receipt of the plan on June 24, 2016.

72. Montessori Charter did not conduct the agreed upon assessments. Parents had withdrawn Student from Montessori Charter, and placed him at The Winston School, a private school, at the beginning of the 2016-2017 school year. Parents permitted Dehesa and Montessori Charter to assess and observe Student at Winston. However, Montessori Charter school administrators did not see the benefit of assessing Student outside of Montessori Charter. For this reason, Montessori Charter did not attempt to assess Student following its receipt of the signed assessment plan.

#### *The Winston School*

73. On August 25, 2016, Parents provided Ms. Rodrigues written notice that they disagreed with the May 19, 2016 IEP offer. Parents stated they would be placing Student at

a nonpublic school, Winston, and would seek reimbursement from Dehesa and Montessori Charter for that placement. Parents enrolled Student at Winston at the start of the 2016-2017 school year, Student's eighth grade.

74. Winston administrator Mary Sterling-Torreti, counselor Dr. Norm Severe, and Student's expert Dr. Sharon Lerner-Baron, each provided credible testimony during the hearing in support of Student's placement at Winston. Ms. Sterling-Torreti had been an administrator at Winston for 28 years and was familiar with its policies and methodologies. Dr. Severe was a licensed psychologist, the Dean of Winston, and had provided Student counselling services at Winston.

75. Student's expert, Sharon Lerner-Baron, Ph.D., had been a licensed clinical psychologist in California since 1998. She received a master's in psychology in 1985, and a Ph.D. in psychology in 1991. Dr. Lerner-Baron provided outpatient individual, marital, family, and group therapy for children and adults in her private practice in La Jolla, California. In the area of education, her specialties included anxiety disorders, adjustment disorders, attention deficit hyperactivity disorder, autism, and learning disabilities. Dr. Lerner-Baron reviewed Student's school records, interviewed Student, and observed him at Winston on two occasions. She first observed Student at Winston on September 22, 2016, for 50 minutes, and again on October 17, 2016, for 35 minutes. She also observed Montessori Charter, absent Student, on October 25, 2016, for one hour. Dr. Lerner-Baron was a knowledgeable, deliberative, and careful expert witness.

76. Winston was a private school located in northern San Diego County. Winston contracted with various school districts and was certified by the California Department of Education as a non-public school. Approximately 111 students attended the school, in grades four through 12, with up to 10 students per class. Each class had a special education credentialed teacher, along with a teaching assistant who assisted with prompting, redirection, and small group instruction. Classes were small, structured, and teacher-directed. Winston catered to a high functioning, special education population, with an emphasis on preparing students for college. Like Student, most students who attended Winston had a specific learning disability, difficulty with executive functioning, and/or attention deficit hyperactivity disorder. Winston embedded occupational therapy in each class, for students who had sensory seeking problems. For behavior, Winston employed positive behavior supports, including a token economy, whereby students received rewards for positive behaviors.

77. Student benefitted from the small ratio of staff to students, structured classroom, behavior strategies, and the teacher-directed instruction provided at Winston. The classroom teacher proactively facilitated Student's attention to work and classroom participation. Student was receptive to teacher instruction and adult intervention. He was not anxious or uncomfortable, even when the teacher stood directly next to him. The teaching staff used strategies designed to reduce stress, such as personally explaining the

reasoning behind grading, pre-teaching, and repeated instruction. Multilevel strategies were used to help alleviate executive functioning problems: teachers provided instructions verbally, in writing for the class, and on a chart.

78. Dr. Lerner-Baron persuasively testified that the manner of instruction she observed at Winston was appropriate for Student. This manner of instruction stood in stark contrast to what she observed at Montessori Charter. There, Dr. Lerner-Baron observed competing distractions throughout the class period, with little teacher facilitation or direction. Students socialized, walked about the classroom, and were required to self-advocate to receive teacher-directed instruction. For example, Dr. Lerner-Baron observed one pupil ask the teacher for assistance on a problem. The teacher showed that student how to complete the equation on a white-board, but quickly erased her work before other students, who had begun to take an interest, could see or benefit from the teacher instruction. Overall, the class was unstructured, disjointed, and very noisy. Sensing Dr. Lerner-Baron's acknowledgment of the noise level, the teacher asked a group of students to talk more quietly. Those students were incredulous by this direction, disrespectfully shouted back at the teacher, and continued talking loudly. Dr. Lerner-Baron credibly testified that it would be difficult for Student, who had an attention processing disorder, learning disabilities, and difficulty self-advocating, to benefit from placement at Montessori Charter.

79. Mother credibly testified that she had incurred \$20,709.00 for tuition related costs for Winston. She provided supporting documentation for this testimony.

#### *Terry Novacek's Testimony*

80. Element Education's executive director Ms. Novacek provided straightforward testimony during hearing. She candidly illustrated many problems that are manifest at Montessori Charter. A summation includes the school's predetermination of IEP offers, based upon school policies and instruction philosophy. It is against school policy to offer positive behavior interventions like a positive behavior support plan, an individual aide, or a different school placement.

81. Ms. Novacek erroneously testified that it would be unlawful for the school to offer a placement other than Montessori Charter, regardless of the student's disability or needs. It also seems unlikely that it would offer a different placement, even if it believed it could. Ms. Novacek, like other staff at Montessori Charter, was emphatically attached to the Montessori instruction philosophy. She believed that child-directed instruction was appropriate for all students. Any change to the school, even those to meet a student's unique needs, such as the provision of a one-on-one aide, damaged the fidelity of Montessori instruction and was unacceptable. In the case where a student had not benefited from Montessori instruction, Ms. Novacek believed that parents were to blame, for not providing an appropriate level of support in the home. The present matter was no different; Ms. Novacek blamed Student's parents, and a lack of parent support in the home, for his educational problems.

82. A Montessori Charter IEP team had never offered a student placement in a special day class. Ms. Novacek had a negative opinion of special day classes, which she described as a place where children go to “wet them self” and “bang their head.” Ms. Novacek would rather see a student fail or, ideally, succeed on their own, using Montessori instruction, than to provide a more supportive environment, like a special day class. She speculated that if a child needed a nonpublic school, Montessori Charter would pay for it, although that scenario had never arisen.

83. Ms. Novacek also opposed positive behavioral interventions and strategies, like a token economy or behavior support plan. As school policy, Montessori Charter did not offer positive behavior interventions and strategies because such would change the school environment. Ms. Novacek deliberated that, if a student’s behavior became problematic at school, that student would be provided less instruction at school, and more at-home instruction, until their behaviors subsided. Ms. Novacek did not consider moving a student from Montessori Charter to at-home instruction a change in school placement because each placement fell under the school’s charter as an independent study program.

84. Ms. Novacek unpersuasively opined that Montessori Charter was a good fit for children who, like Student, had attention deficit hyperactivity disorder, because she had observed several students at the school with unidentified attention disorders. She failed to explain how the presence of other, yet unqualified pupils with attention disorders, at the same school meant that Montessori Charter was equipped to remediate attention disorders.

#### *Cathleen Geraghty-Jenkinson’s Testimony*

85. Cathleen Geraghty-Jenkinson testified as an expert on behalf of Dehesa and Montessori Charter. Dr. Geraghty-Jenkinson attained a masters’ degree in 2006, and a Ph.D. in School Psychology in 2008. At the time of the hearing, she was a full-time professor of psychology at the University of California, Riverside. She also privately conducted psychological assessments and attended IEP team meetings on behalf of various school districts. Dr. Geraghty-Jenkinson had not met or assessed Student. In preparation for the due process hearing, she observed Student at Winston on November 10, 2016, for 20 minutes; observed two classes at Montessori Charter, for 30 minutes each, absent Student, also on November 10, 2016; she reviewed school records, and; spoke to Ms. Doig over the telephone for approximately 20 minutes. During hearing, Dr. Geraghty-Jenkinson was not a careful or reliable witness.

86. Dr. Geraghty-Jenkinson provided misleading testimony. For example, she testified that she based her expert opinion that Student had progressed while at Montessori, in significant part, upon her review of multiple work samples in the areas of math and writing. Based upon this review, during hearing, she examined each goal in the October 2014, and June 2015, IEP’s, and testified that Student had either met, or made progress towards, each goal. However, it was later revealed that Dr. Geraghty-Jenkinson had not reviewed multiple work samples. She subsequently changed her testimony to state that she had reviewed a single math sample and, up to, two writings samples. Yet, Dr. Geraghty-

Jenkinson could not describe what was contained in those particular samples, and she was not familiar with the numerous work samples that were produced during hearing. Although three work samples would have been insufficient to support her opinion that Student had met or progressed towards six goals, it did not appear that she had reviewed any of Student's work. Contrary to Dr. Geraghty-Jenkinson's testimony, Student's work samples showed that he was far below what was required in each goal.

87. In addition, while appearing to read from a May 19, 2016 progress report during hearing, she testified that the progress report notes stated that Student had made progress towards each of his three, prior annual goals. Contrary to her testimony, for the first goal, the progress report stated "[Student] had not made progress towards the goal." When this specific writing goal was developed in June 2015, Student's baseline was at 50 percent. By May 2016, the progress report stated that Student's baseline was 50 percent. For the second goal, in math, the progress report showed no growth. Student began the goal at a 40 percent baseline, and completed the school year at the same 40 percent baseline. Progress notes for the third goal, in vocational/work habits, stated "[Student] has not made progress towards this goal." On this basis, it is not clear what Dr. Geraghty-Jenkinson was reading from, and it appeared that she intentionally tried to mislead this tribunal.

88. Dr. Geraghty-Jenkinson's demeanor was often flippant, dismissive, or exaggerated. She sometimes laughed inappropriately to questions, and was sometimes non-responsive. She testified that school districts privately paid her to attend "thousands" of IEP team meetings. When asked how she had time to privately attend so many meetings, while also working as a full-time professor, she laughed that only the college Dean thought that she worked 40 hours per week as a professor. While likely intended as a light-hearted joke, this response illustrated a lack of veracity and seriousness in her demeanor.

89. Regarding her observation of Student at Winston, Dr. Geraghty-Jenkinson testified that she observed Student write a journal entry during a small, structured, teacher-directed classroom. Student then read that journal entry aloud to the class. She described that Student correctly completed the assigned task without assistance or prompting; was receptive to the teacher's directed instruction; and, completed a journal entry that was well-written and complex. Yet, when asked to compare that written journal entry to a work sample of Student's writing from Montessori Charter, Dr. Geraghty-Jenkinson refused to do so. The Montessori Charter work sample showed a much lower level of skill acquisition to what she had observed Student demonstrate at Winston. Dr. Geraghty-Jenkinson refused to compare the two on the basis that the Montessori Charter entry was a written assignment, and the Winston entry was an oral assignment. However, both were written assignments, the only difference being that the Winston writing assignment was read aloud.

90. Dr. Geraghty-Jenkinson did not recommend placement for Student at Winston; she recommended Montessori Charter. However, her testimony that Student attended to task during her entire observation of him at Winston; appropriately responded to teacher instruction; initiated and completed a task; and, produced a complex written assignment, was persuasive evidence that Student benefited from instruction at Winston.

91. Finally, with the exception of her observation of Student at Winston, Dr. Geraghty-Jenkinson's testimony was incongruent with a preponderance of the evidence submitted at hearing. For example, she opined that Student did not require a math goal in his May 2016 IEP, because math was not a problem area for Student. This testimony ignored that Student was eligible for special education and related services based, in part, on having a specific learning disability in the area of math. Montessori Charter had not assessed Student, nor had Dr. Geraghty-Jenkinson, so there was no evidence supporting her opinion that Student no longer had a math learning disability. Moreover, teachers at Montessori Charter testified that Student had difficulty in math. Student was overwhelmed by math, had not met his math goals, and math was an antecedent to his anxiety and off-task behavior. The May 2016 IEP team had elected to forgo a math goal because they believed that Student was not emotionally ready to begin working on a math goal; not because math was no longer a problem area. Dr. Geraghty-Jenkinson subsequently changed her opinion that Student did not have a math learning disability, and unpersuasively testified that math was covered by the two vocational goals included in the May 2016 IEP. However, neither of those goals were intended by the IEP team to be math goals, and neither goal included any requirement regarding mathematics.

92. Another example included Dr. Geraghty-Jenkinson's description of her classroom observations at Montessori Charter. She described quiet, structured classes, with attentive pupils focused on teacher-directed instruction. This description was inconsistent with overwhelming evidence provided by Montessori Charter's administrators and teachers, who proudly described classes as social, unstructured, and child-directed.

93. In sum, Dr. Geraghty-Jenkinson was not a credible witness. With the limited exception of her observation of Student's performance at Winston, her testimony was given little evidentiary weight.

94. Overall, a preponderance of evidence submitted at hearing overwhelmingly showed that Montessori Charter was not appropriate to meet Student's individual needs.

## LEGAL CONCLUSIONS

### *Introduction: Legal Framework under the IDEA*<sup>3</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)<sup>4</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code

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<sup>3</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>4</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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

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

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 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 (*Mercer Island*) [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE

to the child. (20 U.S.C. § 1415(b)(6); 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, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof for all of his issues, and Dehesa and Montessori had the burden of proof for its issue.

5. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.) “First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (*Rowley, supra*, 458 U.S. at pp. 206-207.) “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” (*Id.* at p. 207.)

6. A procedural violation constitutes a denial of FAPE only if it impeded the child’s right to a FAPE, significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (hereafter *Target Range*)).

### *Charter Schools*

7. Children with disabilities who attend public charter schools and their parents retain all rights under the IDEA and its regulations. (34 C.F.R. § 300.209(a).) A charter school that is a public school of a local educational agency must serve children with disabilities attending those charter schools in the same manner as the local educational agency serves children with disabilities in its other schools. (*Id.*, at subd. (b)(1)(i).)

8. Although charter schools have been granted independence to develop unique educational models, the California Legislature did not intend that the charter school statutes override or conflict with special education law. Education Code section 47646, subdivision (a), provides in pertinent part that a child with disabilities attending a charter school shall receive special education instruction “in the same manner as a child with disabilities who attends another public school of that local educational agency.” It also imposes on the chartering local educational agency the duty to ensure that “all children with disabilities enrolled in the charter school receive special education ... in a manner that is consistent with their individualized education program” and is in compliance with the IDEA and its regulations. (*Ibid.*)

9. A charter school is not permitted to locate a resource center for non-classroom-based independent study outside of the geographic boundaries of the authorizing school district, but within the same county. (*Anderson Union High School District v. Shasta Secondary Home School* (2016) 4 Cal.App.5th 262; Ed. Code § 47600) For its issue, Dehesa and Montessori Charter requested that the Administrative Law Judge order placement at Montessori Charter over Parents' objection. However, Dehesa Superintendent, Ms. Hauer, testified that Montessori Charter, authorized as an independent study learning center by Dehesa, is located outside of the geographic boundaries of the authorizing school district. By the foregoing authority, it is therefore impermissible for the Administrative Law Judge to order placement at Montessori Charter.

#### *Extended School Year*

10. In addition to special education instruction and services during the regular school year, school districts must provide extended school year services in the summer if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, title 5, section 3043, provides that extended school year services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Pupils to whom extended school year services must be offered under section 3043:

“ . . . shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.”

(See also 34. C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).)

11. Here, Student's issues one and two, in part, asserted that Dehesa and Montessori Charter failed to address his needs during the extended school year. However, Student abandoned this claim during hearing. Montessori Charter witness Mr. Pontecorvo testified that Student had difficulty retaining previously learned math concepts. However, Student failed to draw a causal link between that evidence and a need for extended school year services. In fact, Student failed to provide any evidence in support of his need for extended school year services. Student therefore failed to meet his burden of proof that he was denied a FAPE, to the extent that claim relates to Dehesa and Montessori Charter's failure to offer him extended school year services.

#### *Dehesa and Montessori Carter's Affirmative Obligation to Offer a FAPE*

12. Although development of an IEP is a team decision, it is the school district that is ultimately responsible for ensuring that a student is offered a FAPE. (*Letter to*

*Richards*, 55 IDELR 107 (OSEP 2010).) It is the school district that has an affirmative duty to review and revise, at least annually, an eligible child’s IEP. (*Anchorage School District v. M.P.* (9th Cir. 2012) 689 F.3d 1047 [2012 WL 2927758 at p. 5] (*Anchorage*); 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).) Similarly, the school district must conduct a reassessment of the pupil if it determines that the educational or related services needs of the pupil, including improved academic achievement and functional performance, warrant a reassessment. (Ed. Code, § 56381, subd. (a)(1).) Nothing in the IDEA makes these duties contingent upon parental cooperation with, or acquiescence to, the district’s preferred course of action. (*Anchorage, supra*, 689 F.3d at p. 1055.) For example, if the parent does not consent to an assessment, the school district may file a request for a due process hearing to override the lack of consent and obtain an order requiring assessments. (Ed. Code, § 56381, subd. (f)(3).) School districts “cannot excuse their failure to satisfy the IDEA’s procedural requirements by blaming the parents.” (*Anchorage, supra*, 689 F.3d at p. 1055, citing *Target Range, supra*, 960 F.2d at p. 1485.) By this standard, Dehesa and Montessori Charter’s defense, that it did not provide Student a mental health assessment plan, until October 28, 2015, or offer counseling services until March 1, 2016, because Parents were not receptive to such, is not well conceived or persuasive. Dehesa and Montessori Charter offered no persuasive legal authority that permits a school district to eschew its affirmative duties under the IDEA by blaming Student or his parents. (*Anchorage, supra*, 689 F.3d at p. 1055.)

#### *Predetermination*

13. Under the IDEA, parents of a child with a disability must be afforded an opportunity to participate in IEP team meetings with respect to the provision of a FAPE to their child, and the school district must fairly and honestly consider parents’ concerns. School officials may discuss the issues and concerns in advance of the IEP team meeting, but they may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10. (*Douglas County*))

#### *Issue 1(a): The Interim IEP*

14. Student erroneously asserted that Montessori Charter’s interim IEP of September 2, 2014, denied him a FAPE because it failed to offer him comparable services to those in his last IEP, dated June 11, 2014. Student confuses his last IEP, with his last existing agreed upon and implemented IEP.

15. When a student with an IEP, in effect, moves to a new district in the same state within the same school year, the new district must provide services comparable to those the student received in the old district until it either: adopts the prior IEP; or develops, adopts, and implements a new IEP. (34 CFR 300.323(e)) Here, Student transferred from Escondido to Dehesa, between school years, during the 2014 summer. Escondido offered Student’s last IEP, prior to his transfer, on June 11, 2014, the last day of the school year. Parents consented to the IEP, but Escondido did not have an opportunity to implement that IEP.

16. By September 2, 2014, Montessori Charter had promptly offered Student an interim IEP. Ms. Rodrigues was solely responsible for developing the interim IEP. She mistakenly believed that the June 11, 2014 IEP, which offered Student 150 minutes of individual specialized academic instruction, was Student's last called for IEP. She offered Student 60 minutes per week of unspecified specialized academic instruction in his interim IEP, based upon the mistaken belief that 60 minutes of specialized academic instruction at Montessori Charter was comparable to 150 minutes of specialized academic instruction at Student's prior school. Notwithstanding Ms. Rodrigues's errors, Student failed to provide as evidence his last implemented and existing IEP, which would be the last agreed upon IEP, preceding the June 11, 2014 IEP. Student also failed to provide evidence describing what specific services were included in his last implemented IEP.

17. Consequently, Student failed to prove what his existing services, or comparable services, comprised, when Montessori Charter offered the interim IEP. Student therefore failed to meet his burden of proof for that issue.

*Issues 1(b) and 2(a): Student's Behaviors*

18. Student correctly asserted that he was denied a FAPE because Dehesa and Montessori Charter failed provide him appropriate behavior services and supports during the 2014-2015, and 2015-2016, school years.

19. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports 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).)

20. A preponderance of evidence showed that Student's behaviors impeded the learning of himself or others, warranting an assessment and services. (20 U.S.C. § 1414(a)(2)(A); 20 U.S.C. § 1414(d)(3)(B)(i).)

21. Student had behavior problems that were evident almost immediately upon his enrollment at Montessori Charter. The school's first IEP team, convened on October 1, 2014, just 30 days after he started Montessori Charter, found that Student's behaviors impeded the learning of himself or others. Student talked out in class, disturbed others, squirmed, left the classroom without permission, and was not receptive to help from teachers or staff. Each subsequent annual IEP, including the ones developed on June 1, 2015, and May 19, 2016, found that Student's behavior impeded the learning of himself or others, and provided similar details regarding Student's behavior problems.

22. As a result of his behaviors, Student was unable to access his educational program and he missed instruction. Mr. Pontecorvo was unable to deliver specialized academic instruction because Student's behaviors impeded his ability to receive instruction from teachers or staff. Ms. Doig and Mr. Pontecorvo each testified that adults made Student

anxious, withdrawn, or overwhelmed. Student was not receptive to school instruction and he lacked the ability to ask a teacher or staff for assistance, an integral part of Montessori instruction.

23. Ample evidence showed that Student had a significant history of behavior problems at school that warranted IEP intervention. Student's maladaptive behaviors resulted in off-task behavior, refusal to receive instruction, inability to initiate or complete assignments, and elopement from the classroom on many occasions. In light of the information available at the time Student's 2014, 2015, and 2016 IEPs were developed, it was not reasonable to forego IEP based behavior services. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

24. Montessori Charter's IEP teams ignored Student's behavioral needs and failed to offer any behavior services, goals, or assessment, during the October 1, 2014 IEP, June 1, 2015, and May 19, 2016 annual IEPs. The 2016 addendum IEP, along with the May 16, 2016 annual IEP, offered Student counseling goals and services. However, Ms. Maushart credibly testified that the counseling goals were flawed because they did not include Student's classroom teacher as a responsible party. Each goal required implementation, and data tracking, in the classroom. Moreover, while important, mental health counseling was insufficient to identify and remediate all of Student's behavior problems. Rather, Student required positive behavior support services and strategies to receive a FAPE.

25. Montessori Charter unlawfully predetermined that it would not offer Student positive behavioral interventions, strategies, and supports to address his behavior. Ms. Novacek testified that positive behavior interventions, including a behavior support plan or positive reinforcement strategies, would change the school environment and diminish the school's ability to deliver Montessori instruction. It was therefore school policy to predetermine its IEP offers to not include positive behavior support services, strategies, and supports to its students. Frustrated with his behavior, Student's teachers instead imposed ad hoc and punitive measures in an attempt to control his behavior. As punishment for his problem behaviors, teachers took away preferred devices and activities, including Student's sensory processing tools, assistive technology, and recess. If Student's behavior grew worse, it was school procedure to unilaterally expel him from the classroom, to at-home instruction. There was no evidence provided that Montessori Charter's behavior policy was individualized for Student, developed by qualified personnel, or effective.

26. Finally, Dehesa and Montessori Charter failed to offer Student an assessment for behavior issues until after the May 19, 2016 IEP team meeting. That assessment plan was signed and returned to Montessori Charter on June 24, 2016. As of the hearing, Dehesa and Montessori Charter had not begun that assessment.

27. Consequently, Student proved by a preponderance of the evidence that he was denied a FAPE during the 2014-2015 and the 2015-2016 school years, because Dehesa and Montessori Charter failed to provide appropriate behavior intervention.

*Issues 1(c) and 2(b): The IEP Goals*

28. Student alleged that the goals contained in his IEPs failed to address all areas of need. District disputed this claim and asserted that the goals it developed met all statutory requirements and adequately addressed Student's needs.

29. In developing the IEP, the IEP team is mandated to consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.) Here, Montessori Charter identified Student with needs in math, writing, behavior, attention, planning and organization, and social-emotional, during each annual IEP that was offered during the period in dispute.

30. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) 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); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).) 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.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.) By this standard, Student's annual IEP's of October 1, 2014, June 1, 2015, and May 19, 2016, were required to contain a statement of measurable annual goals for writing, math, behavior, attention, planning and organization, and social-emotional development.

31. The weight of the evidence supports Student's contention that his goals were inadequate.

32. Student's annual IEP of October 1, 2014, offered three goals. Goal one required Student to write a three paragraph composition, providing details and transitional expressions, using a writing rubric in two of three trials, measured by work samples. Goal

two required Student to solve 20 math problems of varying type with 80 percent accuracy in three of four trials. Goal three required Student to independently maintain a planner or calendar, and to prioritize tasks, for all assignments and due dates, 85 percent of the time, measured by the teacher. Each goal delineated the persons responsible for the implementing the goals as the resource specialist program teacher; the classroom teacher, identified as “educational facilitator,”; and Parents, identified as “parent-teacher.”

33. While there were problems in the manner the goals were delivered, that did not mean the goals themselves were defective. Evidence showed that the goals offered were measurable, annual goals in the areas of written language, math, and planning and organization. They did not address Student’s behavior problems or his social-emotional needs, which included difficulty communicating with adults, feeling overwhelmed by school, self-negative talk and feelings, withdrawal, and depression.

34. The June 1, 2016 IEP team offered Student three goals. The first goal required Student to write a two paragraph expository essay with 80 percent accuracy in four of five trials, measured by the teacher. Goal two required Student to complete 10 calculation problems with 80 percent accuracy in four of five trials, measured by the teacher. Goal three required Student to create one performance goal to achieve daily during independent study time, with 80 percent accuracy. The goals were measurable, annual goals in the areas of writing, math, and planning. The IEP goals failed to address Student’s behavior and social-emotional deficits.

35. The May 19, 2016 IEP offered six goals. Goal one called for Student, with prompting and using a graphic organizer, to write an expository essay with 80 percent accuracy in three of five trials, measured by the teacher. Goal two was for Student to create a performance goal, and complete that goal, with 80 percent accuracy. Goal three required Student, when given any task, to initiate and complete the task within five minutes and complete the task with 80 percent accuracy, in four of five trials. Goal four required Student, when faced with feelings of inadequacy or anxiety, to select a self-regulating strategy in four of five opportunities measured by observation and documentation. Goal five required Student, when working at school or home, to work on assigned tasks using self-regulation and organizational strategies, and refrain from off task behavior, three of five times measured by observation and documentation. Goal six required Student, when confronted with a difficult task or problem, to use assertiveness and communication skills to self-advocate for his needs in the classroom setting. When approached by a teacher, Student would refrain from shutting down or deflection and accept assistance in four of five opportunities, measured by observations and documentation.

36. The persons responsible for implementing the first three goals were identical to the prior IEPs: the resource specialist program teacher, the educational facilitator, and; the parent-teacher. For goals four, five, and six, the marriage and family therapist and parent were solely responsible.

37. Student had delays in writing, planning, and organizing, and goals one, two, and three, provided measurable ways of addressing those deficits.

38. Goals four, five, and six, in the areas of emotional regulation, focus/attention, and self-advocacy, were inadequate because there was no person responsible to measure the goals. During hearing, the marriage and family therapist who developed those goals, Ms. Maushart, persuasively testified that the goals were flawed because they did not include the classroom teacher as a responsible party. Although Ms. Maushart could work on developing coping strategies during her individual counseling sessions with Student, implementation and monitoring of those strategies, and each goal, required the assistance of the classroom teacher. Ms. Maushart would not be working with Student in the classroom or observing him outside of the therapy sessions. Therefore, absent teacher intervention, observation, and documentation, it was not possible to implement or to measure progress on goals four, five, and six. The IEP therefore failed to offer Student appropriate counseling goals.

39. The May 2016 IEP did not offer Student a math goal. Montessori Charter's expert witness, Dr. Geraghty-Jenkinson, testified that Student did not require a math goal, because math was not a problem area for Student. Her testimony was unpersuasive because (1) Student was eligible for special education and related services based, in part, on having a specific learning disability in the area of math; (2) there was no evidence supporting that Student no longer had a math disability; (3) teachers at Montessori Charter testified that Student had difficulty in math; (4) Student was overwhelmed by math and math was an antecedent to his anxiety and off-task behavior; (5) Student had not met his prior math goals, and; (6) in the May 2016 diagnostic testing, the i-Ready, showed that Student was five-years delayed in areas of mathematics. Student therefore required a math goal.

40. Dr. Geraghty-Jenkinson's testimony that the two planning goals, identified as vocational goals, met Student's need for a math goal, was similarly unpersuasive. Neither of those goals were intended by the IEP team to be math goals, and neither goal included a requirement regarding mathematics.

41. For the foregoing reasons, a preponderance of the evidence showed that each annual IEP failed to offer adequate goals to address all areas of Student's identified deficits, including behavior and social-emotion, and, in the May 19, 2016 IEP, math.

42. Had Dehesa and Montessori Charter offered and provided appropriate goals, it could have ensured tracking and progress in Student's areas of need. Dehesa and Montessori Charter failed to do so, and Student failed to progress academically. He also continued to demonstrate behavior and emotional difficulty. He continued to be off-task, inattentive, unresponsive to instruction, anxious, had difficulty starting or completing assignments, left the classroom without permission, and missed instruction. As a consequence of the school's failure, Student was denied an educational benefit.

43. For the foregoing reasons, a preponderance of the evidence shows that Dehesa and Montessori Charter's failure to offer appropriate annual goals denied Student a FAPE.

*Issues 1(d), 2(c), and 4: Placement at Montessori Charter*

44. Student alleges that placement at Montessori Charter was inappropriate to meet his individual needs. Dehesa and Montessori Charter aver that Montessori Charter is appropriate for Student, and seek an order that they may provide Student that placement over Parents' objection.

45. Evidence overwhelmingly showed that Montessori Charter's IEP team predetermined its placement offer. Predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) For each of Student's annual IEPs, including the October 1, 2014, June 1, 2015, and May 19, 2016 IEP, the school's IEP team went into the IEP team meeting with one placement option, Montessori Charter's independent study program, and was unwilling to consider other options.

46. For example, Ms. Doig testified that school staff believed that, because Montessori Charter was a parent-choice school, it was not appropriate to consider other placement options. Additionally, Ms. Novacek, Ms. Rodrigues, Ms. Doig, and Mr. Pontecorvo testified that Montessori Charter had a one size fits all philosophy. Its teachers and administrators believed that its child-centered teaching philosophy was appropriate for all pupils and, if it was not, than parents were to blame. Each Montessori Charter witness was wed to the Montessori instruction philosophy. Per this philosophy, there were only two possible educational placements; a Montessori instruction learning center, like Montessori Charter, or home instruction. Home instruction was reserved for children who had serious behavior challenges and not ready for school-based instruction. A Montessori Charter IEP team had never offered a student placement in a special day class. School staff had a negative opinion of special day classes, which Ms. Novacek described as a place where children go to "wet themselves" and "bang their head." Special day classes were not considered appropriate for any student and anathema to the Montessori philosophy. For these reasons, Montessori Charter failed to consider a continuum of placement options during each of Student's IEP team meetings. School staff went into each IEP team meeting with a predetermined offer for placement at Montessori Charter or home instruction. Although Ms. Novacek speculated that if a child needed a nonpublic school Montessori Charter would pay for it, that scenario had never arisen. A Montessori Charter IEP team had never offered a student placement at a nonpublic school. On occasion, school staff would consider another, similar, independent study charter school run by Element Education, such as Dehesa Charter School. However, traditional schools and special day classrooms, even those located in Dehesa School District, were not discussed or considered.

47. School policy dictated that changes to the Montessori Charter environment were also prohibited, regardless of a student's individual needs. For example, positive

behavioral interventions and were not offered by Montessori Charter IEP teams because such would decrease the fidelity of Montessori instruction. The school's IEP team's Montessori instruction training, and strong belief in that training, preempted the team's ability to individualize the IEPs.

48. Finally, Ms. Novacek erroneously testified that the school's IEP teams did not consider or offer other school placements because it was unlawful for them to offer a placement other than Montessori Charter, regardless of the student's disability or needs. Ms. Novacek's testimony overlooks that state law governing charter schools do not exist in a vacuum; because Student is an individual with exceptional needs who is eligible for special education, provisions of the Education Code governing the rights of special education students and their parents, and the IDEA, are also applicable. State statutes are to be harmonized with federal laws, and all of them followed if possible. Nonetheless, the IDEA and its implementing regulations are federal laws, and to the extent they conflict with state laws, those federal laws prevail under the Constitution's Supremacy Clause.

49. Montessori Charter's predetermination of Student's placement violated state and federal special education law. The school district cannot come to an IEP team meeting with a predetermined offer of placement. Doing so denied Parents meaningful participation in the IEP decision-making process. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); *Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786.)

50. A preponderance of the evidence also showed that Montessori Charter did not meet Student's individual needs.

51. Dehesa and Montessori Charter argue that Montessori Charter was appropriate for Student. The school district primarily points to Student's grades, state testing, and Dr. Geraghty-Jenkinson's testimony, as evidence that Student progressed at Montessori Charter. The school district errs for the following reasons.

52. First, Ms. Doig, who was responsible for grading Student's work, provided passing grades for most of Student's assignments, including for incomplete and unresponsive work. Ms. Doig modified Student's assignments so that he received less work than his peers. Even with this modification, Student was unable to complete 50 to 70 percent of his classwork, and completed less homework. Yet, Student received passing grades, "C's" and "B's," in each subject on each report card during 2014-2015, and 2015-2016, school years. Student's grades were not a reliable indication of his knowledge or progress in any subject area. Classroom teachers did not base Student's report card grades on curriculum content standards or measureable achievement. Rather, grades at Montessori Charter were subjective and based on the teacher's perception of the student's attitude toward learning. Ms. Doig testified that an "A" for one student was not the same grade as an "A" for a different student, based upon her opinion of each student's enthusiasm toward learning. Teachers believed that Student's attitude toward learning had improved; he was getting closer to an emotional level

that would permit learning. He therefore received passing grades. Nonetheless, because Student's grades were not a reliable measure of his academic abilities, they were not credible evidence.

53. Secondly, Dr. Geraghty-Jenkinson was not a credible witness. She provided misleading testimony. For example, she testified that she based her expert opinion that Student had progressed while at Montessori upon her review of multiple work samples. However, it was later revealed that Dr. Geraghty-Jenkinson had not reviewed multiple work samples. She subsequently changed her testimony to state that she had reviewed a single math sample and, up to, two writings samples. Yet, Dr. Geraghty-Jenkinson could not describe what was contained in those particular samples, and she was not familiar with the numerous work samples that were produced during hearing. Contrary to her testimony, Student's work samples showed that he was far below what was required in each goal. It was clear that Dr. Geraghty-Jenkinson had not reviewed Student's work and had misled the tribunal.

54. Dr. Geraghty-Jenkinson also misled the tribunal when she appeared to read a May 19, 2016 progress report on goals. She erroneously testified that progress report notes stated that Student had made progress towards each of his three, prior annual goals. However, the progress report stated that Student had not made any progress on the goals Student began, and ended, the school year at the same baselines for each goal. Consequently, Dr. Geraghty-Jenkinson's testimony did not reflect the material from which she read.

55. Dr. Geraghty-Jenkinson's demeanor was often flippant, dismissive, or exaggerated, which demonstrated a lack of carefulness and veracity in her testimony.

56. With the exception of her observation of Student's performance at Winston, Dr. Geraghty-Jenkinson's testimony was also incongruent with a preponderance of the evidence submitted at hearing. For example, her opinion that math was not a problem area for Student was unsupported by all other evidence. Student was eligible for special education and related services based, in part, on having a specific learning disability in the area of math. Teachers at Montessori Charter testified that Student had difficulty in math. Student had not met his math goals. Student was overwhelmed by math, which was an antecedent to his anxiety and off-task behavior. Her testimony regarding her classroom observations at Montessori Charter was similarly incongruent with a preponderance of evidence. Her description of quiet, structured classes, with attentive pupils focused on teacher-directed instruction, was inconsistent with testimony provided by Montessori Charter's administrators and teachers, who described classes as social, unstructured, and child-directed.

57. Consequently, Dr. Geraghty-Jenkinson's opinion that Montessori Charter was an appropriate placement for Student was not persuasive.

58. Next, the school district refers to state wide diagnostic testing, the i-Ready and the California Assessment of Student Performance and Progress, to support its argument that Montessori Charter was an appropriate placement. However, these tests show only modest improvement in the areas of Student's learning disabilities in writing and math. On May 27, 2016, at the end of the seventh grade, Student took the i-Ready, a diagnostic test of his math and reading abilities. In math, student received an overall score at the fifth grade level, two-years delayed. Student received scores at the third grade level in geometry, and at the second grade level in numbers and operations, four and five years delayed, respectively.

59. The California Assessment of Student Performance and Progress measured some areas of Student's math and writing, during his sixth and seventh grades. Student did not improve in writing, but showed some improvement in some areas of math. However, that modest evidence of progress was outweighed by a preponderance of evidence that showed Student did not meaningfully progress while at Montessori Charter.

60. A preponderance of evidence showed that Student did poorly during the 2014-2015 school year. Student's anxiety, inattention, and withdrawal impeded his ability to receive instruction and to benefit from his educational placement. The Montessori instructional approach was not sufficiently structured for Student. The Montessori instructional method gave pupils a great deal of freedom to structure their own education, but this approach required a certain level of independence and self-motivation on the pupil's part. Yet, Student was withdrawn, reluctant to seek help from teachers, inattentive and off-task; which did not bode well in an environment that lacked structure, direct instruction, and required self-advocacy to complete any assignment. As a result, Student did not complete assignments and missed instruction. Work samples showed that he had not met the requirements for the three October 2014 goals. Student still struggled in each of his areas of disability.

61. Mr. Pontecorvo was unable to provide Student's specialized academic instruction. Student was inattentive, withdrawn, and non-responsive. Adults, including Mr. Pontecorvo, made him anxious and uncomfortable. Mr. Pontecorvo and Ms. Doig each testified that Student was not yet at the comfort level where he could receive instruction from an adult.

62. The 2015-2016 school year was no better for Student. Mr. Pontecorvo was unable to implement the specialized academic instruction because Student continued to be reluctant to work with adults. Student did not meet his annual goals, nor did he make any progress towards those goals. Student began and ended the school year at the same baselines, evidencing no progress.

63. Throughout the 2015-2016 school year, Student's anxiety, inattention, and withdrawal impeded his ability to receive instruction and to benefit from his educational placement. Montessori Charter's unwillingness to modify its IEP offer for Student resulted in a placement that provided a lack of structure, nominal teacher-directed teaching, and child-centered leaning, which was inconsistent with Student's individual needs. Student's

reluctance to seek help from teachers, inattention, and off-task behavior, made it difficult for him to complete any assignment at a Montessori instruction based school.

64. Mr. Pontecorvo's testimony that Student received "no academic benefit" during the 2014-2015 and 2015-2016 school years, was convincing evidence of the inappropriateness of Student's educational placement.

65. For the foregoing reasons, a preponderance of evidence showed that Dehesa and Montessori Charter denied Student a FAPE during the 2014-2015 and 2015-2016 school years, because the placement the IEPs offered, Montessori Charter, was predetermined and not appropriate to meet Student's individual needs. Consequently, because the May 19, 2016 IEP placement offer was predetermined and inappropriate to meet Student's individual needs, the school district may not implement that IEP over Parents' objection.

*Issues 1(e) and 2(d): Failure to Implement IEP's*

66. Student asserts that he was denied a FAPE because Montessori Charter failed to implement portions of the October 1, 2014, June 1, 2015, March 1, 2016, and May 19, 2016 IEPs. Montessori Charter responds that it materially implemented each agreed upon IEP.

67. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.)

68. 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.*)

69. Student's operative IEPs of October 1, 2014, and June 1, 2015, required Montessori Charter to implement three goals - one each in writing, math, and vocational/work habits. Each IEP provided the following accommodations: modified assignments; graphic organizers; extra time for assignments; preferential seating; 30 minutes per month of consultation by the resource specialist teacher to Parents; movement breaks; breaking down assignments into smaller parts; use of a stress ball and fidget toy; a timer for independent work; and assistive technology devices, including a word processor for written

assignments and the use of speech-to-text software. For services, each IEP offered 60 minutes per week of specialized academic instruction, by a resource specialist program teacher.

70. Montessori Charter did not implement the operative IEPs. As Student's resource specialist program teacher, Mr. Pontecorvo was responsible for implementing the weekly specialized academic instruction. Mr. Pontecorvo attempted to provide Student's specialized academic instruction in a small group, in the school's resource special program classroom. However, Student was not receptive to his instruction. Student was inattentive, withdrawn, and non-responsive. Mr. Pontecorvo and Ms. Doig each testified that Student was not yet at the comfort level where he could receive instruction from an adult. Based upon Student's behavior and emotional difficulty, Mr. Pontecorvo was unable to consistently provide him any specialized academic instruction. Frustrated, Mr. Pontecorvo later attempted to implement the services in the classroom. He had little success with that modality. Per Mr. Pontecorvo's service logs, Student did not receive a significant amount of his specialized academic instruction sessions. When he was provided the service, Student was distracted, withdrawn, and unreceptive to instruction.

71. Montessori Charter also failed to implement Student's classroom accommodations. For example, Mr. Pontecorvo did not consult with Parents for 30 minutes each month as called for in the IEPs. Student was unable to use graphic organizers and did not use a timer for assignments. Teachers, including Ms. Doig, intermittently took away Student's assistive technology device, stress ball and fidget toy, along with recess breaks, as punishment for Student being off-task or for failing to finish assignments. Ms. Doig testified that, like all students, Student could sit anywhere he liked in the classroom, including on desks or the floor, or even outside of the classroom, which she erroneously considered preferential seating.

72. Finally, Montessori Charter did not implement the IEP goals. Ms. Doig did not implement the specific IEP goals or measure progress on those goals. Her testimony that she addressed "areas" of goals was insufficient. As Student's classroom teacher, and educational facilitator, she was required to implement each specific goal, and take data to measure Student's progress for each goal in Student's operative IEPs. Mr. Pontecorvo attempted to implement the goals, but Student was not receptive to his instruction. Parents testified they were not aware that they were the "parent-teacher" identified on the IEP document. Parents did not understand that Montessori Charter had expected them to implement the goals, or how they could do such, given that each worked full time and were not teachers. Parents were not directly familiar with the goals and had not received training from Montessori Charter to provide the goals.

73. The foregoing constitutes a material breach of the school district's obligation to implement Student's October 1, 2014 IEP, during the 2014-2015 school year, and June 1, 2015 IEP, during the 2015-2016 school year.

74. Student's allegation that he was denied a FAPE because the school district failed to implement the March 1, 2016, and May 19, 2016 IEPs, fails, because Parents did not consent to those IEP's. Dehesa and Montessori therefore had no obligation to implement those IEPs until Parents either consented to the IEPs, or a Judge ordered the school district to implement the IEPs.

75. For the foregoing reasons, Student proved by a preponderance of the evidence that Dehesa and Montessori Charter denied him a FAPE during the 2014-2015, and 2015-2016, school years, by failing to implement his October 1, 2014, and June 1, 2015 IEPs.

*Issues 1(f) and 2(e): The IEPs Written FAPE Offer*

76. Student incorrectly alleges that he was denied a FAPE because the school district failed to provide him a written offer or FAPE, for the October 1, 2014, June 1, 2015, March 1, 2016, and May 19, 2016 IEPs.

77. The procedural requirement of a formal, written IEP offer creates a clear record and eliminates troublesome factual disputes years later about what placement and services were offered. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*)). A formal written offer is therefore more than a mere technicality, and this requirement is vigorously enforced. (*Ibid.*) A formal, specific offer from a school district (1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA, (2) helps parents determine whether to reject or accept the placement with supplemental services, and (3) allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (See *Union, supra*, 15 F.3d at p. 1526.)

78. Failure to provide parents a formal written IEP offer is not a per se denial of FAPE and may be excused as harmless error where parents participated fully in the IEP process, understood the placement and services being offered by the district, and the written offer was not significantly delayed. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 461 [District failed to make formal written IEP offer prior to start of new school year, but presented such an offer to parents three days after the start of the new school year.]

79. For Student, the October 1, 2014, June 1, 2015, March 1, 2016, and May 19, 2016 IEPs described in writing the offer of educational placement at Montessori Charter. In addition, in one place of the June 1, 2015, and the May 19, 2016 IEPs, placement is described as home school, in an independent or virtual charter school. Ms. Novacek persuasively testified that this designation was a mistake, and that placement was at the Montessori Charter learning site, a brick and mortar location. Parents similarly testified that they understood the placement offer as Montessori Charter. Parents understood that placement offer, and took Student to Montessori Charter daily, Monday through Thursday, and a half day on Friday, for the 2014-2015 and 2015-2016 school years.

80. Each IEP in dispute described in writing and with specificity the IEP goals, persons responsible for the goals, and classroom accommodations.

81. The March 1, 2016, and May 19, 2016 IEPs offered in writing a counseling service, provided by a nonpublic agency, marriage and family therapist. The duration of the service was 60 minutes and the frequency was weekly during the school year.

82. In writing, each IEP offered Student specialized academic instruction, provided by the school's resource specialist program teacher. The duration, 60 minutes per week, and frequency, weekly, was written into each IEP. The IEPs did not describe whether the service was delivered individually or in a group. Mr. Pontecorvo first attempted to deliver the service in a small group in the school's resource specialist program room. Later, he attempted to deliver the service in the general education classroom. Parents were not confused by the manner in which Mr. Pontecorvo selected to deliver the specialized academic instruction. Parents and Mr. Pontecorvo attended each of Student's IEP team meetings, where Parents participated and asked questions of the school's resource specialist program teacher; to the extent the team discussed services and placement at Montessori Charter. While Parents did not always agree with the IEP offer, they understood the placement and services being offered.

83. For the foregoing reasons, Student failed to show that he was denied a FAPE because the school district failed to provide a clear written offer of FAPE.

*Issue 2(f): Timely Initiation of Due Process Hearing*

84. Student complains that Dehesa and Montessori Charter denied him a FAPE during the 2015-2016 school year, by failing to initiate a due process hearing when Parents failed to consent to the March 1, 2016 addendum IEP, and the May 19, 2016 annual IEP.

85. When a school district determines that the proposed special education program component to which the parent does not consent is necessary to provide a free appropriate public education to the child, the school district shall initiate a due process hearing. If a due process hearing is held, the hearing decision shall be the final administrative determination and shall be binding upon the parties. (*I.R. v. Los Angeles Unified School Dist.*, 805 F.3d 1164; Ed. Code. § 563436(f).)

86. Here, Montessori Charter convened an addendum IEP team meeting on March 1, 2016, and April 4, 2016, to review an Educationally Related Mental Health Report, recently conducted by Ms. Maushart. The school's IEP team adopted the findings of her report. Accordingly, Montessori Charter amended Student's IEP to add three counseling goals. To meet those goals, Montessori Charter offered Student 60 minutes per week of individual counseling, provided by Ms. Maushart. No other changes were made to Student's IEP. Parents did not consent to the addendum IEP. Each Montessori Charter witness who testified, that was familiar with Student, believed that the addendum IEP was required for

Student to receive a FAPE. Yet, Dehesa and Montessori Charter failed to initiate a due process hearing when Parents refused to consent to the addendum IEP.

87. However, as already found in the Legal Conclusions herein, the addendum IEP was inappropriate. Ms. Maushart persuasively testified that the counseling goals were flawed because they did not include the classroom teacher as a responsible party. Implementation and monitoring of counseling strategies, and each goal, required the assistance of the classroom teacher. Absent teacher intervention, observation, and documentation, it was not possible to implement or to measure progress on the goals.

88. Ostensibly, any remedy related to the school district's failure to initiate due process would be related to the IEP's FAPE offer. Yet, that offer has been deemed inappropriate. Student's issue is therefore moot.

89. In an IEP dated May 19, 2016, Dehesa and Montessori Charter offered Student a FAPE for the remainder of the 2015-2016 school year, and for the 2016-2017 school year. Parents refused to consent to the IEP offer. The school district subsequently initiated due process on September 7, 2016, to attain an order from a Judge to implement that IEP offer. Student failed to show that the school district's due process hearing filing, at the start of the following school year, was untimely. Regardless, as found in the Legal Conclusions herein, the May 19, 2016 IEP failed to offer Student a FAPE. The placement offer for Montessori Charter was predetermined and inappropriate to meet Student's individual needs. Consequently, Student's issue as to the May 19, 2016 IEP is also moot.

90. Based upon the foregoing, Student failed to show that Dehesa and Montessori Charter's failure to initiate a due process hearing denied him a FAPE during the 2015-2016 school year.

### *Issue 3: The Educational Records Request*

91. Student complains that Dehesa and Montessori Charter denied him a FAPE during the 2015-2016 school year, by failing to timely provide his parents a complete copy of his educational records.

92. When a parent of a disabled student requests educational records, the local educational agency shall provide parents a copy of the student's educational records within five business days of parents request for records. (Ed. Code § 56504) OAH jurisdiction extends to procedural violations that infringe on the parents' opportunity to participate in the IEP decision making process for their children.

93. Parents sent Montessori Charter a written request for educational records on May 20, 2016. There is no question that Montessori Charter failed to timely provide Parents a copy of Student's educational records. During hearing, Ms. Novacek admitted that educational records were not timely provided to Parents. Various records were provided to

Parents, at various times, more than five business days following the May 20, 2016 request; up to and including during the due process hearing, in November 2016.

94. Some of Student's educational records have never been provided to Parents. Mr. Pontecorvo testified that he had kept some of Student's educational records in a box in his garage, where they were destroyed by a nesting rat.

95. The school district's conduct prevented Parents from accessing Student's educational records to assist them in reviewing the appropriateness of the May 19, 2016 IEP offer, and in preparation for a due process hearing that included an examination of the appropriateness of Student's 2015-2016 school year. As a result, the school district's conduct seriously infringed on Parents' ability to participate in the IEP decision making process.

96. For the foregoing reasons, a preponderance of evidence shows that Dehesa and Montessori denied Student a FAPE, by failing to timely provide Student's educational records.

## REMEDIES

1. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

2. An Administrative Law Judge can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.)

3. The IDEA does not require compensatory education services to be awarded directly to a student, so school district staff training can be an appropriate remedy. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy violations that may benefit other pupils. (*Ibid.*) (*Student v. Reed Union School District*, (Cal. SEA 2008) 52 IDELR 240 [109 LRP 22923; Cal.Ofc.Admin.Hrngs. Case No. 2008080580] [requiring training on

predetermination and parental participation in IEP's]; *Student v. San Diego Unified Sch. Dist.* (Cal. SEA 2005) 42 IDELR 249 [105 LRP 5069] [requiring training regarding pupil's medical condition and unique needs].)

4. As equitable relief, parents may be entitled to reimbursement for the costs of a private school placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at pp. 369-71.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. The placement does not have to provide all services required by a special needs student in order for full reimbursement to be ordered, or meet all requirements of the IDEA. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14. [114 S.Ct. 361, 126 L.Ed.2d 284.]; *C.B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159.)

5. Dehesa and Montessori Charter denied Student a FAPE during the 2014-2015 school year, by providing IEPs that failed to provide appropriate behavior interventions, goals, and placement, and by failing to implement IEPs. Student did not request a specific remedy for these claims. However, Dr. Lerner-Baron's testimony was helpful in analyzing these issues. Student benefited from structured, directed instruction at Winston, and each IEP team recommended that Student receive specialized academic instruction. It is therefore equitable to order Dehesa and Montessori Charter to fund 34, 60 minute sessions of individual academic instruction for Student by a nonpublic agency, one session for each week of the school year.

6. Dr. Severe, Dr. Lerner-Baron, Ms. Maushart, and Student's teachers also supported Student's need for counseling services. It is therefore equitable for Dehesa and Montessori Charter to fund 34, 60 minute sessions of individual counselling for Student, by a nonpublic agency.

7. Finally, each IEP supported that Student had behavior deficits that impeded his learning. Accordingly, it is equitable to order Dehesa and Montessori Charter to fund an independent behavior assessment for Student, by a nonpublic agency.

8. Dehesa and Montessori Charter denied Student a FAPE during the 2015-2016 school years by providing IEPs that failed to provide appropriate behavior interventions, goals, and placement, and by failing to implement IEPs. As a remedy, Student requested that Dehesa and Montessori Charter fund Student's placement at Winston, including transportation costs. Testimony from Dr. Lerner-Baron, Ms. Sterling-Torreti, Dr. Norm Severe, and Dr. Geraghty-Jenkinson established that Student received an educational benefit at Winston. Winston provided Student counseling and teacher-directed instruction in a structured program that met his individual needs. Student failed to provide sufficient evidence of his transportation costs, but provided adequate evidence showing that his parents

incurred \$20,709.00, for costs related to tuition at Winston for one year. It is therefore equitable to order Dehesa and Montessori Charter to pay Parents \$20,709.00.

9. The evidence established that Dehesa and Montessori Charter committed these violations, and its failure to provide Student's educational records, based, in part, upon a systemic misunderstanding of their obligations to special education students. Dehesa did not understand that it, as the local educational agency, was responsible for Student's special education program. It is not permitted to contract away its obligations under the IDEA. Montessori Charter did not understand that it is not lawful to place its school policies, and instructional philosophy, over students' individual needs. There is therefore a need to have Dehesa and Montessori Charter staff trained in these areas. Accordingly, Dehesa and Montessori Charter are ordered to provide training to their directors, special education staff, and special education teachers, in the areas of requirements and best practices for ensuring that appropriate goals, services, and educational placements are offered for pupils with IEPs, along with the proper maintenance of educational records. The training shall be provided by a nonpublic agency, and shall be a minimum of 20 hours.

#### ORDER

1. Within 30 calendar days of this Decision, Dehesa and Montessori Charter shall pay \$20,709.00 to Student's parents for his placement at Winston. No further documentation is required for this payment.

2. Within 30 calendar days of this Decision, Dehesa and Montessori Charter shall contract with a nonpublic agency of their choosing, to provide 34 hours of individual academic instructional services for Student, to be funded by Dehesa and Montessori Charter. Dehesa and Montessori Charter shall also fund the cost for any assessments, materials, or other fees, associated with those services. Student shall have two years from the date Dehesa and Montessori Charter contracts with the nonpublic agency to utilize those services.

3. Within 30 calendar days of this Decision, Dehesa and Montessori Charter shall contract with a nonpublic agency of their choosing, to provide 34 hours of counseling services to Student, to be funded by Dehesa and Montessori Charter. Dehesa and Montessori Charter shall also fund the cost for any assessments, materials, or other fees, associated with those services. Student shall have two years from the date Dehesa and Montessori Charter contracts with the nonpublic agency to utilize those services.

4. Within 30 days of this Decision, Dehesa and Montessori Charter shall contract with a nonpublic agency of their choosing, to assess Student in the area of behavior, to be funded by Dehesa and Montessori Charter. Dehesa and Montessori Charter shall fund the costs for the assessor to attend an IEP team meeting to review the results of the behavior assessment.

5. Within 30 calendar days of this Decision, Dehesa and Montessori Charter shall contract with a nonpublic agency of their choosing, to provide 20 hours of training to Dehesa and Montessori Charter directors, special education staff, and special education teachers, concerning requirements and best practices for providing appropriate goals, services, and educational placements, and for maintaining educational records, for pupils with disabilities. This training shall be completed by January 30, 2018.

6. Student's remaining requests for relief are denied.

7. Dehesa and Montessori Charter shall not implement Student's May 19, 2016 IEP, without the consent of his parents.

### PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: Student prevailed on issues 1(b),(c),(d),(e), and 2(a),(b),(c),(d), to the extent they pertained to the 2014-2015 and 2015-2016 regular school years. Student also prevailed on issues 3 and 4. Dehesa and Montessori Charter prevailed on issues 1(a) and (f), and 2(e) and (f).

### RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56506, 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: January 4, 2017

DocuSigned by:  
*Paul H. Kamoroff*  
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PAUL H. KAMOROFF  
Administrative Law Judge  
Office of Administrative Hearings