# United States Court of Appeals

*for the*

# Fifth Circuit

Case No. 17-20750

RENEE J., as parent/guardian/next friend of C.J., a minor individual with a disability; CORNELIUS J., as parent/guardian/next friend of C.J., a minor individual with a disability,

*Plaintiffs-Appellants,*

– v. –

HOUSTON INDEPENDENT SCHOOL DISTRICT,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON, IN CASE NO. 4:16-CV-2828
HONORABLE LEE H. ROSENTHAL, CHIEF JUDGE

## BRIEF FOR PLAINTIFFS-APPELLANTS

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# CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated: Auburn, New York
April 2, 2018

s/ Andrew K. Cuddy
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## STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs request oral argument. This case involves important procedural and substantive issues under the Individuals with Disabilities Education Act, including the application of the Supreme Court's recent decision in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1,* 137 S. Ct. 988, 1000 (2017) to the programming for a child with autism. It further involves a determination of a school district's obligation to provide meaningful transition programming to a student with autism and various delays. The student in this case may wish to become a police officer, but lacks the social, emotional and cognitive strengths necessary to pursue such a career; the school district's decision to base his transition planning entirely on this unrealistic goal denies him the opportunity to transition to a more realistic career. This case also presents an issue of first impression as to the responsibilities of a school district when persistent bullying of a disabled child leads to school refusals.

The record in this matter is quite large, so oral argument will help the Court to understand the complex factual framework surrounding these issues.

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## JURISDICTION

Jurisdiction in the district court was predicated upon 20 U.S.C. § 1415(i)(3), and jurisdiction in this Court is predicated upon 28 U.S.C. § 1291.

## ISSUES PRESENTED

I. A school district took no action for more than three months after persistent bullying led to a disabled student refusing to attend school. Did this deny the student a free appropriate public education?

II. A student with autism, social, emotional, and cognitive delays long expressed interest in becoming a police officer, despite lacking the social, emotional and cognitive ability to do so. The school district's transition planning for the student was based on this unrealistic dream, and thus deprived the student of any meaningful transition activities. Did this deny the student a free appropriate public education?

III. The school district recommended extended school year (i.e., summer) programming for a student, but did not provide prior written notice, as required by IDEA, to the parents, and further did not inform the school that the student was to receive the services. As a result, the student did not receive summer programming. Did this procedural violation deny the student a free appropriate public education?

IV. Did the school district's refusal to provide the student with applied behavioral

analysis (ABA) substantively deny the student of educational benefits, and was the school district's refusal to provide ABA an impermissible predetermination?

V. What relief is warranted?

## STATEMENT OF THE CASE

C.J. is a child with multiple disabilities, including Autism, an Emotional Disturbance, a mild Intellectual Disability and Attention Deficit Hyperactivity Disorder ("ADHD"). ROA.3805. C.J. was not identified as having autism until he reached the age of twelve, and, even subsequent to that diagnosis, has not received specific research-based interventions to address his needs as a student with autism. ROA.1775, 3320.

In spring 2016, when C.J. was fifteen years old, Dr. Peter Simione, psychologist, conducted an extensive psychological evaluation. ROA.1775. Dr. Simione found that C.J.'s primary diagnosis was an autism spectrum disorder, a "neurodevelopmental disorder that manifests as deficits in social communication, social interaction, restricted and repetitive behavioral patterns, [and] unusual sensitivity or interest in sensory input." *Id.* C.J. also exhibits "intellectual deficits that negatively impact his reasoning and problem solving abilities." *Id.* He experiences "impairments with academic, social, and self-regulatory functioning and challenges in managing activities of daily living." *Id.*

During the 2013/14 school year, C.J. began attending the seventh grade at defendant Houston Independent School District's (HISD) Black Middle School. ROA.3411. He had previously attended HISD's Hamilton Middle School. ROA.3368. His October 2013 individualized education program (IEP) reported that C.J. had not been tested at the district-wide level since third grade, when he was reading at grade level 1.5 and demonstrating math skills at the 1.7 grade level. ROA.3412, 3414. He continued at Black for eighth grade; again, the district-wide test results from the third grade were carried over to his IEP. ROA.3547. In fact, HISD carried over C.J.'s annual goals and objectives from the 2012/13 through the 2013/14 and the 2014/15 school years. ROA.3683 (IEP); 4287–4289.

On October 14, 2014, HISD's Admission, Review and Dismissal (ARD) committee conducted an annual review meeting for C.J. ROA.3546. This IEP would not be superseded until the ARD committee convened again on April 30, 2015. ROA.3599.

## I. 2014/15—C.J.'S SCHOOL REFUSALS AND AND HISD'S REFUSALS OF HOMEBOUND INSTRUCTION

On January 21, 2015, C.J. had an outburst at home, banging his head and hitting himself in the face, while accusing his mother of allowing his teacher to abuse him. ROA.4717–4718. This had not happened before. ROA.4717. He said that his mother had allowed the teacher to call him "retarded and stupid[.]" *Id.* C.J.'s mother deduced

that he was talking about a Ms. McGowan, who was the teacher's assistant in the classroom. ROA.4718.

On January 22, 2015, C.J.'s mother wrote a formal complaint letter to the principal at Black reporting that C.J. had been harassed and bullied at school by Ms. McGowan and a Mr. G., who were both teachers' assistants. ROA.4718; 2132–2133. The letter noted that the problems began in 2013. ROA.2132. C.J. reported that a student named Salvador began bullying C.J. in September 2014, calling him retarded and stupid and threatening to "kick his ass" if C.J. "snitch[ed]" on him. *Id.* The parent explained that C.J. had been a target for bullies since 2013, due both to his disability and his fear of defending himself. *Id.* She reported that, in spring 2014, he was assaulted in band class by three students. *Id.*

The parent's letter detailed that, in October 2014, C.J. started complaining of Ms. McGowan's treatment of him. ROA.2132. She would scream at him when he did not understand his work, complain in front of the class that she could not "deal with him" and would mock the behaviors that manifested his autism. *Id.* At the same time, the parent noticed that C.J.'s self-stimulating behaviors were increasing. *Id.* ("he would come home and (stem) [sic] more than usual and ask if he could be placed in homebound"); ROA.4719–4720 (explaining "stimming"). During the Christmas break, he told his mother he was afraid to return to school, because McGowan would

not stop Salvador from bullying him. ROA.2132. He also told his mother that McGowan and Mr. G. would laugh at him when he engaged in self-stimulating behaviors. *Id.* On January 16, 2015, McGowan referred to C.J. as "crazy boy." ROA.2133.

Prior to the January 21, 2015 outburst, C.J. had always liked school. ROA.4720. His request for homebound instruction was something new. *Id.* C.J. stopped attending school on January 27, 2015. ROA.475.

HISD staff set up an informal meeting with the parents to hear the parents' concerns about bullying. ROA.4454. The parents were provided with forms to complete and to submit to the principal so as to trigger an investigation. ROA.4455–4456.

The ARD committee did not convene to address the bullying. ROA.4454–4459. Instead, staff met with the parents and discussed the procedural steps apparently necessary to secure home services for C.J. ROA.4453–4454. HISD requires a completed homebound services packet, with a physician's statement, before an ARD committee can meet and recommend homebound services for students with IEPs. ROA.4380–4381.

On February 5, 2015, the parents met with HISD's homebound director, Darlene Blasco. ROA.4282. The parents produced a letter from Dr. Guruswami K.

Ravichandran, M.D., stating:

> This patient's condition is categorized as severe mental illness that affects this patient's decision making capacity, judgment and higher executive and organizational skills and performance. The patient requires regular family and individual intervention and counseling and medication management to avoid deterioration of the underlying Neuro-psychiatric condition. Periodically Patient's condition relapses even while receiving careful medical and psychiatric interventions.
>
> Upon observation and examination I am recommending the following:
>
> This patient will benefit from immediate partial hospital program for 2–8 weeks at Cypress Creek Psychiatric Center with other adolescents followed by a trial homebound schooling for yet another 6–12 weeks. It is not unusual practice while treating complex conditions such as this patients mental illness. A copy of this letter will also be made available to the admitting staff at the above hospital.

ROA.213, 243. The parents requested home services in accordance with the doctor's letter. ROA.236. Ms. Blasco did not issue a Prior Written Notice (PWN) or arrange an ARD committee meeting. ROA.4384–4385. After the parents met with Ms. Blasco, they spoke with HISD nurse, who indicated that the Ravichandran letter contained insufficient information to warrant a grant of homebound instruction. ROA.4643–4644. The parents thus obtained an updated letter and delivered it to the school the following Saturday. *Id.* The updated letter stated:

> I was told to specify other more severe reasons as to why this student required home bound schooling. During the previous visit and current visit patient was administered CSSRS.
>
> *Chicago Suicide Screening Rating Scale Results:*
>
> History of Risk Factors:

> There is a history of anger management problems.
>
> A family member has a history of suicidal behavior. Behavior includes suicidal attempts but completed suicide has not occurred.
>
> *Current Risk Factors:*
>
> Violent ruminations and impaired impulse control present. Wants to destroy furniture and TV. [C.] experiences intermittent severe anxiety or panic.
>
> Suicide Risk:
>
> Based on the above risk factors the risk of SUICIDE is considered MODERATE. Persistent passive wishes to be dead without actual intent or plan is present. Suicidal behavioral history at home within the last 6 months
> Upon observation and examination I am recommending the following:
>
> homebound schooling for yet another 6–12 weeks.

ROA.243. Despite the updated letter, HISD did not provide homebound instruction. In response to interrogatories, HISD states that it sent work home, made home visits, and developed a transition plan and social story for C.J. while he was absence from school. ROA.475. HISD, however, admits these actions did not constitute homebound services or in-home instruction. *Id.*

During March 2015, C.J.'s mother continued to inquire as to homebound services. ROA.2169 (text message). School work was provided to C.J. at home twice during the months of January through May, 2015. ROA.4469, 4806.

From April 16th to 21st of 2015, C.J. received Partial Hospitalization Program (PHP) services at Cypress Creek Hospital for anxiety related to bullying, and from

April 22nd to May 17th of 2015, he attended a half-day program at that facility. ROA.4428–4430, 4441 (PHP is a full-day program, IOP is half-day program). In therapy, C.J. expressed anxiety about being bullied by peers, having been called names and being hit. ROA.4429. Although C.J. wanted to change schools due to the bullying, he was willing to go back to his current school, so the counselor worked with him on coping skills. ROA.4433, 4434. C.J. did not receive academic instruction at Cypress Creek. ROA.4431.

On April 30, 2015, HISD convened an ARD meeting and formally denied C.J. services at home. ROA.4390, 3599–3637 (ARD committee report). HISD staff admitted at hearing that C.J.'s partial hospitalization did not prevent the school district from offering C.J. homebound services. ROA.4413.

On August 19, 2015, HISD finally answered the January 22, 2015 letter about bullying, summarily denying that any had occurred. ROA.273, 4477. According to this letter, Ms. McGowan was not interviewed as part of the investigation, as she had resigned her position at HISD. ROA.273.

## II. 2015/16 SCHOOL YEAR

At the April 30, 2015 ARD committee meeting, HISD staff admitted that C.J.'s progress reports had not been updated at least since the start of the school year. ROA.4287–4289, 3683. The ARD committee stated that it planned to write new

goals over summer 2015, with new goals and placement to be determined in August of 2015. ROA.4289. At this time the baselines for each IEP goal on the April 2015 IEP were set at 10%, relying on information in the October 2014 IEP. ROA.4299.

On June 11, 2015, the ARD committee met again. ROA.3683. Staff expressed concerns that C.J.'s present levels of performance stated in the IEP were unchanged, and that the IEP goals were similar for two years. ROA.4481. The June ARD committee transcript documents that updated goals and progress reports from the 2014/15 school year were not available. ROA.362–363.

At the June 11, 2015 ARD, C.J.'s parents requested compensatory education to make up for the failure to implement services and the absence of data and progress reports during the 2014/2015 school year. ROA.3683. HISD's Prior Written Notice is silent as to this parental request. ROA.3686.

*A. Summer Programming*

The extended school year (ESY) criteria included as part of the annual goals in the June 11, 2015 IEP include the statement that "[s]tudent does not have a need for ESY" as to all but one annual goal. ROA.3643–3652; compare ROA.3646 (vocational awareness goal: "may have a need for ESY, however a final decision cannot be made at this time"). The ARD committee, however, did recommend ESY services for June 2015. ROA.4301-4302; 2223–2235. The June 11, 2015 ARD

committee meeting transcript states that it was unclear when ESY services were going to start or how long they were going to be. ROA.367.

The parents left the June 11, 2015 meeting unsure whether or not C.J. was being offered ESY services. ROA.4637–4639. On June 18, 2015, they received an email from HISD staff indicating that C.J. could begin attending a summer program on June 22, 2015. ROA.4639; 4103 (email).

C.J.'s father visited the summer program site the week after the parents received the email informing them of the summer program. ROA.4640. He was directed to a classroom, where he spoke to a woman about C.J. receiving summer services. *Id.* She told C.J.'s father that she knew nothing of this; if C.J. was to attend the program, HISD was supposed to have sent paperwork. ROA.4641. The woman also informed C.J.'s parent that the summer session was almost over. ROA.4642. As a result, C.J. received no ESY services during summer 2015. *Id.*

*B. Regular School Year*

C.J.'s ARD committee next met on August 21, 2015. ROA.4289, 3712 (IEP). As C.J. was to attend the ninth grade during the 2015/16 school year, his placement changed to Booker T. Washington High School. ROA.3712. The August 21, 2015 IEP contains no district-wide assessment results, stating rather that C.J. "has been determined exempt" from said assessments for the previous two years. ROA.3713.

The baselines for C.J.'s annual goals as set forth in the August 21, 2015 IEP were based upon information provided by Black Middle School. ROA.4292–4296.

The additional comments included in the August 21, 2015 IEP state that "[d]ue to [C.J.] missing approximately 5 months of school in the Spring of 2015, [C.J.] will be offered 2 hours per week of compensatory time totaling 20 weeks beginning 2015–2016 school year. He will receive 1 hour of math and 1 hour of reading of [sic] tutoring." ROA.3744. The comments state that "[p]arent agreed[,]" but C.J.'s parents denied agreeing to this sum of services. ROA.4729–4730.

C.J. was assigned to Monica Goffney's Skills for Learning and Living (SLL) class at Booker T. Washington and began attending on August 24, 2015. ROA.4861– 4862. Typically, the SLL classrooms include both a teacher and a classroom aide. ROA.4330. At the start of the school year, however, the aide position in Ms. Goffney's classroom was vacant. ROA.4330–4331, 4366.

On September 18, 2015, a fight broke out in Goffney's special education class. ROA.2072, 4308, 4934–4935. No aide was in the classroom at the time of the incident. ROA.4367. During the fracas, C.J. was punched repeatedly by another student, suffering bruising to his head. ROA.4651.

C.J.'s parents immediate requested an ARD committee meeting. Tr. 4651. C.J. had expressed to them that he did not want to return to Booker T., because he was

afraid of the student who had injured him. ROA.4653.

The ARD committee convened again on September 28, 2015. ROA.2041. The additional comments to the IEP note that, as a result of the fight, C. was anxious about coming to school and has missed five days. ROA.2072. C.J.'s mother wished to ensure a transition and safety plan was in place for his return. *Id.* The ARD committee decided that C. would return to school on September 30th, and would spend the first hour of the school day at the office of student support service and then transition to class. *Id.* The comments note that a male was hired as a teacher's assistant for C.J.'s classroom and was being processed by human resources. ROA.2073. C.J. was also to receive services from the school's licensed specialist in school psychology (LSSP). ROA.4309.

C.J. returned to Cypress Creek, attending the full-day program from October 21, 2015 through the 29th, and transitioning to the half-day program on October 30th, and remaining there through November 2nd. ROA.4330. He again expressed concerns about bullying. ROA.4433–4434.

On October 28, 2015, the HISD completed a Full and Individual Evaluation (FIE) of C.J. ROA.1934. As part of the FIE, the parents reported that C.J. was almost blind in his right eye. ROA.1947. Despite this, the school nurse reported that he passed a vision screening "unaided." ROA.1941.

On October 29, 2015, the ARD committee recovened. ROA.1995 (IEP). At this meeting, the committee discussed the FIE. ROA.394. Staff reported C.J. was reading at the second-grade level. Id. At the October 2015 ARD committee meeting, C.J. was offered psychological counseling for the first time: thirty minutes once every three weeks (six sessions per semester) from the school's LSSP. ROA.4331–4332, 444.

The parents elected not to express full agreement with this IEP. ROA.4332, 3844. After five days, based on Texas law, HISD put the October 29, 2015 ARD into place, issuing prior written notice on November 9, 2015. ROA.4318–4323, 3846(PWN).

Eventually, C.J. was moved from Ms. Goffney's class to Valerie Payne's class because of a conflict between C.J. and another student. ROA.4354–4363. Ms. Payne had an aide and had one when C.J. started in her class. ROA.4361.

Ms. Payne was C.J.'s teacher for the spring semester of the 2015/16 school year. Ms. Payne's class had ten students and one aide. ROA.2486–2487. She did not attend any of C.J.'s ARD committee meetings. ROA.2512.

Ms. Payne has no specific training in autism, and had not heard the term "applied behavioral analysis" before her deposition in the underlying administrative matter. ROA.2484–2485. Ms. Payne did not attend any training session on ABA. ROA.4205–4206, 4902–4904.

Ms. Payne stated that, at the end of the 2015/16 school year, C.J. was probably able to read at the first- or second-grade level. She said C.J. did not know his multiplication tables, and could not compute multi-digit numbers, or subtract even one-digit numbers, without a calculator. ROA.2518–2519; 4886.

## III. THE SIMIONE EVALUATION REPORT

Dr. Peter Simione, a state-licensed psychologist and LSSP, evaluated C.J. during the 2015/16 school year. ROA.1817, 1775. Dr. Simione reviewed records, including a teacher survey form, and Ms. Payne's deposition transcript, and spent about twelve hours directly evaluating C.J. ROA.1781–1782, 4540. Dr. Simione explained that C.J. is a student with autism and an intellectual disability, who reported bullying and perceived abuse, which resulted in him being absent from school and voicing thoughts of suicide. ROA.4528–4529, 1792. C.J. reported he had been called retarded, stupid, and dumb, and that he believed a teacher had told other children to hit him. ROA.4537–4538, 1783–1784. He described being assaulted. ROA.4541–4545. His mother reported a fight. ROA.4544. Dr. Simione concluded that

> [a]s a special education student, [C.J.] was not able to receive meaningful educational benefit due to the perception of a hostile environment, absence/unavailability, as well as inadequate design and implementation of educational programming to meet his unique needs.

ROA.1775.

Dr. Simione expressed that, even assuming C.J. was not *actually* experiencing a continuous bullying atmosphere, C.J. could be perceiving the atmosphere as hostile. ROA.4551–4552. He explained that he would be "concerned about his interpreting too readily threats . . . as a way to self-protect. So if somebody was genuinely kidding with him, him interpreting that as an insult or teasing. So we have somebody who has both difficulty with social interpretation combined with somebody who has a high level of vigilance due to the potential of being threatened and needing to protect themselves." ROA.4552.

Dr. Simione concluded that C.J.'s "educational programming should emphasize an intensive behavioral intervention. An Applied Behavioral Analysis (ABA) program structure would be appropriate, given the diagnosis, level of functioning, record review, and assessment data." ROA.1798. Implementing an ABA program requires:

> an objective curriculum, assessment process, a person trained in applied behavioral analysis (ABA), as well as a board certified behavior analyst [BCBA] to oversee program development, staff training, task and behavior analysis, objective modification, maintenance, and mastery, as well as data collection and analysis.

ROA.1798–1799. He listed the primary areas of development for curriculum and learning activities as "self-regulation, self-help skills, communication, social skills, and academic development." ROA.1799.

C.J. needs "an intensive program that is data based, empirically supported,

developmentally focused, spans home and school, has minimal unstructured time, minimizes gaps of time in program breaks, and utilizes trained personnel." ROA.1799. He must be in a "highly structured classroom with a low student-teacher ratio, [that] emphasizes the use of visual cues, and combines small group and individualized instruction." *Id.* The curriculum must "focus on functional academic skills, social skills, self-regulation skills, vocational skills, and independent learning skills." *Id.*

Dr. Simione faulted the October 29, 2015 IEP for several reasons:

- C.J.'s perception of being in a hostile and unsafe environment;
- parental report of an administrator not allowing the implementation of C.J.'s educational plan;
- lack of educational programming from January 28, 2015 through August 2015;
- the lack of transition plan for C.J. returning back to school.

ROA.1796. Furthermore, C.J.'s "programming did not demonstrate a scope and sequence of clearly identifiable and specific objectives, utilizing a research based methodology, to facilitate the acquisition, generalization, and maintenance of skills to meet his unique needs as a student with autism and an intellectual disability." *Id.* Dr. Simione noted that his opinion is supported by:

- lack of the assessment protocol for behavioral-based interventions;

- no indication of regular monitoring of data by someone trained in behavioral analysis such as a Board Certified Behavioral Analyst (BCBA);
- the lack of curriculum broken down into small manageable steps to facilitate acquisition and minimize frustration;
- lack of data regarding the type and level of prompting required;
- lack of information regarding the maintenance and generalization of skills learned.

*Id.* C.J.'s classroom teacher, Valerie Payne, had never even heard the term "Applied Behavioral Analysis," which caused Dr. Simione concern. ROA.2485, 4535.

Dr. Simione expressed concern that "his programming has not been coordinated with his home environment. His programming did not systematically target his specific atypical behaviors, which can interfere with social interaction, attention, increase the probability of being targeted for bullying, or may create potential health risks, such as eating nonfood items. His programming did not systematically address independent functioning and activities of daily living deficits." ROA.1796.

Dr. Simione found HISD did not provide C.J. a meaningful transition program. C.J.'s transition goal of investigating law enforcement careers had been in place since 2013, was not realistic, and was inappropriate as it fed into one of C.J.'s areas of perseverative interests. ROA.4573, 4619–4620, 1803. HISD records support Dr. Simione's testimony that the transition goal had been in C.J.'s IEP for a long time

with little or trivial progress. ROA.3420 (10/24/13), 3463 (12/17/13), 3503 (3/6/14), 3553 (10/14/14), 3605 (4/30/15), 3643 (6/11/15), 3717 (8/21/15), 3760 (9/28/15), 3810 (10/29/15).

Dr. Simione also pointed out the necessity of improving C.J.'s social skills and pragmatic language so that he can understand the difference between teasing/kidding and bullying. ROA.1802. Not understanding and feeling bullied can result in decreased school attendance, as it did for C.J. ROA.1802–1803. Dr. Simione recommended speech therapy to improve C.J.'s pragmatic language skills. ROA.1804.

Dr. Simione said it was unclear how HISD developed IEP goals and objectives, and measured them. The IEP goals without objectives were not adequate and resulted in static programming for C.J. ROA.1796. The data collection was very irregular, and lacked consistency of when the data was taken. The trend lines are not a fair comparison of the data. ROA.4559–4560. He said the baselines were not clear and that some of C.J.'s baselines had been in place since 2013, and if goals have not been accomplished over periods of years, it impedes the person's ability to develop new skills and their ability to function. ROA.4562–4563. Progress reporting was similarly deficient. ROA.4559.

Dr. Simione concluded C.J. had not made progress as his academic reading skills

were still around the first-grade level. ROA.4566–4567. He explained that C.J. may have regressed in some areas, as he demonstrated higher reading skills in the fifth grade than in the ninth grade. ROA.4615–4617; 3878–3880. Dr. Simione testified that C.J. is capable of reaching a fourth-grade functional level of skills if he had a systematic approach, his vision issues are addressed and he feels he is in a safe environment. ROA.4567.

Dr. Simione recommended both parent and teacher training. The teachers need to be trained so that they can collect data appropriately, and someone with experience in ABA needs to interpret the data and recommend program modifications. ROA.1800, 4569–4570. He testified that C.J.'s parents are "quite unsophisticated" in their knowledge of autism and behavioral interventions, and need parent training. ROA.1800, 4571–4572. Parent training was not included in the October 2015 IEP. ROA.3803–3851 (IEP).

HISD administrators were aware that Dr. Simione recommended ABA services and intensive ABA for C.J. ROA.5178. HISD's LSSP Lorenzo Moore agreed that Applied Behavioral Analysis ("ABA") is an appropriate approach to working with children with autism, and that improving C.J.'s social skills and behavioral skills is "critically important[.]" ROA.5126–5127. HISD's Senior Manager for Office of Special Education, Toni Pompi-Rodriguez, testified that HISD does not "do Applied

Behavioral Analysis, but we do have some techniques from ABA, from TEACCH." ROA.4491. Ms. Payne testified she is not trained in autism, and had not heard the term "applied behavioral analysis" prior to her deposition and has not attended any training sessions specific to ABA. ROA.2484–2485, 4205–4206, 4902–4904.

## PRIOR PROCEEDINGS

This is an action brought by plaintiff parent appealing an administrative order following an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA).

On December 9, 2015, plaintiff parents of student C.J. requested an impartial due process hearing with the Texas Education Agency. ROA.951. The due process complaint alleged a denial of a free appropriate public education (FAPE) and requested an order directing defendant Houston Independent School District (HISD):

a) to provide a speech therapy evaluation; a recreation and leisure evaluation; a social evaluation; assistive technology; and occupational therapy evaluations to determine if [C.J.] qualifies for these services;
b) to provide [C.J.] outside counseling services;
c) to provide compensatory services to address the lack of an appropriate education program for [C.J.] during the second semester 2014-15 school year;
d) to allow [C.J.] to transfer to a school of his parents' choice including

transportation to and from school;

e) to provide attorney's fees and costs;

f) to provide: a person-centered transition evaluation; and

g) to provide any other relief the Hearing Officer deems prudent to provide this student with a Free Appropriate Public Education.

ROA.959. On August 15, 2016, a special education hearing officer (SEHO) denied all relief requested by C.J.'s parents. ROA.948.

Plaintiff initiated this action via a complaint dated September 20, 2016. ROA.9. On November 22, 2016, defendant HISD filed an answer. ROA.7. Defendant sought a judgment affirming the SEHO's decision. ROA.91.

Following motion practice, on November 1, 2017, the district judge, Lee H. Rosenthal, U.S.D.J., issued a Memorandum Opinion and Order. ROA.9. On November 1, 2017, the district court issued a final judgment in favor of defendant. ROA.844. On November 28, 2017, plaintiff filed a notice of appeal with the district court. ROA.849–850. This appeal followed.

## SUMMARY OF ARGUMENT

This is an appeal of a district court's memorandum and order upholding the decision of a special education hearing officer (SEHO) in favor of the school district. C.J. is a student with autism and social, emotional and cognitive delays. Following years of

persistent bullying, in January 2015 he began refusing to attend school. The school district failed to convene an IEP Team (or, in Texas parlance, an ARD committee) to address C.J.'s absences until April 30, 2015; as a result, C.J. missed most of the spring semester of the 2014/15 school year.

The school district's ARD committee recommended summer services for C.J. for 2015, but did not provide prior written notice of this decision until June 18, 2015, not long before the end of the summer 2015 session. Furthermore, the district did not even inform the school that C.J. was attending. As a result, C.J. did not receive summer services.

C.J. enjoys watching police shows on television and perseverates about a career in law enforcement. He lacks the essentials to pursue such a career. Despite this, the school district's transition planning, for years, has been based on this impossible dream. C.J. should have been engaged in realistic transition planning, rather than researching a career that he cannot pursue.

The school district did not employ research-based methodologies in educating C.J., despite IDEA's mandate that such methods be employed to the extent practicable. The district apparently has a policy of not providing applied behavioral analysis (ABA), irrespective of a student's special needs.

# ARGUMENT

## I. STANDARD OF REVIEW

This Court reviews de novo, as a mixed question of law and fact, a district court's decision under the Individuals with Disabilities Education Act (IDEA). The district court's findings of underlying fact are reviewed for clear error. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.,* 118 F.3d 245, 252 (5th Cir. 1997). The clear error standard of review precludes reversal of a district court's findings unless the court is left with a definite and firm conviction that a mistake has been committed. *Houston Indep. Sch. Dist. v. V.P.,* 582 F.3d 576, 583 (5th Cir. 2009).

The Supreme Court has held that the burden of proof in an administrative hearing challenging an IEP was properly placed upon the parent, who was the party seeking relief, rather than the school district. *Schaffer v. Weast,* 546 U.S. 49 (2005). In *Schaffer,* the fact-finder deemed the evidence to be in perfect "equipoise," so neither party had proven its case via a preponderance of the evidence; the issue, then, for the Supreme Court was to determine who wins in such an event. The court noted that "[i]n truth, however, very few cases will be in evidentiary equipoise." 546 U.S. at 58.

## II. PROCEDURAL VIOLATIONS

The Individuals with Disabilities Education Act (IDEA) requires that school districts

in states receiving federal funds implement procedures and policies that assure that each disabled student receives a "free appropriate public education," or "FAPE." See 20 U.S.C. §§ 1400(d)(1)(A), 1412(a), 1415(a); *Daniel R.R. v. State Bd. of Educ.,* 874 F.2d 1036, 1044 (5th Cir. 1989). In order to ensure that each student receives a FAPE, parents and school districts collaborate to develop an individualized education program ("IEP") that is "reasonably calculated to enable the child to receive educational benefits." 20 U.S.C. § 1400(d)(1)(A); *R.H. v. Plano Indep. School Dist.,* 607 F.3d 1003, 1008 (5th Cir. 2010); *J.H. ex rel. A.H. v. Fort Bend Indep. Sch. Dist.,* 482 F. App'x 915, 917–18 (5th Cir. 2012). The purpose of the IDEA is "(a) [t]o ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (b) [t]o ensure that the rights of children with disabilities and their parents are protected; (c) [t]o assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and (d) [t]o assess and ensure the effectiveness of efforts to educate children with disabilities." 34 C.F.R. § 300.1.

The "review of the adequacy of an IEP is limited to two basic questions: (1) Did the school district comply with the procedural requirements of the IDEA?; and (2)

Is the IEP reasonably calculated to enable the student to receive educational benefits?" *Klein Indep. Sch. Dist. v. Hovem,* 690 F.3d 390, 396 (5th Cir. 2012), citing *Board of Educ. v. Rowley,* 458 U.S. 176, 206–207 (1982). Under *Rowley,* the IDEA "generates no additional requirement that the services so provided be sufficient to maximize each child's potential[,]" providing, at the federal level, for a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 198, 201.

"When a parent or guardian challenges the appropriateness of an IEP crafted by a state or local education agency and the resulting educational placement, a reviewing court's inquiry is generally twofold. It must ask first whether the state or local agency complied with the procedures set forth in the Act, and if so whether 'the individualized educational program developed through the Act's procedures [was] reasonably calculated to enable the child to receive educational benefits?' " *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.,* 118 F.3d 245, 248 (5th Cir. 1997) (citation omitted). In *Michael F.,* the Fifth Circuit "articulated four factors relevant to the determination of whether an IEP is reasonably calculated to provide meaningful educational benefits under IDEA: (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the

least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated." 118 F.3d at 253.

*A. Delay in Convening an ARD Committee to Address Bullying*

"A school is responsible for addressing harassment incidents about which it knows or reasonably should have known. In some situations, harassment may be in plain sight, widespread or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment." U.S. Dep't of Educ., Office of Civil Rights, Dear Colleague Letter: Bullying and Harassment, at 2 (Oct. 26, 2010),[1] quoted in *T.K. v. New York City Dept. of Educ.,* 779 F.Supp.2d 289, 316 (E.D.N.Y. 2011).

In *T.K. v. New York City Dep't of Educ.,* 810 F.3d 869, 872–73 (2d Cir. 2016), the Second Circuit provided examples of a student being bullied:

> But at a certain point L.K.'s schoolmates bullied her so severely that she came home crying and complained to her parents about the bullying on a

[1] http://www2.ed.gov/about/offices/list/ocr/letters/colleague201010.pdf

> near daily basis. L.K.'s three SEITs [special education itinerant teachers] testified that her classmates constantly bullied her. One SEIT even described the classroom as a "hostile environment" for L.K. A neurodevelopmental pediatrician found that the "minimal interactions" L.K. had with her classmates "were mostly negative."
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> The witnesses supported these generalized assessments by describing specific instances of bullying. In May and November 2007 one student pinched L.K. hard enough to cause a bruise and stomped on her toes. Her classmates ostracized her, backing away from her to avoid touching her. In one instance, they refused to touch a pencil, treating it as contaminated merely because L.K. had touched it. At other times they pushed L.K. away; tripped her; laughed at her; and called her "ugly," "stupid," and "fat." One student drew a demeaning picture of her and another made a prank phone call to her home.

*Id.*, at 872–873. "One of her SEITs reported that bullying negatively affected L.K.'s 'ability to initiate, concentrate, attend and stay on task with her homework assignments and activities after school.'" *Id.*, at 873. The Second Circuit found the bullying to deny the student a FAPE "by violating her parents' procedural right to participate in the development of her IEP." 810 F.3d at 876.

In C.J.'s case, HISD similarly denied him a FAPE. On January 22, 2015, C.J.'s mother wrote a formal complaint letter to the principal at Black reporting that C.J. had been harassed and bullied at school by Ms. McGowan and a Mr. G., who were both teachers' assistants. ROA.4718; 2132–2133.

HISD staff set up an informal meeting with the parents to hear the parents' concerns about bullying. ROA.4454. The parents were provided with forms to complete and to submit to the principal so as to trigger an investigation, but the ARD

committee did not convene to address the bullying. ROA.4454–4459.

On February 5, 2015, the parents met with HISD's homebound director, Darlene Blasco and produced a letter from Dr. Guruswami K. Ravichandran, M.D. ROA.4282. Ms. Blasco did not issue a Prior Written Notice (PWN) or arrange an ARD committee meeting. ROA.4384–4385.

After the parents met with Ms. Blasco, they spoke with HISD nurse, who indicated that the Ravichandran letter contained insufficient information to warrant a grant of homebound instruction. ROA.4643–4644. The parents thus obtained an updated letter and delivered it to the school the following Saturday. *Id.*

During March 2015, C.J.'s mother continued to inquire as to homebound services. ROA.2169 (text message). School work was provided to C.J. at home twice during the months of January through May, 2015. ROA.4469, 4806. It was not until April 30, 2015 that HISD convened an ARD meeting and formally denied C.J. services at home. ROA.4390, 3599–3637 (ARD committee report).

The bullying described by the parents in the January 22, 2015 letter is substantially similar to the bullying described by the Second Circuit in *T.K.* He was described as "stupid," "retarded," and "crazy boy," had been subjected to physical assault and threats of assault, and had been mocked for his autistic behaviors. ROA.2132–2133. He engaged in crying and self-abusive behaviors as a result of the

bullying, and began refusing to attend school. *Id.* His psychiatrist described a moderate risk of suicide. ROA.213, 240, 243. Eventually his mental health deteriorated to such an extent that he was hospitalized. ROA.4428–4430, 4441.

From January until May of 2015, C.J. received no academic instruction, due to his school refusals, but the ARD committee did not convene to address the bullying until the final day of April. ROA.4390, 3599–3637 (ARD committee report). Under IDEA, a district must address school refusals. See, e.g., *Weixel v. Bd. of Ed.,* 287 F.3d 138 (2nd Cir. 2002) (special education services include home instruction where child's disability prevents the student from attending class). While this Court has held a per se procedural violation does not necessarily constitute a violation of the IDEA, it has also explained that when there is a loss of educational opportunity, a procedural violation will be found to deny FAPE. *Adam v. Keller,* 328 F.3d 804, 808 (5th Cir. 2003); *S.H. ex rel. A.H. v. Plano Indep. Sch. Dist.,* 487 Fed. Appx. 850, 858 (5th Cir. 2012).

The district court erred in simply blaming the student's extended absence on the parents. ROA.815–816. While acknowledging that "the five-month absence from school—essentially the second semester of 8th grade—set him back[,]" the district court absolves the school district on the basis that "he did not provide the District with documents showing medical needs that made him eligible to receive

[homebound services.]" ROA.829, 822. Yet the district court cites no authority requiring a parent to fill out any particular form as a prerequisite for convening an ARD committee to address bullying, or school refusal, problems. Here, the parents made the district aware of the impending school refusals by letter dated January 22, and provided a doctor's note describing a suicide risk on February 5th. ROA.2132–2133; 213, 240, 243. At that point, the district should have evaluated C.J. to determine the impact of his disability on the school refusals and convened an ARD committee to address these problems; its failure to do so for another three months effectively cost C.J. a full semester's instruction. This is a denial of FAPE.

*B. Failure to Provide Prior Written Notice*

IDEA requires prior written notice (PWN) "to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency [] (A) proposes to initiate or change; or (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." 20 U.S.C. § 1415(b)(3). This notice must include:

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

20 U.S.C. § 1415(c)(1). Failure to provide PWN is a procedural violation, so a parent must establish this it "(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits" for that violation to constitute a denial of FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii).

*1. Extended School Year*

At the June 11, 2015 ARD committee meeting, HISD did recommend ESY services for June 2015, but the parents left the June 11, 2015 meeting unsure whether or not C.J. was being offered ESY services. ROA.4301-4302; 2223–2235; 4637–4639. On

June 18, 2015, they received an email from HISD staff indicating that C.J. could begin attending a summer program on June 22, 2015. ROA.4639; 4103 (email).

C.J.'s father visited the summer program site the week after the parents received the email informing them of the summer program. ROA.4640. He was directed to a classroom, where he spoke to a woman about C.J. receiving summer services, and who told C.J.'s father that she knew nothing of this; if C.J. was to attend the program, HISD was supposed to have sent paperwork. ROA.4640–4641. The woman also informed C.J.'s parent that the summer session was almost over. ROA.4642. As a result, C.J. received no ESY services during summer 2015. *Id.*

While this Court has stated that IDEA provides "no specific period" during which PWN must be sent, it seems self-evident if the delay in providing such notice deprives a student of services, that delay would constitute a denial of FAPE. *Liva v. Northside Indep. Sch. Dist.,* 263 F.3d 164 (5th Cir. 2001) (no specific period). As with HISD's delay in convening an ARD to address bullying, the delay in providing the parents notice of the offered ESY services deprived C.J. of educational benefits. This is also a denial of FAPE.

*C. Failure to Rely Upon Current Information*

C.J.'s IEPs did not rely upon updated and current information, especially with respect to present levels of performance and accurate progress reporting. *Bend-Lapine v.*

*K.H.,* 43 IDELR 191, 234 Fed. App'x 508 (9th Cir. 2007) (summary order) (ambiguous goals were unmeasurable and contrary to the IDEA); *Kuszewski v. Chippewa Valley Schs.,* 34 IDELR 59, (E.D. Mich. 2001), aff'd 38 IDELR 63 (6th Cir. 2003) (goals must be clear and objectively measurable); *Brantley v. Indep. Sch. Dist. 625 (St. Paul),* 26 IDELR 839 (D. Ct. MN 1997) (deficient IEP goals denied a child a FAPE). An IEP goal should pass the "stranger test"; if a stranger can implement it and measure using it and determine progress, then the IEP goal is appropriate. *Mason City Cmt. Sch. Dist.,* 46 IDELR 148 (SEA IA 2006).

An IEP must include present levels of performance, must have measurable goals and objectives, including accurate baselines, and describe how the child's progress will be measured, including when periodic reports on progress will be provided to the parents. 20 U.S.C. § 1414(d)(1)(A)(i)(I), (II) and (III); 34 C.F.R. § 300.320.
In conjunction with creating an appropriate IEP, school districts must monitor the progress of a child on an IEP and take steps if the child is not progressing. 20 U.S.C. § 1414(d)(40(A) through 20 U.S.C. § 1414(d)(4)(B) provides that a school district must review the child's IEP periodically (not less than annually) to determine if the goals are being achieved, and revise the IEP as appropriate to address any "lack of expected progress towards the annual goals." 20 U.S.C. § 1414(d)(4)(B) (ii)(I).

C.J.'s October 2013 individualized education program (IEP) reported that C.J. had

not been tested at the district-wide level since third grade, when he was reading at grade level 1.5 and demonstrating math skills at the 1.7 grade level. ROA.3412, 3414. He continued at Black for eighth grade; again, the district-wide test results from the third grade were carried over to his IEP. ROA.3547. In fact, HISD carried over C.J.'s annual goals and objectives from the 2012/13 through the 2013/14 and the 2014/15 school years. ROA.3683 (IEP); 4287–4289.

At the April 30, 2015 ARD committee meeting, HISD staff admitted that C.J.'s progress reports had not been updated all year. ROA.4287–4289, 3683. The ARD committee stated that it planned to write new goals over summer 2015, with new goals and placement to be determined in August of 2015. ROA.4289. At this time, the baselines for each IEP goal on the April 2015 IEP were set at 10%, relying on information in the October 2014 IEP. ROA.4299.

On June 11, 2015, the ARD committee met again. ROA.3683. Staff expressed concerns that C.J.'s present levels of performance stated in the IEP were unchanged, and that the IEP goals were similar for two years. ROA.4481. The June ARD committee transcript documents that updated goals and progress reports from the 2014/15 school year were not available. ROA.361–362.

This long-term failure to collect and distribute accurate information about C.J.'s levels and progress could not but deprive him of educational opportunity, and,

furthermore, significantly impedes the ability of the parents to participate in the decision-making process. Dr. Simione noted that the IEP goals without objectives were not adequate and resulted in static programming for C.J. ROA.1796. The data collection was very irregular, and lacked consistency of when the data was taken, and the trend lines in the district's records are not a fair comparison of the data. ROA.4559–4560. The baselines were not clear and some of C.J.'s baselines had been in place since 2013, and if goals have not been accomplished over periods of years, it impedes the person's ability to develop new skills and their ability to function. ROA.4562–4563. Progress reporting was similarly deficient. ROA.4559.

Dr. Simione concluded C.J. had not made progress as his academic reading skills were still around the first-grade level. ROA.4566–4567. He explained that C.J. may have regressed in some areas, as he demonstrated higher reading skills in the fifth grade than in the ninth grade. ROA.4615–4617; 3878–3880. Dr. Simione testified that C.J. is capable of reaching a fourth-grade functional level of skills if he had a systematic approach, his vision issues are addressed and he feels he is in a safe environment. ROA.4567. This obviously has not been taking place, and the significant lapses in tracking levels and progress have contributed to this deprivation of opportunity, denying C.J. a FAPE.

*D. The Refusal to Provide ABA is a Predetermination*

Predetermination of CSE recommendations based upon district policy, rather than upon the student's needs, constitutes a denial of a free appropriate public education. *Deal v. Hamilton County Bd. of Educ.,* 392 F.3d 840 (6th Cir. 2004). In *Deal,* the court was faced with a school district that refused to consider ABA. *Id.*, at 846. The court found that "the School System, and its representatives, had pre-decided not to offer Zachary intensive ABA services regardless of any evidence concerning Zachary's individual needs and the effectiveness of his private program. This predetermination amounted to a procedural violation of the IDEA. Because it effectively deprived Zachary's parents of meaningful participation in the IEP process, the pre-determination caused substantive harm and therefore deprived Zachary of a FAPE." *Id.*, at 857. The court stated that "[t]he facts of this case strongly suggest that the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program." *Id.*, at 858. "The clear implication is that no matter how strong the evidence presented by the Deals, the School System still would have refused to provide the services. This is predetermination." *Id.*

HISD's Senior Manager for Office of Special Education, Toni Pompi-Rodriguez, testified that HISD does not "do Applied Behavioral Analysis, but we do have some

techniques from ABA, from TEACCH." ROA.4491. As with the district in *Deal,* HISD did not have an open mind about providing an ABA, impermissibly predetermining, as a matter of policy, that a student would not receive ABA irrespective of his special needs. This, as in *Deal,* denied C.J. a FAPE.

## III. SUBSTANTIVE VIOLATIONS

To meet its substantive obligation under the IDEA, a school must offer an individual education program (IEP) reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1,* 137 S. Ct. 988, 1000 (2017). A school district must "be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.*, 137 S. Ct. at 1002.

### *A. Failure to Provide a Meaningful Transition Plan*

The purposes of the IDEA include "[t]o ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]" 34 C.F.R. § 300.1(a). Under IDEA, "transition services" means "a coordinated set of activities for a child with a disability that"

> (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
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> (2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes—
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> (i) Instruction;
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> (ii) Related services;
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> (iii) Community experiences;
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> (iv) The development of employment and other post-school adult living objectives; and
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> (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

34 C.F.R. § 300.43(a). "Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education." 34 C.F.R. § 300.43(b). "Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include— (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) The transition services (including courses of study) needed to assist the child in reaching those goals." 34 C.F.R. § 300.320(b).

It is hard to imagine C.J. obtaining any meaningful education benefit from a transition plan that is completely unrealistic. Dr. Simione noted that C.J.'s transition goal of investigating law enforcement careers had been in place since 2013, was not realistic, and was inappropriate as it fed into one of C.J.'s areas of perseverative interests. ROA.4573, 4619–4620, 1803. HISD records demonstrate that the transition goal had been in C.J.'s IEP for a long time with little or trivial progress. ROA.3420 (10/24/13), 3463 (12/17/13), 3503 (3/6/14), 3553 (10/14/14), 3605 (4/30/15), 3643 (6/11/15), 3717 (8/21/15), 3760 (9/28/15), 3810 (10/29/15). Children with autism and intellectual disabilities do not grow up to be police officers.

The transition plan is to be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests[,]" as well as upon "age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills[.]" 34 C.F.R. § 300.43(a)(2), § 300.320(b)(1). While C.J. may have had an interest in becoming a police officer, this goal is completely inconsistent with C.J.'s needs and individual strengths, and is not based upon any appropriate assessments. Such a plan does not further the IDEA's purpose of preparing students for further education, employment, and independent living, and thus denies C.J. a FAPE. 34 C.F.R. § 300.1(a).

*B. Failure to Employ Research-Based Methods*

As part of the 1997 reauthorization of the Individuals with Disabilities Education Act (IDEA), Congress also found that "[o]ver 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by [] having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible" and by "supporting highquality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them [] … to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and … to be prepared to lead productive, independent, adult lives, to the maximum extent possible[.]" 11 Stat. 40, presently codified at 20 U.S.C. § 1400(c)(5)(A) &(E).

Congress went even further seven years later. The 2004 reauthorization includes the requirement that "the special education and related services and supplementary aids and services" be "based on peer-reviewed research to the extent practicable[.]" 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Congress found that implementation of IDEA "has been impeded by the failure of schools to apply replicable research on proven methods of teaching and learning." IDEA 2004 includes numerous references to "scientifically based instructional practices" and "research based interventions." In describing permissible uses of federal funds, IDEA 2004 includes "providing

professional development to special and regular education teachers who teach children with disabilities based on scientifically based research to improve educational instruction." 20 U.S.C. § 1411(e)(2)(C)(xi). The child's IEP must include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable to be provided to the child." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). This language in IDEA 2004 creates new requirements for schools to use scientific research-based instructional practices and interventions, if such research exists. Congress' goal was to ensure equality of opportunity, full participation, independent living and economic self-sufficiency. 20 U.S.C. § 1400(c)(1), (4). In addition, "[t]he phrase 'to the extent practicable,' as used in this context, generally means that services and supports should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research." 71 FR 46665.

The Second Circuit has addressed the need for research-based interventions squarely in *A.M. v. N.Y. City Dep't of Educ.,* 845 F.3d 523, 542 (2d Cir. 2017). Noting that "[a]lthough the IDEA does not speak to methodology, see Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,665 (Dep't of Educ. Aug. 14, 2006), the implementing regulations define a child's '[s]pecial education' as 'specially designed

instruction . . . to meet the unique needs of a child with a disability.' 34 C.F.R. § 300.39(a). *Rowley* teaches that the substantive adequacy of a child's IEP turns on whether its provisions are 'reasonably calculated to enable the child to receive educational benefits.' 458 U.S. at 207, 102 S.Ct. 3034. This inquiry requires courts to determine whether 'the content, methodology, or delivery of instruction' have been narrowly tailored to 'address the unique needs of the child that result from the child's disability.' 34 C.F.R. § 300.39(b)(3)(i) (emphases added)." In that case, the Second Circuit found a denial of FAPE where the IEP Team refused to specify the ABA methodology despite strong evaluative support that the student required ABA. 845 F.3d at 544–45.

*A.M.* was decided a day before oral argument in *Endrew F. Endrew*'s emphasis on the child's specific circumstances in determining FAPE dovetails nicely with the Second Circuit's insistence that FAPE requires methodologies "narrowly tailored" to the child's unique needs.

Here, the record clearly establishes a need for ABA. When a child has autism, the Texas Autism Supplement requires the IEP team to consider specific strategies that are designed to help children with autism, including peer-reviewed, research-based educational programming practices to the extent practicable, Extended School Year, daily schedules, in home training, positive behavior supports, communication

interventions, social skills training, staff training and teaching strategies based on peer-reviewed, research-based practices, such as, for example, applied behavioral analysis (ABA). 19 Tex. Admin. Code § 89.1055(e).

Dr. Simione concluded that C.J.'s "educational programming should emphasize an intensive behavioral intervention. An Applied Behavioral Analysis (ABA) program structure would be appropriate, given the diagnosis, level of functioning, record review, and assessment data." ROA.1798. HISD's LSSP, Dr. Moore, agreed that Applied Behavioral Analysis ("ABA") is an appropriate approach to working with children with autism, and that improving his social skills and behavioral; skills is "critically important" for C.J. ROA.5126–5127.

At some point, Dr. Moore apparently introduced discrete trial training, a component of ABA, to C.J.'s programming, with some positive results, but the record is vague as to the extent of this programming and the date of its commencement. ROA.5105. C.J.'s classroom teacher during the second semester of 2015/16 was not trained in autism, and had not heard the term "applied behavioral analysis" prior to her deposition and has not attended any training sessions specific to ABA. ROA.2484–2485, 4205–4206, 4902–4904.

Had C.J. been in an intensive ABA program all along, his social and communication skills would likely have improved, allowing him to understand the

difference between teasing/kidding and bullying. ROA.1802. Not understanding and feeling bullied led to decreased school attendance, and probable regression in core academic skills. ROA.1802–1803; 4615–4617; 3878–3880. The failure to recommend ABA denied C.J. a FAPE.

*C. Failure to Address Vision Needs*

HISD?s October 28, 2015 FIE notes that the parents reported that C.J. is nearly blind in his right eye. ROA.1947. C.J. has reported seeing a "darkness" in his right eye. ROA.4784. Two doctors testified C.J.?s right eye is compromised, getting worse, as the result of amblyopia and is a permanent condition; C.J. has a "serious vision loss even after correction." ROA.4417–4424 (Taylor); 4780–4786 (Elchahal). C.J. should wear his glasses to protect the other eye. ROA.4785–4786, 4687–4688.

C.J.'s mother explained C.J. has always had glasses but resists wearing them. ROA.4739–4740, 4746. The ARD did not discuss how to help C.J. wear his glasses, and no vision teacher attends his meetings. ROA.4336–4341.

Dorothy Vetrano, HISD?s vision teacher, agreed C.J. has a right eye that has a serious visual loss after correction. ROA.2621, 4680–4684. She testified that a Functional Vision Evaluation ("FVE") would be needed to decide what C.J. is accessing visually in his educational environment but said if C.J. won?t wear his glasses the FVE would not be accurate. ROA.4685–4687. She agreed C.J. could be

taught to wear his glasses, and that needs to wear them. ROA.4687—4688, 4697–4698.

Ms. Goffney was never aware that C.J. was supposed to be wearing glasses. ROA.4935–4936. Although at her deposition, Ms. Payne did not know C.J. was to wear glasses, during her testimony at the hearing, she agreed there is a way to teach him to wear his glasses. ROA.2515, 4890–4891.

The failure to address C.J.'s vision needs, by, at minimum, employing ABA to teach him to wear his glasses, is having a clear adverse effect on him. In addition, that the classroom teachers were unaware of this need impacts on his ability to learn in the classroom. This denies him a FAPE.

*D. Failure to Address School Refusals*

The IDEA requires a child's IEP team to consider the use of positive behavioral interventions and supports, and other strategies, to address the behavior of a child whose behavior impedes the child's learning or that of others. 34 C.F.R. § 300.324(a)(2)(i); 20 U.S.C. § 1414(d)(3)(B)(i); *R.P. v. Alamo Heights Indep. Sch. Dist.,* 703 F.3d 801, 813 (5th Cir. 2012); *R.C. v. Keller Indep. Sch. Dist.,* 958 F.Supp.2d 718, 732–33 (N.D. Tex. 2013).

School avoidance behaviors may warrant such interventions. See, e.g., *L.O. v. N.Y. City Dep't of Educ.,* 822 F.3d 95, 114 (2d Cir. 2016) ("L.O. commenced a separate action

challenging the adequacy of the subsequent IEP formulated in March 2012, including the CSE's failure to address K.T.'s school avoidance behaviors. In that action, L.O. was awarded compensatory services by an IHO for a ten-month period (i.e., the duration for which K.T. had been without any schooling and services since the last day covered by the IHO's ruling in the present action), which extended beyond K.T.'s period of eligibility to receive services under the IDEA (i.e., beyond his twenty-first birthday), and K.T. was subsequently placed in a residential private school education program."); *Bd. of Ed. v. S.G.,* 2006 WL 544529 (D.Md. 2006) affirmed 2007 WL 1213213 (4th Cir. 2007) (summary order); *Johnson v. Metro Davison Co. Sch. Sys.,* 108 F.Supp.2d 906 (M.D.Tenn. 2000); and see *Weixel v. Bd. of Ed.,* 287 F.3d 138 (2nd Cir. 2002) (special education services include home instruction where child's disability prevents the student from attending class); *Application of a Child Suspected of Having a Disability,* Appeal No. 07-086 (N.Y. SEA 2007) (school refusals warranted IDEA classification, not merely Section 504 plan).

## IV. THE COURT SHOULD DIRECT APPROPRIATE RELIEF

Compensatory educational services are designed to make up for the services a child has lost. *Miener v. Missouri,* 800 F.2d 749, 753 (8th Cir. 1986); *C.C. v. Beaumont Indep. Sch. Dist.,* 65 IDELR 109 (E.D. Tex. 2015) (upholding majority of compensatory education award); Caldwell Indep. Sch. Dist., 111 LRP 56462 (TEA

2011) (awarding in excess of one year of compensatory education and noting its equitable nature), upheld by *Caldwell Independent School District v. L.P.,* 994 F.Supp.2d 811, aff'd., 62 IDELR 192 (5th Cir. 2013). In C.J.'s case, the Court should remand for fact-finding as to his current levels of performance, and to allow a fact-finder to determine what compensatory award would allow him to reach functional levels (i.e., fourth-grade) in reading and math, the levels Dr. Simione indicated he could reach with appropriate programming. ROA.4567.

The Supreme Court has pointed out the importance of the IEE to parental participation, noting that

> parents have the right to review all records that the school possesses in relation to their child. [20 U.S.C.] § 1415(b)(1). They also have the right to an "independent educational evaluation of the[ir] child." *Ibid.* The regulations clarify this entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 CFR § 300.502(b)(1) (2005). IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

*Schaffer v. Weast,* 546 U.S. 49, 60–61 (2005). Under the federal regulations, "[t]he parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section." 34 C.F.R. § 300.502(a)(1). "A parent has the right to an

independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section." 34 C.F.R. § 300.502(b)(1). " If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either— (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria." 34 C.F.R. § 300.502(b)(2).

The parents need not express their disagreement to the school district prior to obtaining the IEE. See, e.g., *Hudson v. Wilson,* 828 F.2d 1059 (4th Cir. 1987); *Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. v. Ill. St. Bd. of Educ.,* 41 F.3d 1162 (7th Cir. 1994); *Raymond S. v. Ramirez,* 918 F. Supp. 1280 (N.D. Iowa 1996); *Mullen v. Dist. of Columbia,* 89-2069-OG, 16 EHLR 792 (D.D.C. 1990); *Hiller v. Bd. of Educ. of Brunswick Cent. Sch. Dist.,* 687 F. Supp. 735 (N.D.N.Y. 1988); *P.R. v. Woodmore Local Sch. Dist.,* 256 Fed. Appx. 751 (6th Cir. 2007) affirming 481 F. Supp. 2d 860 (N.D. Ohio 2007). *Letter to Anonymous,* 17 IDELR 1113 (OSEP 1991). In *Warren G. v. Cumberland School District,* the Third Circuit held that "[t]o accept the District's argument [that the parents' failure to express disagreement with the

District's evaluations prior to obtaining their own forecloses their right to reimbursement] would render the regulation pointless because the object of parents' obtaining their own evaluation is to determine whether grounds exist to challenge the District's. *Warren G. v. Cumberland School District,* 190 F.3d 80, 87 (3rd Cir. 1999).

A parent may request a publicly-funded IEE to assess an area that was not covered by the district's evaluation. *Letter to Baus,* 65 IDELR 81, 115 LRP 8855 (OSEP 2015). "When an evaluation is conducted in accordance with 34 CFR §§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs." *Id.* In *Grapevine-Colleyville Independent School District,* 28 IDELR 1276, 28 LRP 5140 (Tex. SEA 1998), a hearing officer awarded an IEE where the school district had declined "to provide a medical evaluation of [the child's] potential Childhood Disintegrative Disorder." The Court should also award an independent educational evaluation, as the district failed to provide prior written notice as to its denial of the parents' request for such an evaluation, and to assist in determining future programming.

## CONCLUSION

Based on the foregoing, the Court should reverse the judgment of the district court, and grant such further relief as the Court deems just and proper.

Dated: Auburn, New York
April 2, 2018

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Robyn Cocho, hereby certify pursuant to Fed. R. App. P. 25(d) that, on April 2, 2018 the foregoing Brief for Plaintiffs-Appellants was filed through the CM/ECF system and served electronically on the individual registered on the courts CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th Cir. R. 32.2, THE BRIEF CONTAINS:

A. 11,108 words.

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/s/ Andrew K. Cuddy
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