

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

IRVINE UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018080117

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on August 2, 2018, naming Irvine Unified School District. OAH continued the matter for good cause on September 11, 2018.

Administrative Law Judge June R. Lehrman heard this matter in Irvine, California, on October 2, 3, and 4, 2018.

Attorneys Damian Fragoso, Ushma Vyas, and Claudia Candelas represented Student. Mother attended the hearing on October 2, 2018, a portion of October 3, 2018, and October 4, 2018.

Attorney Peter Sansom represented Irvine Unified School District. Irvine's Director Jennifer O'Malley attended all hearing days. Irvine's Executive Director Melanie Hertig attended on October 2, 2018. Irvine's Director of Special Education/Secondary Programming Allison Robbins attended a portion of October 3, 2018.

At the parties' request, OAH granted a continuance for the parties to file written closing arguments and the record remained open until October 22, 2018. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

Issue 1: Did Irvine deny Student a free appropriate public education by failing to assess her in the areas of (a) cognitive ability and (b) academic achievement prior to making its June 4, 2018 individualized education program offer for the 2018-2019 school year;

Issue 2: Did Irvine deny Student a FAPE by improperly categorizing her as a student with intellectual disability;

Issue 3: Did Irvine's June 4, 2018 IEP deny Student a FAPE by failing to provide adequate goals and services to address the impact of Student's mental health on her ability to access her education: and

Issue 4: Did Irvine's June 4, 2018 IEP deny Student a FAPE by failing to offer placement in a one-to-one direct instruction environment for some or all of the school day?

SUMMARY OF DECISION

Irvine did not deny Student a free appropriate public education by failing to assess her in the areas of cognitive ability and academic achievement prior to making its June 4, 2018 individualized education program offer for the 2018-2019 school year. Irvine had sufficient current information regarding cognition and academics to support the present levels of performance it reported and the goals, placement, and services it offered. Irvine did not improperly categorize Student as a student with intellectual disability and did not thereby deny Student a FAPE. Student's claim derives from a 2017

¹ 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.)

assessment which was resolved by settlement agreement and is not at issue. To the extent the determinations made therein were carried forward into the 2018 assessment and IEP that is at issue, no evidence was presented that the categorization was incorrect, or that it impacted Irvine's offer of FAPE, or that Student's right to a FAPE was impeded, nor that Parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE was significantly impeded, nor that the categorization caused a deprivation of educational benefits. Irvine did deny Student a FAPE by failing, in the June 4, 2018 IEP, to provide adequate goals and services to address the impact of Student's mental health on her ability to access her education; Irvine is ordered to fund an independent educational evaluation to further assess and recommend appropriate supports in this area of need. Irvine did not deny Student a FAPE by failing in the June 4, 2018 IEP to offer placement in a one-to-one direct instruction environment for some or all of the school day; such a placement was too restrictive, and no evidence established that Student would be unable to access the less restrictive environment that was offered, if she had been offered the appropriate supports and services.

FACTUAL FINDINGS

1. Student was a 17-year-old female who resided in Irvine at all relevant times. Student was hardworking, sweet, pleasant, sociable, and eager to please. She wished to be just like all other teenage girls. She was kind, helpful, willing to learn, social and conversational.

HISTORICAL ASSESSMENTS ²

2. The Wechsler Intelligence Scale for Children-Fourth Edition was

² Factual Findings 2 through 8 were stipulated and repeated here almost verbatim from the parties' stipulation.

administered to Student by an Irvine school psychologist as a component of a triennial multidisciplinary assessment dated June 9, 2009. Student obtained a full scale scaled score of 68 on that administration of the Wechsler, which was in the second percentile and classified as extremely low.

3. Irvine's Multidisciplinary Assessment dated June 9, 2009, determined that Student met the eligibility criteria for the categories of mental retardation (now referred to as intellectual disability) and language or speech disorder.³

4. The Wechsler, Fourth Edition, was again administered to Student by an Irvine school psychologist as a component of Irvine's multidisciplinary assessment dated January 27, 2012. Student obtained a full scale scaled score of 56 on that administration of the Wechsler, which was in the 0.2 percentile and classified as extremely low.

5. The Kaufman Assessment Battery for Children, Second Edition was also administered to Student as a component of Irvine's multidisciplinary assessment dated January 27, 2012. Student obtained a mental processing index score of 61, which was in the 0.1 percentile (classified as lower extreme) and a nonverbal index scaled score of 64, which was in the first percentile (classified as lower extreme).

6. Irvine's multidisciplinary assessment dated January 27, 2012, determined that Student met the eligibility criteria for the categories of intellectual disability and language or speech disorder.

³ The parties' stipulation, and documents introduced into evidence, used various terms, including "speech/language impairment," "speech and language impairment," and "speech or language impairment," to describe the eligibility category delineated in Education Code, section 56333 and California Code of Regulations, title 5, section 3030, subdivision (b)(11) as "language or speech disorder." The statutory terminology will be used throughout this Decision.

7. On June 6, 2013, Perry Passaro, Ph.D. issued an independent educational evaluation for Student in the area of psycho-education. Dr. Passaro administered the Kaufman, Second Edition, to Student and obtained the following scores: fluid-crystallized index scaled score of 66, which was in the 0.2 percentile and classified as lower extreme; mental processing index scaled score of 57, which was in the 0.2 percentile and classified as lower extreme; and nonverbal index scaled score of 62, which was in the first percentile and classified as lower extreme. Dr. Passaro also administered the Stanford-Binet Intelligence Scales, Fifth Edition to Student and obtained an abbreviated IQ standard score of 55, which was in the 0.1percentile and classified as mildly delayed. Dr. Passaro determined that Student appeared to meet the eligibility criteria for language or speech disorder, other health impairment, and intellectual disability.

8. Irvine School Psychologist Michelle Kessy opined at hearing that the 2009 and 2012 scores were significantly subaverage, and established a cognitive profile that generally remained stable over time.

PAST EDUCATIONAL SETTINGS

9. Evidence established that the parties had entered into a settlement agreement dated September 25, 2014, but not its complete contents. The settlement agreement contemplated that Irvine would complete a triennial assessment in the spring of 2016.

10. At hearing, no IEP's prior to January 2016 were entered into evidence, nor was the special education placement and services Student received before January 2016 established at hearing.

11. The parties stipulated that on September 29, 2017, Student and Irvine entered into a settlement agreement resolving their respective claims against each other prior to and through the date of full execution of the agreement and until the day

preceding the commencement of Irvine's 2018-19 regular school year⁴ except that the parties reserved their rights regarding the following: Irvine's reevaluation of Student in Spring 2018; the June 4, 2018, IEP team meeting; and the June 4, 2018, IEP.⁵

2014-2015, Seventh Grade

12. During the 2014-2015 school year, her seventh grade, Student was educated at a private school called New Vista. Her operative IEP for this time period was not entered into evidence, nor was her eligibility category, special education placement, or services for this time period established at hearing.

2015-2016, Eighth Grade

13. During the 2015-2016 school year, her eighth grade, Student was home-schooled with a K-12 online charter school called California Virtual Academies or CAVA. Her operative IEP for this time period was not entered into evidence, nor was her eligibility category, nor her placement and services, established at hearing.

14. CAVA convened an IEP for Student on October 26, 2015. The October 2015 IEP contained ten goals, all of which were contemplated to be accomplished by October 25, 2016. Goal 1 addressed identification of homonyms, synonyms, and antonyms and their use in sentences. Goal 2 addressed describing the gist of a picture and/or a short story and describing its "who, what doing, where, when, why," using grammatically correct sentences. Goal 3 addressed explaining the meaning of figurative

⁴ Evidence established that August 23, 2018, was the day preceding the commencement of Irvine's 2018-2019 regular school year.

⁵ Although the parties' September 29, 2017 settlement agreement resolved claims predating August 23, 2018, facts predating August 23, 2018, were presented at hearing as relevant background, and are therefore recounted in detail herein.

language and simple idioms when presented verbally or in pictures. Goal 4 addressed identification of at least two possible solutions when provided with a problem. Goal 5 addressed giving appropriate sentences and reciprocal questions to initiate, maintain and/or terminate conversations in various social situations. Goal 6 addressed stating the main idea and identifying at least two statements within a text that support that main idea. Goal 7 addressed recognizing and correcting the shifts in verb tense. Goal 8 addressed solving for rational numbers, fractions, and decimals using addition, subtraction, multiplication, and division. Goal 9 addressed identifying key terms and solving real world problems involving money. Goal 10 addressed use of a list of writing resource material (e.g. dictionary and graphic organizers) to produce clear and coherent writing.

15. When identifying progress and present levels of performance in preparation for the June 2018 IEP that is at issue here, Irvine treated the goals in the October 26, 2015 IEP as the last agreed upon IEP goals.

16. Other than goals, the contents of the October 26, 2015 IEP were not presented as evidence, thus, it cannot be gleaned what Student's eligibility, services or offer were in the October 26, 2015 IEP.

17. Mother was pleased with the online virtual charter CAVA. Student was required to go online one to two hours per day. CAVA personnel checked in via computer frequently. Although not usual for them, CAVA allowed Mother to hire a private tutor to give Student one-to-one instruction for approximately six hours per day.

CAVA TRIENNIAL ASSESSMENT

18. While at CAVA, Student's triennial assessment came due. CAVA conducted a multi-disciplinary assessment and generated a report dated January 15, 2016. The assessment report noted that Student's last signed IEP was "not available." The report noted that Mother did not agree with a prior determination of eligibility based on

intellectual disability.

Cognitive Functioning

19. In pertinent part, CAVA assessed Student's cognitive functioning using the Cognitive Assessment System, Second Edition and the Comprehensive Test of Nonverbal Intelligence, Second Edition. CAVA assessed her academic achievement using the Woodcock-Johnson Tests of Achievement, Third Edition.

20. Student's full scale score on the Comprehensive Test of Nonverbal Intelligence was 78. Her Cognitive Assessment System scores ranged from 60's to 80's. These scores were too high to qualify Student as intellectually disabled. At hearing, Irvine's school psychologist Michelle Kessy established that the "cut-off" for an intellectual disability determination was generally a score below 70.

Adaptive Behavior

21. Student's adaptive skills were assessed as moderately low using the Vineland Adaptive Behavior Scales, which measures adaptive behavior in domains of communication, daily living skills, socialization, motor skills, and maladaptive behavior. The ratings revealed Student had low to adequate adaptive skills, which were commensurate with her expected abilities. According to the Vineland scores, there were no educationally relevant areas of need in the adaptive skills domain at that time. Student's Adaptive Behavior Composite standard score of 72 summarized her overall level of adaptive functioning as moderately low.

Academic Achievement

22. CAVA also performed an academic assessment utilizing the Woodcock Johnson Tests of Achievement, Third Edition, a comprehensive set of individually administered tests for measuring scholastic aptitudes and educational achievement.

Student's academic skills and her ability to apply those skills were both within the very low range. When compared to others her age, Student scored low in writing, and very low in reading, mathematics, and math calculation. Her letter-word identification skills and reading fluency skills were moderately impaired. Her reading comprehension skills were severely impaired, meaning that she struggled greatly when asked to use surrounding information to determine the missing word from a sentence or passage. Overall Student's academic achievement was scored as moderately to severely impaired. The Woodcock Johnson administered by CAVA in January 2016 was the last time Student's academic achievement was assessed using standardized testing.

23. CAVA also reviewed Student's scores on the i-Ready Diagnostic & Instruction tool, using teacher-led and individualized online instruction. Student was then at the second grade level in overall math, and the first grade level in overall reading.

Eligibility

24. The CAVA assessment found that although Student had previously met eligibility criteria as a student with an intellectual disability, her current nonverbal intelligence score of 78 on the Comprehensive Test of Nonverbal Intelligence did not support this eligibility. It was the CAVA school psychologist's professional opinion that Student had auditory processing deficits, which were impacting her in reading, math, and oral language. The assessor found Student met the eligibility criteria for specific learning disability and language or speech disorder.

25. CAVA convened an IEP team meeting on January 20, 2016, and February 18, 2016. The IEP changed Student's eligibility category from an unspecified prior category to a new primary category of specific learning disability and a secondary category of language or speech disorder. The ten goals remained unchanged from the October 2015 IEP. It was not established at hearing whether Mother consented.

26. The CAVA January/February 2016 IEP offered the CAVA general education program in an independent study environment with special education supports.

IRVINE'S TRIENNIAL ASSESSMENT

27. Despite the fact that CAVA had completed a triennial assessment in January 2016, Irvine undertook another triennial in May 2016 pursuant to the settlement agreement dated September 25, 2014, which contemplated that Irvine was to complete a triennial assessment in the spring of 2016. Thus, two triennial evaluations were completed within a six-month time frame.

28. The Irvine triennial assessment was conducted, and a report prepared by an Irvine school psychologist and speech pathologist, neither of whom was called to testify. In pertinent part, the assessors administered the Adaptive Behavior Assessment System, Second Edition, the Brigance Transition Skills Inventory; and the Wechsler, Fifth Edition.

Cognitive Functioning

29. The Wechsler Intelligence Scale for Children, Fifth Edition is an individually administered clinical instrument designed to assess the cognitive ability and problem-solving processes of children aged six through 16. Student's full scale IQ score was 66, or "extremely low." Student's scores were "extremely low" on all subtests including verbal comprehension (62), visual-spatial (64), working memory (59), with the exception of a "very low" fluid reasoning score (76) and a "low average" (89) processing speed. This tool contained a non-verbal measure on which Student scored 67, also "extremely low." The nonverbal index is a composite of cognitive ability removing linguistic components, i.e. cognition based on visual and spatial abilities.

30. Ms. Kessy did not perform this assessment but opined at hearing concerning it. Irvine's testing in 2016, especially the Wechsler results of 67 on the

nonverbal index, was not consistent with the CAVA Comprehensive Test of Nonverbal Intelligence score of 78 in nonverbal intelligence. Ms. Kessy opined that Irvine's triennial results were more consistent with the testing that had been done previously in 2009 and 2012. Student's nonverbal intelligence score of 67 showed to Ms. Kessy that Student's deficits were not caused solely by language, verbal, or auditory processing deficits.

Adaptive Functioning

31. To assess for adaptive functioning, Irvine administered the Adaptive Behavior Assessment System, Second Edition, a rating form that can be completed by a child's parents and teachers. The rater rates the child according to how often (never, sometimes, or always) the child correctly performs a behavior without help when the behavior needs to be displayed. This assessment tool is a norm-referenced, standardized diagnostic measure used to assess the adaptive skills of children aged 5 to 21, in areas including communication, functional academics, health and safety, leisure activities, and self-care. It measures adaptive skills and generates a general adaptive composite score, broken down into domains or skill areas comprising the "conceptual composite" (consisting of subtests for communication, functional academics, and self-direction); the "social composite," and the "practical composite." It yields a global adaptive composite score, and several domain composite scores. Using ratings from Mother and from Student's online CAVA teacher, Student's assessment yielded a general adaptive composite from Parent of 84 and teacher of 96, with conceptual domain scores of 87 and 92; social domain scores of 80 and 88, and practical domain scores of 86 and 113, all of which were low average or average, with the 113 score being above average. The report indicated that the CAVA teacher had an online presence only, and that her scores should be viewed with caution. Nevertheless, because these adaptive scores were as high as they were, Irvine's assessors did not find Student intellectually disabled despite her cognitive scores. The relevant definition of intellectual disability required both

significantly subaverage general intellectual functioning, and deficits in adaptive behavior.

Academic Achievement

32. Irvine did not administer standardized academic testing during this triennial. In order to assess Student's academic functioning, it used either the "Brigance Transition Skills Inventory," noted in the "assessment procedures" portion of the report, or the "Brigance Comprehensive Inventory of Basic Skills II," as noted in the "Academic Functioning" portion of the report. Nowhere was it indicated whether these tools were the same or different or, if different, which one was used. Nor was the purpose and designated uses of the tool, whichever one was used, if they were different, described anywhere, nor specified at hearing. It was unclear exactly what the tool was supposed to be used for. Whatever tool was used, it apparently assessed Student's functional reading skills, academic/functional writing skills, writing skills, academic math skills, and quantitative math skills. The findings indicated that Student was not able to answer what country she was a citizen of, nor recite her social security number. She was able to complete three out of nine unspecified writing tasks. She could add and subtract two-digit numbers but not three-digit numbers, and she was able to comprehend certain math terms but not others. The report concluded that Student's overall decoding was at the third grade range, but her comprehension was lower. The results were not scored, normed, or standardized against any population of other students. The results were reported conversationally and anecdotally. Although informative, the tool used was not a formal standardized academic assessment.

Eligibility

33. Despite Student's low cognitive scores, Irvine determined that Student was not intellectually disabled at that time.⁶ This was because the relevant definition

⁶ The triennial contained a number of sloppy errors that negatively impacted the credibility of its findings. First, it included outmoded language of "mental retardation" rather than "intellectual disability," a change enacted into law in 2010. (Rosa's Law, Pub. L. No. 111-256 (Oct. 5, 2010) 124 Stat. 2643 [updating and replacing references in federal statutes, including the IDEA, from "mental retardation" to "intellectual disability"]). Second, when defining "mental retardation," it cited to California Code of Regulations, title 5, section 3030, subdivision (h), which was revised operative July 1, 2014, and was no longer current when the report was written in May 2016. The assessment should have cited the then-current, and still current section 3030, subdivision (b)(6). Third, the triennial report stated two inconsistent paragraphs concerning whether Student's achievement was or was not commensurate with her cognitive ability, a comparison which was relevant for purposes of determining Student's eligibility under specific learning disability. In one paragraph, the report stated that no severe discrepancies were found between overall intellectual ability and "scores in oral expression, listening comprehension, basic reading skills, reading comprehension, mathematics calculation, mathematics reasoning and broad written language." The next paragraph stated that a severe discrepancy was found. Fourth, although both inconsistent paragraphs referred to certain "scores," no such scores were assessed or stated in the report, and it is unclear to what, if any, such "scores" the report referred. Fifth, the report contained numerous references to Student as "his/her," and concluded that Student's "academic skills are commensurate with his/her (sic) overall cognitive ability at this time." Sixth, the two inconsistent paragraphs were carried over into the analysis of whether Student met eligibility criteria for specific learning disability, with

required significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior. Irvine's triennial assessment did not find deficits in adaptive behavior sufficient to meet this definition. The Adaptive Behavior Assessment System general adaptive composite scores from Parent of 84 and teacher of 96, with conceptual domain scores of 87 and 92, social domain scores of 80 and 88, and practical domain scores of 86 and 113, ruled out intellectual disability as an eligibility category. The assessment recommended that Student was eligible under the category of language or speech disorder. Mother at hearing nevertheless testified that she had thought that Irvine had "always" considered Student to be intellectually disabled.

34. In the spring of 2016, CAVA issued a report card for the eighth grade indicating the Student obtained A's in all subjects, and could progress to the ninth grade.

2016-2017, Ninth Grade

35. At the commencement of the 2016-2017 school year, her ninth grade, Student returned to Irvine and attended an Irvine high school program at University High School the entire school year, on the high school diploma-bound track. University High was Student's high school of residence. University High was a large campus with open sports fields. It was comprised of seven academic buildings and 15-20 total buildings including a theater. It covered approximately 50 to 60 acres. Approximately 2300 to 2500 students typically attended.

36. Upon enrollment, Irvine generated a temporary interim placement and services based on the CAVA January/February 2016 IEP. Since CAVA had used one-to-one instruction, Irvine developed a comparable temporary 30-day program as best it

one paragraph stating she did meet the criteria, the second paragraph stating she did not, and the final conclusion concluding she did not.

could. Student's temporary placement and services upon enrollment were determined by an August 24, 2016 interim placement form. This document indicated that Student's eligibility categories upon enrollment were specific learning disability and language or speech disorder. Her classes were to be separate classrooms in public school specialized academic instruction in what Irvine called "directed learning strategies" classes. The document indicated directed learning strategies classes would comprise 249 minutes (or approximately four hours) per week, and that Student would be outside general education in special education classes for 19 percent of her time and, by inference, in general education for the remaining 81 percent. The document also offered 60 minutes of group and 60 minutes of individual speech services per week.

37. The directed learning classes at University High all occurred within a single building known as the "500 building." The 500 building was adjacent to a parking lot, where it was easy to get dropped off and picked up with only a short walk into the classrooms. During interim periods, transitions, lunch and recess, students moved from one location to the other on campus independently. Elective classes could be located anywhere on campus.

38. This was the placement and services that were actually implemented for the duration of the 2016-2017 school year. In other words, during the 2016-2017 school year, Student was on the diploma track, in general education, with four hours per week of directed learning classes, and two hours per week of speech services.

39. Ms. Kessy's opinion, expressed at hearing, was that this placement and services overtaxed Student's ability and created anxiety, as she was unable to perform the tasks demanded of her. Diploma track meant that the curriculum could not be modified. Student was expected to master ninth grade, college preparatory coursework.

40. Thereafter, Irvine convened IEP team meetings on September 22, 2016, and October 5, 2016, to make Student a formal offer of FAPE for the 2016-2017, ninth

grade school year.

41. The IEP team did not discuss or revisit Student's pre-existing eligibility categories. Irvine continued to offer a primary eligibility category of specific learning disability (despite the contradictory findings in the triennial assessment concerning that category) and a secondary eligibility category of language or speech disorder.

42. Irvine offered Student directed learning special day classes for functional English, functional math, and learning strategies, for approximately 12.5 hours per week, comprising 38 percent of her time outside general education and, by inference, the remaining 62 percent of the time in general education. The IEP contemplated that Student would be working toward a certificate of completion rather than a diploma. The focus was to be on functional life skills, not academic subjects. Mother did not consent, and therefore the interim 30-day placement offer continued to be implemented for the duration of the 2016-2017 school year.

JUNE 5, 2017 IRVINE ADAPTIVE BEHAVIOR/POST-SECONDARY TRANSITION/UPDATED SOCIAL/EMOTIONAL ASSESSMENT

43. In spring 2017, at the end of the ninth grade, Mother requested Irvine to assess Student for central auditory processing and mental health concerns. In response to the mental health concerns, Irvine conducted an Adaptive Behavior/Post-Secondary Transition/Updated Social/Emotional Assessment. Ms. Kessy and an education specialist completed the social-emotional assessments and generated a report dated June 5, 2017. The auditory processing assessment was to be completed by an outside provider.

44. The following procedures were components of the evaluation: interviews, observations and records review; the Behavior Assessment System for Children, Third Edition; Children's Depression Inventory, Second Edition; Multidimensional Anxiety Scale for Children, Second Edition; Adaptive Behavior Assessment System, Third Edition; and the Brigance Diagnostic Transition Skills Inventory. No cognitive testing was done.

Social Emotional Functioning

45. During this assessment, Ms. Kessy administered the Behavior Assessment System for Children, Third Edition, an assessment tool comprised of rating forms designed to discern social emotional functioning. It was designed to facilitate the differential diagnosis and educational classification of a variety of emotional and behavioral disorders of children and to aid in the design of treatment plans. Overall, Parent and teacher reported observing anxiety, learning problems, attention problems, and somatization or physical symptoms.

46. Ms. Kessy also administered the Children's Depression Inventory, Second Edition, which provided a comprehensive multi-rater assessment of depressive symptoms in children aged 7 to 17 years. When results were combined with other sources of verified information, this assessment can aid in the early identification of depressive symptoms, the diagnosis of depression and related disorders, as well as the monitoring of treatment. According to the self-rating form, Student did not demonstrate depression-like behaviors in the home or school settings. However, Mother and Father, as well as teacher and case carriers, all reported observing symptoms of depression in Student.

47. Ms. Kessy also administered the Multidimensional Anxiety Scale for Children, Second Edition, a comprehensive assessment of anxiety dimensions in children and adolescents aged 8 to 19 years. This assessment tool indexed the range and severity of anxiety symptoms, and could be a useful adjunct to the diagnosis of anxiety disorders. When combined with other valid sources of information, it could aid in the early identification of anxiety-prone youth, as well as in monitoring treatment effects. Student's self-reporting indicated average scores, but Ms. Kessy felt Student did not understand the questions. Mother's and Father's responses fell in the very elevated range. Ms. Kessy felt that she understood the sources of Student's anxiety and

depressive symptoms. Ms. Kessy thought the general education placement was too hard for Student and Student was therefore experiencing performance anxiety.

Adaptive Functioning

48. Ms. Kessy also administered the Adaptive Behavior Assessment System, Third Edition. Mother, Father, general education English teacher Tasha Dockery, special education teacher Tiffany Hughes, and special education teacher and case carrier Leo Maldonado responded to the rating scales for this instrument. Student's conceptual composite scores were 66 from Mother, 67 from Father, 49 from the general education teacher, 60 from one special education teacher, and 65 from the other special education teacher. Her general adaptive composite score was 63 from Mother, which according to Ms. Kessy was extremely low. Father rated Student at 68, the general education teacher rated Student at 58, and the special education teachers rated Student at 76 and 75. Ms. Kessy opined that all these adaptive scores were significantly subaverage, and low enough to qualify student for the adaptive functioning prong of the definition of intellectual disability. These June 2017 adaptive scores on the Adaptive Behavior Assessment System were important because, as discussed below, they were lower than the scores that Irvine had obtained using the same Adaptive Behavior Assessment System assessment tool in the 2016 triennial, and the decrease was Ms. Kessy's justification for recommending changing Student's eligibility category in June 2017.

Academic Achievement

49. The education specialist administered an instrument called the "Brigance Diagnostic Transition Skills Inventory." As with the Brigance tool used in Irvine's triennial assessment, there was no indication of what the publisher of the test recommended its designated usages were, nor what it was intended to discern. The results, here as in the triennial assessment, appear to be informative but non-standardized, anecdotal, and no

scores were reported. The report placed Student's word-recognition reading level at fourth grade according to the Brigance lists of words she could recognize. The report then anecdotally recited how many lists, sentences, measurements, price signs, and labels she was able to complete, but the report did not distill that information down into a score, a percentile, an age or grade level, or a list of skills. Student was able to state her first name, middle name, last name, phone number, street mailing address, date of birth, gender, place of birth, hair color, eye color, height, weight, doctor's name, and person to contact in case of an emergency. She was unable to answer her last school attended, highest grade completed, health, marital status, student ID number, or social security number. She appeared to need to watch the speaker's face closely in order to understand.

50. Student's functional writing skills were assessed by asking her to provide her personal data in writing. She could write her first name, middle name, last name, complete mailing address, age, date of birth (month/day/year), gender, place of birth, hair color, eye color, height, weight, doctor's name, and an address/phone number to contact in case of an emergency. She did not complete her telephone number, country of citizenship, name of high school, highest grade completed, social security number, health, marital status, spouse's name, signature, date, or number of dependents. Her printing was legible, but her cursive was not. She did not usually write in complete sentences that were four or more words long.

51. In math, Student was able to complete six addition problems, and one out of six subtraction problems, containing two-to-four digit numbers without the use of a calculator. The report assessed her multiplication and division skills as well, and reported that she was unable to multiply two-to-three digit numbers or divide two-to-four digit numbers without the use of calculator, but could do so with a calculator. She could read all numbers words and could write 35 out of 42 numerals for number words. She could

read 18 out of 23 basic math direction words. She could comprehend 9 out of 23 basic math direction words. She could read 32 out of 39 basic vocabulary words for quantitative concepts and ordinal numbers. She could comprehend 18 out of 39 basic vocabulary words for quantitative concepts and ordinal numbers. She was unable to convert fractions, decimals, and percents. She did not know these concepts. In solving one-step and two-step problems, Student was able to solve one out of eight problems. She was able to choose three out of eight operations to solve the problems. She could match 10 out of 12 names of geometric shapes with corresponding figures. She could not match vocabulary for geometric concepts with pictures that illustrated them. When given a start time and travel time and asked to figure out the arrival time, she was unable to calculate the correct future time. When given the time by which a job needed to be finished and the amount of time it would take to complete the job, she was unable to calculate the start time. When given two clocks conveying different times, she was unable to correctly calculate the elapsed time.

52. She was unable to convert a coin or bill into an equivalent amount in coins. When given a picture of a group of coins to count, she correctly counted six out of nine groups of coins that included pennies and nickels, or pennies, nickels, dimes, and quarters. She incorrectly counted three of the groups of coins. She was unable to convert a group of nickels to another equivalent amount using pennies, nickels, and dimes. She correctly added six out of eight groups of items adding up to less than ten dollars with the use of a calculator. She correctly added one out of eight groups of items adding up to more than ten dollars with the use of a calculator. When given a regular price and a sale price and asked to calculate the amount saved, she was unable to do so, even with the use of a calculator. She could not comprehend charts showing admission prices, bus fares, shipping/handling, sales tax, item plus sales tax, income tax, taxi fares, telephone call rates, and the like. When given a calendar and questions about the

calendar, she was able to answer questions about the number of days in a given month and the day of the week. But when given a date in a given month, she was unable to answer questions about the date, or the future date when given a date and duration in number of days or weeks. When given dates that were written out nominally, Student was not able to write dates numerically. When given dates that were written out numerically, Student was not able to write dates nominally. When given six housing advertisements to answer questions about, Student was unable to correctly answer any. She was able to comprehend the ads that contained information about housing. When given a list of safety phrases to match with their sign, she was able to match four out of 20 safety signs. When asked to use an index and grid to locate cities or towns on a map, Student correctly located three cities. When asked to find the best route or highway to take to travel between two cities or towns, Student was unable to do so. When asked to use a compass to tell directions on a map, Student was able to correctly give one out of three directions.

53. The Brigance was not normed against a peer group. Thus, the results were not specifically comparative to same-aged or any other group of peers. Ms. Kessy therefore could not attest how the education specialist had used the results of the Brigance to determine a grade equivalency for Student's academic functioning. Ms. Kessy recounted that he told her he had estimated Student's grade level as being at the fourth grade level for word-recognition reading and reading comprehension, and at the second grade level for vocabulary recognition.

Eligibility

54. This assessment was the first time, so far as the evidentiary record presented in this case, in which Irvine recommended that Student be classified as

eligible under the category of intellectual disability.⁷ This June 5, 2017 assessment was limited in scope to Student's social-emotional functioning, an area Mother had specifically requested be assessed. This June 5, 2017 assessment was not a triennial, nor was it an annual. It was merely an update to assess Student's social-emotional functioning, at Mother's request.

55. Ms. Kessy, at hearing, was unable to explain why eligibility was re-visited at this time. Ms. Kessy stated that changed circumstances can lead one to re-visit prior eligibility determinations, but she could not establish any changed circumstances here. Her testimony concerning the frequency of re-determining eligibility, in the absence of changed circumstances, or what might lead a district to do that, was equivocal and unconvincing. It appears that such redeterminations are uncommon, in that Ms. Kessy could not recall when, if ever, any such determinations had ever occurred in her career. Nor could she recall the frequency of changing an eligibility to intellectual disability without performing cognitive assessments. Nevertheless, she recommended that here. At hearing, Sarah Meeks, a school psychologist who did not perform this assessment, opined that its scope might be sufficient to determine eligibility, depending upon the child's suspected areas of need, and depending also on the results of prior assessments. She acknowledged that it was unusual to re-determine eligibility mid-year. The only circumstances she could offer to justify such a mid-year change were sudden changes in a student's circumstances, for example traumatic brain injury, the sudden onset of

⁷ Any claims concerning the appropriateness of the June 5, 2017 assessment were resolved by a settlement agreement. However, the findings made in the June 5, 2017 assessment were carried forward into the later 2018 Irvine assessments and IEP which are at issue. As such, the June 5, 2017 assessment, although not itself at issue, is relevant to later assessments and is therefore described in detail herein.

symptoms of emotional distress, and the like.

56. In the absence of new cognitive testing, Ms. Kessy relied on Student's cognitive scores from the 2016 triennial assessment and before. More importantly here, she relied on the adaptive functioning, the second prong of an intellectual disability eligibility determination. The Adaptive Behavior Assessment System results ("conceptual composite" scores of 66 from Mother, 67 from father, 49 from the general education teacher, 60 from a special education teacher, and 65 from another special education teacher, and "general adaptive composite" scores of 63 from Mother, 68 from Father, 58 from the general education teacher, and 76 and 75 from the special education teachers), were, in Ms. Kessy's view, significantly subaverage, and low enough to qualify Student for the adaptive prong of the intellectual disability definition.

57. It was not common to re-review cognition in annual IEP's, because cognition is usually stable after age five except in the case of illness or trauma, and was therefore usually reevaluated only every three years.⁸

⁸ Additionally, Ms. Kessy's assessment also took this opportunity to find that Student no longer met the category of specific learning disability, again relying on Student's adaptive scores and opining that there was no discrepancy between her ability and her achievement. However, Ms. Kessy testified that specific learning disability determinations should scrutinize a student's processing skills, then assesses for a discrepancy between those skills and the student's achievement. Ms. Kessy acknowledged that she performed no such assessments to tease out Student's processing skills. She also acknowledged that the contemplated auditory processing assessment to be performed by an outside provider had not been completed. And, except for the Brigance, various more formal standardized academic assessments to assess achievement were also not performed at this time. At hearing, Ms. Kessy relied on the CAVA and Irvine triennial academic assessments even though the CAVA triennial

JUNE 5, 2017 IEP

58. The June 5, 2017, IEP recommended intellectual disability as a primary eligibility category and language or speech disorder as a secondary category. Mother disagreed and did not consent.

2017-2018, Tenth Grade

59. As discussed above, the parties stipulated that on September 29, 2017, Student and Irvine entered into a settlement agreement resolving their respective claims against each other prior to and through the date of full execution of the agreement. The settlement agreement resolved all claims pertaining to all assessments and IEP's that had occurred.

60. With certain carved-out exceptions, the September 29, 2017 settlement agreement also prospectively resolved claims concerning the remainder of the 2017-2018, tenth grade, school year through and until August 23, 2018, the day that would precede the commencement of Irvine's 2018-2019 regular school year, which would be Student's eleventh grade year.

61. The carved-out exceptions were that the parties contemplated, and reserved their rights regarding, an assessment plan, an assessment of Student to occur in the spring of 2018, and a June 2018, IEP, all of which are at issue here.

62. During the 2017-2018 school year, her tenth grade, Student attended University High only until October 2017, when Mother withdrew her from public school.

had come to a different conclusion regarding specific learning disability, and despite the Irvine triennial's inconsistent conclusions about that category. Moreover, as with intellectual disability, no one could explain why Irvine was re-visiting eligibility at that time.

CURRENT EDUCATIONAL SETTING

63. During the 2017-2018 school year, Student's tenth grade, and the current 2018-2019 school year, her eleventh grade year, Student received no special education placement or services. Mother had a schoolroom-type area set up at home, where Student received private instruction from in-home tutors.

64. At the time of hearing, Student had not been enrolled in any official school placement since October 2017. It was not established whether the tutoring arrangement complied with legal requirements pertaining to home-schooling.

65. Tutor Lindee McTigue had a master's degree and a teaching credential, and taught for four years at Norwalk La Mirada Unified School District. She had worked as a private tutor for the last four years. She had no special education credentials. She tutored Student from February 2018 until June 2018, two to three times per week for three hours each session. Ms. McTigue created an overall curriculum plan using IEP goals from a previous IEP; however it was unclear from her testimony which IEP she used. She updated the plan at least once. She also created individual lesson plans for each session with Student. Ms. McTigue estimated that Student's instructional reading level was at the third grade and her independent reading level was at the second grade. Ms. McTigue acknowledged that Student should learn to transition and navigate independently, for example from class to class, but she felt placement on a campus would be extremely difficult for Student, and so anxiety-producing as to not be beneficial.

66. Brooke Kuhnel tutored Student from approximately April 25, 2018, through the time of the due process hearing, and had seen Student three to five days per week, approximately 10 to 12 hours per week, since that time, except for vacation in July and August. Ms. Kuhnel had no California teaching credential. She had a Utah teaching credential and had opened a business to tutor students who were being home-

schooled. She and Ms. McTigue planned an agenda for the days they worked together. They coordinated until June 2018, after which she was unaware of Ms. McTigue's schedule. Student worked hard and independently on homework each night. Ms. Kuhnel observed that Student was anxious, displayed tics, tended to laugh inappropriately, picked at her fingers and nails, and apologized profusely. Her listening skills were impaired, in Ms. Kuhnel's opinion, and she was better at reading than listening. Ms. Kuhnel used an online learning program with Student called "IXL," which was a curriculum that could be customized. Student logged into the program, worked online, and Ms. Kuhnel monitored her by remotely logging in as well. Ms. Kuhnel picked and chose among the topics offered, according to what she felt would work best for Student, according to her own experience, and depending on what Student responded well to. At the time of hearing, Student was at the fourth grade level across all subjects on the IXL program, about 25 percent of the way through fourth grade. Ms. Kuhnel intended to advance Student to fifth grade once she mastered the fourth grade curriculum. Ms. Kuhnel assigned homework every day, in every subject except science. When they started working together six months before the hearing, Ms. Kuhnel observed that Student was performing at a first to second grade level. In addition to IXL, Ms. Kuhnel used an audiologist-recommended software for central auditory processing disorder called "hear builders," on which she worked with Student every day.

67. Ms. Kuhnel appeared very competent, credible, and serious. Her testimony was given great weight. In Ms. Kuhnel's opinion, University High would overwhelm Student. She and Student had gone on social outings to work on Student's adaptability, but Student became anxious in large groups. Student was aware that she struggled at school. Ms. Kuhnel feared Student would shut down, and not advocate for herself. Ms. Kuhnel acknowledged that there could be benefit to Student in acquiring group skills, but felt that a large campus that required navigating hundreds of people during

transitions among crowds would overwhelm Student.

68. Christine Felicijan served as a consultant to Ms. McTigue. Ms. Felicijan joined some of Student's educational sessions beginning December 2017 until the summer of 2018. Ms. Felicijan met with Ms. McTigue to collaboratively teach Student, once a week for two-to-three hours. Ms. Felicijan's main experience was as a special education teacher for Santa Ana Unified School District from 1994 to 2009 where she worked at a special education center dealing with students with severe behaviors and emotional disturbances. She obtained her special education credential in 1994 or 1995.

69. For the most part, Ms. Felicijan's testimony was vague and disjointed, rambling and non-responsive, with answers going on for many minutes at a time. It was given very little weight, especially as she professed wide-ranging expertise, unsubstantiated by her background or experience, on a variety of topics as far afield as the propriety of Irvine's assessments, the necessity for an "alternate assessment," federal and state legal requirements that applied to assessments, anxiety, depression, bullying, post-traumatic stress disorder, limitations on what medical doctors did and did not treat, and Student's abilities, strengths, weaknesses, and social and emotional needs. Ms. Felicijan's credibility was greatly diminished by professing to have expertise on this wide variety of disparate topics. Ms. Felicijan attended the June 4, 2018 IEP team meeting and penned a letter regarding her reactions to the offer made there. Her testimony was vague, defensive, and inconsistent regarding the timing of when she wrote the letter. Little weight is attributed to her opinions stated in the letter, which concerned the IEP's contents.

70. However, Ms. Felicijan's feelings about certain topics comported with and bolstered those of Ms. Kuhnle. Both felt that Student would experience anxiety in new situations and large groups. Ms. Felicijan's opinion, that Student required coping mechanisms to enter a group or class, and to be able to self-advocate and self-protect,

was credible. Ms. Felicijan also credibly estimated that in the summer of 2018, Student was academically at the second to third grade level, with supported reading at the fourth grade level and independent reading at the second to third grade level. Ms. Felicijan admitted that Student could benefit socially from being with other children on a comprehensive campus, with appropriate supports, such as a small class, with other students with a similar profile to hers, who were not aggressive and who did not exhibit behavioral problems.

SPRING 2018

Assessment Plan

71. Ms. Meeks developed a February 27, 2018 assessment plan, as contemplated by the September 2017 settlement agreement, after reviewing Student's previous assessments and IEP's. The assessment plan proposed assessments in the areas of social-emotional functioning, adaptive skills, and post-secondary transition. It did not propose any academic or cognitive testing. Ms. Meeks explained at hearing that this assessment plan was not developed for a triennial, was more limited in scope, and was not intended to assess comprehensively in all areas of suspected disability. As a general rule, cognition was only assessed once every three years unless a change in circumstances warranted reassessment. When she developed the assessment plan, there had been no such change in circumstances to warrant a comprehensive reassessment. Ms. Meeks considered the May 2016 scores on the Wecshler from the Irvine triennial assessment to be still current, valid, and reliable. Ms. Meeks also justified the lack of academics testing at this time, saying that she had access to Student's work samples. This testimony was not credible and was given little weight. Ms. Meeks did not in fact have access to Student's work samples when she prepared the assessment plan, which was when she determined what testing should be done. She obtained the work samples

from Student's tutors afterward when doing the assessment report itself. Via letter dated April 11, 2018, Mother consented to Irvine's February 27, 2018 assessment plan.

Progress On Goals

72. In June 2018, Irvine reported progress on what it understood to be the last agreed upon and implemented CAVA IEP goals, which had been dated October 25, 2015, with ten goals to be accomplished by October 25, 2016. Education Specialist Jennifer Hill reported Student's progress on goals six through ten by reviewing work samples provided by Student's private tutor. The speech-language pathologist reported on Student's progress on goals one through five by conferring with the tutor.

Social-Emotional and Adaptive Functioning Assessment

73. Ms. Meeks and educationally related mental health assessor Kelly Cohen assessed Student in social-emotional and adaptive functioning in May 2018 and generated a June 4, 2018 Multidisciplinary Assessment Report. Ms. Cohen was a Licensed Marriage and Family Therapist. She conducted assessments, counseling, training, crisis intervention, attended IEP meetings, and collaborated with teachers. Her training in mental health issues was more extensive than the training of a school psychologist.

SOCIAL-EMOTIONAL

74. Ms. Meeks' general impression of Student was as a sweet girl, with strong social skills, who was friendly and cooperative, but who was weak in academics and struggled across the board. From review of Irvine's records, previous assessments, IEP's and observations, Ms. Meeks concluded that Student exhibited global cognitive delays that impacted all her functioning. At the time, it concerned Ms. Meeks that Student might have mental health needs that were impacting her education.

75. Ms. Meeks administered the Conners Comprehensive Behavior Rating Scales. The Conners was a comprehensive assessment tool that assessed a wide range of behavioral, emotional, social, and academic concerns and disorders in children and adolescents. Results of this measure indicated Student was demonstrating significant social and emotional concerns within the home and educational settings. Parents and Ms. McTigue endorsed that Student exhibited emotional distress, social problems, separation fears, academic difficulties, and very elevated physical symptoms. Per Parents, Student exhibited very elevated levels of worry. Ms. McTigue endorsed significant concerns with social anxiety and upsetting thoughts.

76. Ms. Meeks also administered the Multidimensional Anxiety Scale for Children, Second Edition, as had Ms. Kessy. Both Parents and Student indicated elevated to very elevated ratings on the total score, indicating that overall Student was likely experiencing elevated anxiety symptoms. Ratings were elevated to very elevated in separation anxiety/phobias, and physical symptoms including panic and tension or restlessness.

77. Ms. Meeks also administered the Children's Depression Inventory, Second Edition. Student, Parents, and Ms. McTigue completed the inventory. The total score, which reflected the number and overall severity of depressive symptoms, indicated no significant concerns with depression, however Student exhibited negative mood, physical symptoms, sadness, irritability, poor appetite, and/or fatigue.

ADAPTIVE FUNCTIONING

78. Ms. Meeks also administered the Adaptive Behavior Assessment System. Student's overall adaptive behavior skills, according to her parents and teachers, fell in borderline to below average ranges when compared to skills of her peers. Student's conceptual, social skills, and practical composite scores were within the borderline to below average ranges. These ratings indicated areas of weakness in all areas of adaptive

skills. Tutors Ms. McTigue and Ms. Kuhnel, and both Parents, completed the rating scales. On the conceptual composite, Student's scores were 74, 78, 81 and 81. On the social composite they were 78, 83, 84 and 81. On the practical composite they were 77, 86, and 82 with one rater missing. On the general adaptive composite, they were 75, 82, and 80 with one rater missing.

79. These scores were somewhat higher than the scores obtained in 2017 by Ms. Kessy, when Student's "conceptual composite" scores were 66 from Mother, 67 from Father, 49 from the general education teacher, 60 from a special education teacher, and 65 from another special education teacher, and when her general adaptive composite scores were 63 from Mother, 68 from Father, 58 from the general education teacher, and 76 and 75 from special education teachers. Ms. Kessy testified she was comfortable that the 2018 Adaptive Behavior Assessment System scores evidenced continued deficits in Student's adaptive skills, as did her 2017 report that changed Student's eligibility to intellectual disability.

ELIGIBILITY

80. Relying on Irvine's June 5, 2017 Adaptive Behavior/Post-Secondary Transition/Updated Social/Emotional Assessment, Ms. Meeks in the 2018 assessment reiterated intellectual disability as Student's primary eligibility categorization, without any analysis.

81. At hearing, Ms. Meeks relied on the prior cognitive testing that had been done, including the Wechsler results from Irvine's triennial in May 2016, which were still "current, valid, and reliable" for Student in 2018.

MENTAL HEALTH

82. Mental health assessor Kelly Cohen conducted the mental health portion of this assessment. Ms. Cohen interviewed Student. During such an interview, the

assessor asks specific questions designed to tease out anxiety and depression. The interview and observation did not lead Ms. Cohen to believe that Student had mental health concerns. She observed that Student displayed clear speech and logical thought patterns; however her speech was sometimes broken and difficult to understand. As a result, Ms. Cohen asked many clarifying questions. Ms. Cohen's assessment report stated that Student's memory and insight seemed to be impaired, as Student "had difficulty identifying and recalling feelings, thoughts, and occurrences that she previously experienced, as well as current feelings." Student identified her biggest challenges as "understand[ing] the problems." She felt that the teachers at University High had not helped her, and that school "[wa]s hard because remembering and understanding [wa]s difficult." The teachers at University High made Student nervous when they asked her questions. Student felt that the teachers did not think she was smart enough. However, per Ms. Cohen's observation, Student was not depressed, she was happy and smiling. Ms. Cohen observed no anxiety.

83. Ms. Cohen also interviewed Mother. Mother's concerns were Student's anxiety, lack of social relationships, and tics. Ms. Cohen's impression was, however, that Mother's concern about Student's anxiety was not current, but related to past events, especially concerning a foot injury in the past that Mother said had caused Student to panic.

84. Ms. Cohen concluded that although Student had no depression, there were some discrepancies around whether she appeared anxious or not. Ms. Cohen therefore concluded that Student did have a mental health condition that was negatively impacting her ability to access her education.

85. Ms. Cohen concluded that Student had difficulty identifying feelings associated with both depression and anxiety. She concluded that anxiety was a factor that was currently impacting Student. Student exhibited symptoms that included:

excessive worry, panic, and physical symptoms such as stomach aches, tense body, and restlessness. Thus, Ms. Cohen concluded Student may have had a mental health condition that was negatively impacting her ability to access her education. As a result, she recommended that the IEP team consider social- emotional support such as school-based counseling.

June 4, 2018 Supplemental Transition Assessment

86. Education specialist Jennifer Hill conducted a transition assessment in May and June, resulting in a report dated June 4, 2018. Since 2017, Ms. Hill had monitored students who resided in Irvine but attended educational settings outside of Irvine. She administered and interpreted academic assessments, helped develop IEP's, and monitored academic and behavioral progress. She held a clear education specialist credential, a Cross-cultural, Language, and Academic Development Certification, and other out-of-state certifications. She had a master's degree in Social Work. Ms. Hill was a very accomplished professional with impressive credentials. Her testimony was given substantial weight.

87. Ms. Hill interviewed Student using a transition survey form that asked Student questions regarding her future plans for school and work, career interests, and career goals. Ms. Hill completed the survey with Student's input, as Mother had indicated concern about how much of it Student had understood. Ms. Hill's observations confirmed Mother's concern; for example, Student had difficulty with stating the age at which she would exit school. She had to puzzle out her own age and grade.

88. Ms. Hill did not administer any standardized instruments. The transition assessment was not a standardized assessment normed against other students. The tools used were survey forms and interviews. Ms. Hill did not repeat, but she reported the results of Ms. Kessy's administration of the Adaptive Behavior Assessment System and the Brigance from the Adaptive Behavior/Post-Secondary Transition/Updated Social

Emotional Assessment from June 2017. Although the Brigance tested many functional and academic skills, Ms. Hill acknowledged that the Brigance was not an evaluation of overall academic skills, nor was it a standardized tool that was normed against a population of students. When reviewing the prior Brigance versus Student's current work samples, it appeared to Ms. Hill that Student had made a substantial amount of academic progress in skills involving computation, one- to two-step word problems; converting the values of coins to dollars; computing the value of groups of coins; computing total costs of purchases, and writing dates.

89. Ms. Hill re-administered some portions of the Brigance, specifically relating to reading a restaurant menu and understanding the courses of a meal, i.e. appetizer, entrée and dessert, etc.; food preparation recipes and instructions; and multiplying unit costs, i.e. converting \$0.99 per apple into a cost for several apples. She concluded that Student could access the menu, could double or halve recipes, and could understand food preparation instructions with minimal assistance, and needed support in math computation.

90. At the time of the assessment, Student was being tutored at home. Ms. Hill interviewed the tutor Ms. McTigue, and saw Ms. McTigue's lesson plans and work samples from Student's work during the spring 2018 time frame. From interviewing Ms. McTigue and from Ms. McTigue's lesson plans, Ms. Hill deduced that Student's independent reading level was at the second grade, and that Student could attempt fourth grade reading material with instructional support, such as stopping at challenging words and discussing context, rereading the word by syllables, or substituting less challenging words. In math, Ms. Hill deduced that Student was working on calculating money, elapsed time, and addition and subtraction. In writing, Student was working on writing one paragraph with a topic sentence, details, and a conclusion. Ms. Hill used the lesson plan and the work samples to determine Student's present levels of performance,

her progress on IEP goals from the CAVA October 2015 IEP, which Irvine treated as the last agreed-upon IEP goals, and to propose future goals.

91. At hearing, Ms. McTigue disputed any categorization of the work samples as “testing information.” Ms. McTigue gave Student a great deal of support to accomplish the work; for example some paragraphs were created by dictation, which would not have been obvious from looking at the page. For another example, Ms. McTigue was supplementing Student’s second and third grade math level skills. She and Student “did the work together.” When it was difficult for Student, they stopped, and worked on the difficult skill. For another example, some work samples indicated that Student was underlining important parts of text, and answering questions about the text and underlining the evidence in the text to back up her answers. Other pages, however, showed highlighting that might have been in Ms. McTigue’s hand rather than Student’s, which would not be obvious from looking at the page. At the time of Ms. Hill’s assessment and interview, Ms. McTigue felt Irvine was viewing the work samples as something that Student had mastered, when that was not representative. However, she acknowledged at hearing that the work samples provided insight into Student’s skill levels. For example, Student’s sentences were simplistic and unfinished. The work samples did indicate that Ms. McTigue was working with Student on fourth grade texts, with support.

92. At hearing, Ms. Hill acknowledged that the work samples were not normed or standardized. Thus, they did not provide a reliable measure of where Student stood academically compared to a relevant population of other students. The work samples were not performance-based, i.e. they did not indicate the length of time Student took to complete the tasks, nor whether she conducted them un-aided. Nonetheless, Ms. Hill opined that academic testing was not needed, due to access to Student’s work samples, which in her opinion provided her with even more reliable data than standardized

assessments would have done.

93. Academic assessments that might have been performed would have consisted of the Woodcock Johnson, the Wechsler, or other curriculum-based assessments.

JUNE 4, 2018 IEP

94. The IEP team met on June 4, 2018. Ms. Cohen reported Student's present level of performance in social-emotional functioning, based on her educationally related mental health assessment, as follows: "Although [Student] has difficulty identifying feelings and symptoms of anxiety, rating scales completed by [Student], her mother, and her tutor indicate significant emotional distress on the part of [Student] in regards to both physical and emotional symptoms of anxiety. [Student] reports that she may experience 'butterflies' at home in certain situations and her mother reports that she may experience excessive worry in response to everyday stressors."

95. Ms. Hill drafted the academic present levels of performance, using information provided by tutor Ms. McTigue. Based on Ms. McTigue's input, Ms. Hill wrote that in the area of Language Arts, after listening to a second grade passage of more than six sentences, Student was able to answer literal "wh" (who, what, when, etc.) questions with 70 percent accuracy. Student was reading fourth-grade level fictional text aloud with her tutor, stopping periodically to check for understanding and review the story. When Student encountered unknown or challenging vocabulary while reading, she attempted to use the context to figure out the meaning. After listening to second-grade level text, Student was able to look up vocabulary in Google or a dictionary and use it in a sentence. Student struggled to read two pages of third-grade level text, but was able to identify the main idea and some detail. With regard to writing, Student was able to write a one-paragraph narrative essay that contained a topic sentence, detail sentences, and a conclusion, with the support of a graphic organizer.

Student had not yet begun to work on editing her writing, instead relying on her tutor to identify and correct her errors.

96. With regard to her math skills, Student had demonstrated mastery on second- and third-grade level worksheets pertaining to money skills. She practiced by purchasing items, counting change, and calculating tips. She was able to count combinations of money up to ten dollars. She had mastered multiplication and division through ten. Student had worked on telling time on an analog clock. Work samples indicated she was able to tell time to the nearest five minutes.

97. Ms. Hill felt she had sufficient information to report on the academic present levels of performance, and to develop goals in the areas of reading, writing, and math. Ms. Hill felt it was not necessary to reevaluate Student in the area of academics in preparation for the June 2018 IEP, neither for her eligibility category, to determine her academic skills levels, nor to determine appropriate placement and services.

98. The IEP offered seven academic goals, all written by Ms. Hill. Goal number one in the area of reading comprehension of nonfiction text stated that by June 2019, Student would identify the main idea and explain in two-to-three sentences, in writing, how key ideas from the text support the main idea, with 70 percent accuracy in three consecutive trials as measured by a teacher-selected assessment. The baseline for this goal stated that Ms. McTigue had indicated that Student was able to identify the topic and some supporting details in a two- page third grade nonfiction text, but this skill was challenging for Student. "Accurate baseline data for Student's mastery of this goal will be collected and shared within 30 days of her return to [Irvine]. Annual goals and objectives may be adjusted based on baseline data collected."

99. Each of the other academic goals drafted by Ms. Hill similarly stated that the baseline information came from Ms. McTigue, accurate baseline data should be revisited, and annual goals and objectives may be adjusted based on baseline data

collected.

100. Goal number two was in the area of reading comprehension for literature. It stated that by June 2019, after reading an independent level literary text, and using a graphic organizer, Student would complete the graphic organizer to describe the story elements (character, setting, conflict, and solution) using details such as descriptions, thoughts, actions, or words, from the story with no more than two teacher prompts with 70 percent accuracy on three consecutive texts. The baseline for this goal stated: "Currently, Student's home tutor reports that Student reviews characters, setting, problem, and short term solution, together with the tutor as she moves through reading."

101. Goal number three was in the area of writing. It provided that by June 2019, when given a writing prompt, Student would compose a paragraph that included a topic sentence, a minimum of three supporting reasons or details, and a minimum of three linking words/phrases, such as "for instance," "in addition," or "in order to," and scoring 70 percent accuracy on a teacher-created rubric over three consecutive trials as measured by a teacher-created rubric. The baseline stated: "According to feedback provided [by] Mrs. McTigue, Student currently writes 1 paragraph consisting of a topic sentence, 3 details, and a conclusion sentence with 60% accuracy."

102. Goal number four was in the area of writing/editing. It provided that by June 2019, after completing the pre-writing, drafting, and revising steps of the writing process and given an editing checklist for guidance, Student would edit a piece of writing, to identify and correct 75 percent of errors in punctuation, capitalization, or misspelled words, and create a corrected second draft to be attached to the original draft on three consecutive writing samples. The baseline stated that according to feedback provided by Ms. McTigue, when provided with one sentence, Student was able to identify and correct 60 percent of simple mechanical and grammatical errors.

103. Goal number five was in the area of math, specifically “elapsed time.” It provided that by June 2019, when presented with ten word problems involving elapsed time to the nearest five minutes and with no more than one verbal prompt, Student would calculate elapsed time with 70 percent accuracy in five consecutive trials. The baseline referred to work samples that indicated Student had mastered telling time to the nearest five minutes. According to Ms. McTigue, Student was able to calculate elapsed time to the nearest hour.

104. Goal number six was in the area of math, specifically fractions. It provided that by June 2019, when given ten addition or subtraction equations consisting of two fractions with unlike denominators, and a visual support of the steps for addition/subtraction of unlike denominators, Student would generate equivalent equations with like denominators, then add or subtract to solve, with 70 percent accuracy in five consecutive trials. The baseline stated that Student had demonstrated mastery of addition and subtraction of decimal numbers but not fractions. During the transition assessment, Student demonstrated some difficulty when she was asked to double fractions in a recipe.

105. Goal number seven, in the area of math, specifically equations, stated that by June 2019, when given a set of ten one-step equations (e.g. $2x = 12$) with whole numbers, Student would solve for the variable using visual or arithmetic strategies with 70 percent accuracy for three consecutive sets of problems. The baseline stated that math work submitted suggested that Student understood that two numbers can combine for a sum or product and that the sum or product can be split into separate parts. This was a conceptual precursor skill for the ability to solve simple algebraic equations. No work was submitted to suggest that Student has been exposed to this skill yet.

106. At hearing, Ms. Hill acknowledged that it was unusual to write academic

present levels of performance and goals solely from information provided by a tutor. It was unusual as a general rule to encounter any student whose sole education was being provided by home tutors, and this was Ms. Hill's only experience with such a situation. However, Ms. Hill felt that Ms. McTigue's information was clear, valid, and reliable. Ms. Hill acknowledged that if the work samples had been substantially altered, they would not be valid representations of Student's functioning.

107. Ms. Cohen wrote goal number eight in the area of social-emotional functioning, pursuant to her mental health assessment, after discussion with Ms. Meeks. The baseline for this goal stated that Student was not currently able to verbally identify feelings that led to excessive worry, panic, and physical symptoms, such as stomach aches, a tense body, and restlessness. The goal stated that by June 2019, within counseling sessions, Student would verbally identify feelings that lead to excessive worry, panic, and physical symptoms (stomach aches, tense body, restlessness), in 75 percent of opportunities over a four-week data collection period as measured by psychologist data logs. Ms. Cohen, on the basis of her mental health assessment interview of Student, concluded that Student was unable to identify her own emotions, thoughts and feelings. Ms. Cohen identified this as Student's most pressing need, in that one could not embark on a therapeutic program without having this basic preliminary skill. This was a starting point in order to start being able to work on Student's anxiety issues.

108. Irvine offered placement at University High on a "certificate of completion" rather than a diploma track. Irvine proposed the eligibility category of intellectual disability with a secondary category of language or speech disorder.

109. Irvine offered the "Directed Learning" classes with a modified curriculum and pass or fail grading for English, Math, Science, and Social Studies for approximately four hours per week for each class. Directed classes met grade-level curriculum but at a

slower pace, with supports. The classes had four to six students each, with a teacher and an aide. The students had a similar profile to Student's. Irvine also offered an additional four weekly hours of a class called "Directed Learning Strategies." Irvine also offered a one-hour college awareness and a one hour career awareness class. Student would be outside the regular class 57 percent of her time and 43 percent within. The directed classes could modify the curriculum, although not all of the students in the class were on a certificate track. Some were working towards a diploma and, in their cases, the curriculum would not be modified. Modified work could consist of simplified questions with lower standards. For example, the classroom text could be modified down to a fourth-grade reading level. The math class had five students and one aide, teaching consumer math for practical life skills. The English class had six students. All the academic goals could be worked in the directed classes.

110. Irvine offered speech and language services of 30 half-hour small group, and 30 half-hour individual, speech therapy sessions for the year.

111. Irvine offered twelve 20-minute counseling sessions. Ms. Cohen anticipated that school psychologist Ms. Meeks would use these sessions to build rapport with Student, and to identify feelings in general and hypothetically, using social scripts to identify the feelings of others and oneself. As a licensed mental health professional, Ms. Cohen performed specialized counseling services but did not typically serve students who were intellectually disabled, as they may not be able to benefit from therapy if their cognitive deficits were too severe. However, she acknowledged that Student was "more verbal than most intellectually disabled students." Ms. Cohen thought the goal was appropriate and measurable, and Ms. Meeks was an appropriate person to implement it. Licensed mental health professionals, such as Ms. Cohen, typically addressed much higher levels of emotional needs, such as crippling anxiety or suicidal ideation.

112. At hearing, Ms. Cohen explained that she and Ms. Meeks thought “long and hard” about how to meet Student at her existing level, and they felt that identification of feelings was the first step. They also thought about the number of sessions to offer, and felt that once this goal was accomplished, they would then afterward proceed to offer successive additional goals, not yet offered but anticipated in the future. Appropriate future goals might address the identification of emotional triggers, and the development of coping mechanisms.

113. Ms. Meeks felt the offer of twelve 20-minute sessions was a “good starting point” and “adequate” to meet Student’s counseling goal to verbally identify feelings that lead to excessive worry, panic, and physical symptoms like stomach aches, tense body, and restlessness. Ms. Meeks anticipated that if Student developed difficulties, she could problem-solve during the 12 offered sessions. Also, Ms. Meeks and Student’s other service providers could consult and determine a new plan to address difficulties if these arose once Student was on site, or call a new IEP team meeting if necessary. Ms. Cohen did not anticipate that Student would require all year to meet this goal. She thought once it was met, the goal would be adjusted, and perhaps additional counseling services would be offered to achieve new, updated goals.

114. Irvine also offered accommodations including an “anytime pass” to “seek out a trusted adult for social-emotional support.” Other accommodations included extra time to complete assignments, tests and quizzes; simplified and repeated instructions; testing in a quiet separate setting or small group; a copy of class notes to be provided to Student; test items to be read aloud or reworded if needed in a manner that did not influence Student’s answers; grading for content rather than grammar or mechanics; and visual lists of words to support a writing goal.

115. Student’s contemplated schedule would have had her rotate through all six or seven academic classes every two days. The school day would have had six

periods, with a break outside between second and third period, then lunch outside after fourth period. Student might have had a "block schedule," where certain academic classes would not occur every day but would alternate, with some days having academics during first, third, and fifth periods, and other days having different subjects in second and sixth periods. Student's non-academic or elective classes, such as art, gym, or ceramics classes, could have been located anywhere on campus. For Student's "anytime pass" to "seek out a trusted adult for social-emotional support," the details would need to be worked out as to who that person would be, where that person would be located, and how Student would access that person.

116. Ms. Hill did not believe Student required one-to-one instruction. She felt Student had made progress and did not have the sort of deficits, such as severe behaviors or severe academic concerns, that required as restrictive a placement, although she acknowledged that the progress Student made to date was in a one-to-one environment. In addition, she felt the social benefits of Student being in a school setting had been overlooked in the home tutoring environment, where Student was missing important milestones. On campus, Student would have to transition from one setting to another; navigate the campus; follow a schedule; and learn other important life skills.

117. Mother did not consent to the June 4, 2018 IEP offer, and this due process hearing ensued. Mother would not consent to counseling with a school psychologist unless she knew which person would be assigned. She also felt the twelve 20-minute counseling sessions were too minimal to meet Student's anxiety needs which, in Mother's opinion, required once or twice weekly sessions. Mother visited the Directed Learning classes and, although Mother felt Student might obtain educational benefit in the setting, she did not believe that the individual teachers whom she observed would be able to engage Student. Although Mother also believed Student could benefit from

engaging with peers on a school campus, she was concerned about how the setting would affect Student's disabilities. Mother testified that Student suffered from anxiety and Tourette's syndrome that incepted in the ninth grade, when she was bullied. These concerns prompted Mother to remove Student from the school setting and formed the basis of her objections to the June 4, 2018 IEP offer.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁹

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)¹⁰ et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet

⁹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹⁰ All subsequent references to the Code of Federal Regulations are to the 2006 version.

the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 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 District*. (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress

was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.) The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School District* (2017) 580 U.S. ___ [137 S.Ct. 988] (*Endrew F.*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, at pp. 1000-1001, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student’s IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Id.*, at p. 1001.)

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

preponderance of the evidence].) In this matter, Student had the burden of proof on the issues decided.

ISSUE 1: FAILING TO ASSESS IN THE AREAS OF (A) COGNITIVE ABILITY AND (B) ACADEMIC ACHIEVEMENT PRIOR TO JUNE 4, 2018 IEP OFFER

5. Student contends Irvine failed to comprehensively assess Student in the areas of cognition and academics in order to offer her a FAPE for the 2018-2019 school year. Student contends that given the multitude of different educational environments Student had during her academic career, from non-public school, to virtual academy, and in-home private tutoring, and her eighth grade passing marks in CAVA's online general education classes, she should have been comprehensively assessed in the spring of 2018, especially as to her cognitive abilities. Student also contests the accuracy of the estimates of Student's academic performance as falling between a second- to fourth-grade functional level. Student contends that it was indefensible for Irvine to fail to conduct academic testing to establish what placement would best accommodate Student's level of academic functioning. Student also contests the accuracy and usefulness of the Brigance and the work samples provided by Ms. McTigue and relied on by Ms. Hill, and argues that reliance on only the work samples constituted relying on a single assessment tool, which the law forbids.

6. Irvine contends that reassessment of Student's cognitive abilities and academic achievement was not necessary or warranted in the spring of 2018 as a precondition to its June 4, 2018 offer for the 2018-2019 school year, Student's eleventh grade. Irvine contends Student has an established cognitive profile for which she has been formally assessed and reassessed repeatedly, including the two triennials performed by CAVA and Irvine in 2016. With regard to academics, Irvine contends it had sufficient non-formalized assessment information to provide it with the necessary data to offer a FAPE, including extensive information about Student's prior academic

achievements and the input of her private tutors. In sum, Irvine contends it was not necessary to formally assess either Student's cognition or her academic achievement in spring 2018.

7. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 (c)(2) & 300.303.)

8. The IDEA provides for reevaluations (referred to as reassessments in California law) to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district "determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment." (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

9. A local educational agency must assess a special education student in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. (20 U.S.C. § 1414(b)(2)(A)). The assessments used must be: selected and administered so as not to be discriminatory on a racial or cultural basis; provided in a language and form

most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; used for purposes for which the assessments are valid and reliable; administered by trained and knowledgeable personnel; and administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b)(3); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

10. Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) The IEP team must consider the assessments in determining the child's educational program. (34 C.F.R. § 300.324(a)(1)(iii).)

11. Education Code section 56381, subdivisions (b)(1) and (2), provide that as part of a reassessment, the IEP team and other qualified professionals, as appropriate, shall review existing data, current assessments and observations, and teacher and related services providers' observations, and input from the parents. The team should, on the basis of that information, identify what additional data, if any, is needed to determine the present levels of performance and educational needs of the pupil.

12. Individuals who are both "knowledgeable of the student's disability" and competent to perform the assessment, must conduct assessments of students' suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not

including speech/language testing where concern prompting assessment was deficit in reading skills].)

13. A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

(A) Cognitive Assessments

14. With respect to cognitive testing, Irvine did not deny Student a FAPE by not performing new cognitive testing immediately prior to making the June 4, 2018 IEP offer. New assessments in this area were not required at the time to help the IEP team identify the special education and related services Student required. The team had accurate information with regard to cognition, as Student had been assessed using formal standardized cognitive instruments in both the CAVA and the Irvine triennials in 2016, less than three years prior to the offer of FAPE at issue here. These scores were still current, valid, and reliable, as attested to by Ms. Meeks. From prior testing in 2009 and 2012, which was consistent with the results of repeated testing in 2016, Student had an "established profile" that, in the absence of changed circumstances such as an injury not at issue here, would not normally be expected to change. The CAVA 2016 triennial had assessed Student's cognitive functioning using the Cognitive Assessment System, Second Edition in which her scores ranged from 60's to 80's, in the below average range. Student's full scale score on the nonverbal intelligence index, the Comprehensive Test of Nonverbal Intelligence, Second Edition, was 78, which was an important, but outlier, higher score than all the others in the record. Comparing the 2009 and 2012 results, the

CAVA Cognitive Assessment System scores, and Irvine's 2016 Wechsler scores, which were for the most part in the "extremely low" range (i.e., a full scale IQ score of 66, verbal comprehension of 62, visual spatial of 64, working memory of 59, and a non-verbal measure of 67), yielded a sufficient understanding of Student's cognition. With respect to cognition, the June 4, 2018 IEP offer was not flawed by insufficient evaluative information about Student's individual capabilities. Nor was there a lack of information such as to deny Student educational opportunities or hinder Parents' ability to participate in the IEP process. There was no evidence presented, and no reason to believe, that alternative services would have been more seriously considered during the collaborative IEP process if the school district had formally assessed Student's cognitive functioning. (Cf. *Timothy O. v. Paso Robles Unified School District* (9th Cir. 2016) 822 F.3d 1105, 1125.) In short, the lack of formal cognitive testing in the spring of 2018 did not deny Student a FAPE.

(B) Academic Assessments

15. Irvine's failure to use standardized academic instruments in 2018, in light of the wealth of information Irvine did have, did not result in a denial of a FAPE. Irvine's offer of placement, and its proposed academic goals, were individually designed to provide educational benefit to Student, providing a level of instruction reasonably calculated to enable Student to make progress appropriate in light of her circumstances.

16. This is not to say that there were no inconsistencies in the academic testing used. For example, the specific Brigance instrument used in the 2017 assessment was inconsistently named and ambiguous. As with the Brigance tool used in Irvine's triennial in 2016, there was no indication of what the publisher of the test recommended its designated usages were, nor what it was intended to discern. The results appeared to be non-standardized, anecdotal, and no scores were reported. Ms. Hill acknowledged that the Brigance was not an evaluation of overall academic skills, nor was it a

standardized tool that was normed against a population of students. After the 2016 CAVA triennial assessment administration of the Woodcock Johnson, no standardized academic instruments were used. Thus, Student's performance could not be assessed compared to a normed population, nor a percentile assigned to her.

17. Ms. Meeks' testimony that she relied on Student's work samples when deciding not to place academics on the February 2018 assessment plan was not credible, given that she did not in fact have access to Student's work samples until after she prepared the plan.

18. Furthermore, at hearing, Ms. McTigue disputed any categorization of the work samples as "testing information," because she gave Student a great deal of support to accomplish the work. Ms. Hill acknowledged that the work samples were not normed or standardized, not timed, not necessarily independent, and could not provide a reliable measure of where Student stood academically compared to a relevant population of other students.

19. Finally, Ms. Hill's June 2018 progress reporting on goals, and drafting of baselines, all explicitly acknowledged that they were based on work samples and tutor reporting, and would need to be updated with more accurate information as the school year progressed.

20. Nevertheless, Irvine had a wealth of data to review. The Brigance tools used in the 2016 Irvine triennial and the 2017 assessment, reviewed by Ms. Hill during her 2018 transition assessment, assessed many skills in great detail. Although reported conversationally and anecdotally, and not scored, normed or standardized, the results were informative. The Brigance provided voluminous information about many of Student's word recognition, reading vocabulary, comprehension, reading comprehension, listening and speaking skills, general speaking skills, functional writing skills, and math skills. Ms. Hill's substantial professional experience enabled her to

discern Student's present levels of performance in Student's areas of unique need from the Brigrance results, and the voluminous other information she had from interviewing Ms. McTigue and from the work samples themselves, despite their limitations. As Ms. McTigue acknowledged at hearing, the work samples did provide insight into Student's skill levels, and did indicate that Ms. McTigue was working with Student on fourth grade texts, with support.

21. Ms. Hill, when drafting the relevant portions of the IEP, deduced that Student's independent reading level was at the second grade, and that Student could attempt fourth grade reading material with instructional support. She knew that Ms. McTigue estimated Student's instructional reading level at the third grade and her independent reading level at the second grade. This was consistent with Ms. Felicijan's credible estimate that in the summer of 2018, Student was academically at the second to third grade level, with supported reading at the fourth grade level and independent reading at the second to third grade level.

22. Despite acknowledging the limitation of the work samples, Ms. Hill's opinion in light of her experience, was credible. Academic testing was not needed, due to access to Student's work samples, which in her opinion provided her with even more reliable data than standardized assessments would have done. Thus, Ms. Hill had sufficient information to report on the academic present levels of performance and to develop goals in the areas of reading, writing, and math.

23. In conclusion, with respect to academics, the June 4, 2018 IEP offer was not flawed by insufficient evaluative information about Student's individual capabilities. Nor was there a lack of information such as to deny Student educational opportunities or hinder Parents' ability to participate in the IEP process. There was no evidence that alternative services would have been more seriously considered during the collaborative IEP process if Irvine had formally assessed Student's academic functioning. Given the

wealth of information concerning academic functioning that Irvine did have, the lack of formal academic testing in the spring of 2018 did not deny Student a FAPE.

ISSUE 2: CATEGORIZATION AS A STUDENT WITH INTELLECTUAL DISABILITY

24. Student contends that the reclassification of Student as intellectually disabled in 2018 was based on the social-emotional assessment Irvine performed in 2017. Although any claims pertaining to the 2017 assessment were resolved by settlement agreement, Student contends that that assessment's flaws persisted into the 2018 assessment and IEP offer at issue here. Student argues that the 2017 assessment was not a triennial assessment, nor was it a comprehensive assessment, nor was it conducted in preparation for an annual IEP meeting. The assessment was conducted due to Parent's request for reassessment in limited areas. As such, there was no requirement or request to reassess eligibility at that time. Student contends that Ms. Kessy's explanation, that she reviewed eligibility because Student's adaptive scores had decreased, was flawed in that there was never any written explanation of the basis of the change of eligibility category to help Parents understand and meaningfully contribute to the ongoing discussion of eligibility. Finally, although purportedly based on prior cognitive testing that had been done in previous years, neither of the prior triennial assessment reports from CAVA or Irvine in 2016 had found eligibility under the intellectual disability category.

25. Irvine contends that the categorization of Student as intellectually disabled was appropriate, in that her established cognitive profile evidenced significantly subaverage general intellectual functioning, and because the results of adaptive testing instruments used by Ms. Kessy in 2017, and Ms. Meeks in 2018, evidenced deficits in adaptive behavior.

26. To be eligible for special education and related services, students must be found eligible by the IEP team, after review of the results of assessments. (Ed. Code, §

56026, subds. (a), (b) & (d); Cal. Code Regs., tit. 5, § 3030.) The IEP team must find that the student's impairment falls within certain delineated categories, and that the degree of their impairment requires special education and related services. (Cal. Code Regs., tit. 5, § 3030.)

27. California Code of Regulations, title 5, section 3030, subdivision (b)(6) states: "Intellectual disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance."

28. The IDEA does not give a student the legal right to a proper disability classification. (*Weisberg v. Lancaster School District* (9th Cir. 2010) 591 F.3d 1255, 1259.) Nothing in the IDEA requires that children be classified by their disability so long as each child who has a disability listed in the IDEA and who, by reason of that disability, needs special education and related services, is regarded as a child with a disability. (20 U.S.C. § 1412(a)(3)(B); Ed. Code § 56301(a).)

29. When a student is found eligible under any category, the analysis of whether he or she was denied a FAPE shifts to an examination of whether the IEP was tailored to meet the student's unique needs. (*Heather S. v. Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055 ["whether Heather was described as cognitively disabled, other health impaired, or learning disabled is all beside the point. The IDEA does not concern itself with labels, but with whether a student is receiving a [FAPE]. A disabled child's [IEP] must be tailored to the unique needs of that particular child. . . . The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [a student's] disabilities"]; *see also* 20 U.S.C. § 1412(a)(3)(B) ["Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that

disability, needs special education and related services is regarded as a child with a disability under this subchapter.”]; Ed. Code, § 56301, subd. (a).)

30. The United States Department of Education has advised that “a child’s entitlement is not to a specific disability classification or label, but to a free appropriate public education.” (*Letter to Fazio* (OSEP 1994) 21 IDELR 572, 21 LRP 2759.) A properly crafted IEP addresses a student’s individual needs regardless of his eligibility category. (See *Fort Osage R-1 School District v. Sims* (8th Cir. 2011) 641 F.3d 996, 1004 [category “substantively immaterial”]; *Hailey M. v. Matayoshi* (D. Hawaii, Sept. 7, 2011, No. 10-00733) 2011 WL 3957206, p. 3). “The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself.” (*Pohorecki v. Anthony Wayne Local School District* (N.D. Ohio 2009) 637 F.Supp.2d 547, 557.)

31. It must be acknowledged that the history of the eligibility determination was convoluted and confusing. Irvine’s 2009 and 2012 assessments determined that Student met the eligibility criteria for the categories of mental retardation (now intellectual disability) and language or speech disorder. Evidence established that the parties had entered into a settlement agreement dated September 25, 2014, but not its complete contents. At hearing, no IEP’s prior to January 2016 were entered into evidence, nor was Student’s eligibility category, if any was in fact agreed to, established at hearing. Other than goals, the contents of an October 26, 2015 IEP developed while Student was enrolled in CAVA were not presented as evidence, thus, it cannot be gleaned what Student’s eligibility was in the October 26, 2015 IEP. CAVA’s 2016 triennial assessment noted that Student’s last signed IEP was “not available” and that Mother was not in agreement with a prior determination of eligibility based on intellectual disability. CAVA’s triennial assessment found Student’s score of 78 in the nonverbal intelligence assessment results on the Comprehensive Test of Nonverbal Intelligence was too high to support a finding of intellectual disability, and found that Student met the eligibility

criteria for specific learning disability and language or speech disorder. Thereafter, in May 2016, Irvine's triennial assessment, using outmoded language of "mental retardation" and an out-of-date legal citation for that term, determined that Student was not intellectually disabled despite Student's low cognitive scores, because the relevant definition required deficits in adaptive behavior, and Irvine's triennial assessment did not find deficits in adaptive behavior sufficient to meet this definition. The Irvine triennial recommended that Student was eligible under the category of language or speech disorder. With regard to specific learning disability, the triennial report contained multiple inconsistent paragraphs concerning whether Student's achievement was or was not commensurate with her cognitive ability, but ultimately concluded that she was not eligible under the category of specific learning disability. Thereafter, when Student returned to Irvine and attended a public high school program at University High at the commencement of the 2016-2017 school year, her ninth grade year, Irvine convened IEP meetings on September 22 and October 5, 2016. At neither of these meetings did the IEP team discuss or revisit Student's pre-existing eligibility categories, and Irvine offered a primary eligibility category of specific learning disability (despite Irvine "ruling out" that category in its triennial assessment) and a secondary eligibility category of language or speech disorder. However, as Mother did not consent to this IEP, it still cannot be gleaned what, if any, was the last agreed upon and implemented eligibility category. Then, in June 2017, Irvine conducted the important Adaptive Behavior/Post-Secondary Transition/Updated Social/Emotional Assessment. This was the first assessment, so far as the evidentiary record presented in this case, in which Irvine recommended that Student be classified as eligible under the category of intellectual disability. In the absence of recent cognitive testing, Irvine relied on Student's prior cognitive assessment scores. The tipping point in the determination was the adaptive functioning scores. The eligibility determination made in the June 2018

assessment and IEP that are at issue here merely carried the 2017 recommendations forward.

32. Here, the 2017 genesis of the proposed change in Student's eligibility category, during a mid-year social-emotional assessment, was unusual. It did not occur either during a triennial or annual IEP. The June 5, 2017 assessment was limited in scope to Student's social-emotional functioning, an area Mother had specifically requested be assessed. The witnesses established that it was extremely unusual, and they could not explain why Student's eligibility category was re-visited at this time. No one could establish any changed circumstances warranting such a mid-year determination. Testimony concerning the frequency of re-determining eligibility, in the absence of changed circumstances, or what might lead a school district to do that, was equivocal.

33. However, the unusual nature of the mid-year re-examination did not establish a violation of law, which neither prohibits mid-year re-examinations of eligibility, nor mandates that eligibility may only be examined at annual or triennial assessments or IEP's.

34. Moreover, the unusual mid-year re-determination was proposed in an assessment that was performed in 2017, and Student subsequently settled all claims pertaining thereto. Therefore, to the extent that Student argues that there was a procedural error in 2017 significantly impeding Parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE, that claim can no longer be brought.

35. Nor did Student establish that the categorization, although derived in an unusual fashion, was incorrect. The June 2017 assessment determined that Student was intellectually disabled based on her established cognitive profile, addressed in detail above. It relied on the fact that her scores on the Adaptive Behavior Assessment System had lowered, thus satisfying the second prong of the inquiry. In 2017, Student's

“conceptual composite” scores were 66 from Mother, 67 from Father, 49 from the general education teacher, 60 from a special education teacher, and 65 from another special education teacher, with general adaptive composite scores of 63 from Mother, 68 from Father, 58 from the general education teacher, and 76 and 75 from the general education teacher. Ms. Kessy opined that these scores evidenced adaptive deficits sufficient to meet the second prong of the definition of intellectual disability. Student, who had the burden of proof, did not refute her analysis. In 2018, Ms. Meeks also administered the Adaptive Behavior Assessment System again. Ms. Meeks established Student’s scores fell in the borderline below-average ranges when compared to skills of her peers, and that the ratings indicated areas of weakness in all areas of adaptive skills. Again, Student, who had the burden of proof, did not establish that Ms. Meeks’ analysis was incorrect.

36. Nor did Student establish any deprivation of educational benefits by virtue of the eligibility determination. No evidence was presented that a different eligibility category was appropriate, or would have yielded a different offer. There was no evidence presented, and there is no reason to believe, that alternative services would have been more seriously considered during the IEP process if the eligibility category had been different. To the extent that certain related services offered are found insufficient below, that was not a result of any eligibility category determination. Thus, however the eligibility category was derived, Student did not establish that it resulted in any FAPE denial. Therefore Irvine prevailed on Issue 2.

ISSUE 3: JUNE 4, 2018 IEP GOALS AND SERVICES TO ADDRESS THE IMPACT OF STUDENT’S MENTAL HEALTH

37. Student contends that despite Irvine’s assessments presented at the June 4, 2018 IEP team meeting revealing previously unknown mental health issues, Irvine offered only four hours of counseling services in the June 4, 2018 IEP, and only one goal

in the area of “identifying feelings.” Student contends the goals and services offered were insufficient. As a remedy, Student requests a finding that Irvine’s June 4, 2018 IEP failed to offer a FAPE and an order that Irvine fund an independent educational evaluation in the area of educationally related mental health to assist the IEP team in developing adequate supports and goals to address Student’s needs.

38. Irvine contends the June 4, 2018 IEP offered appropriate goals and services to address the impact of Student’s mental health. Student exhibited and had been assessed for symptoms of anxiety. Irvine contends the goal and the offer of counseling were appropriate to address this concern.

39. An IEP is a written statement that includes the student’s present levels of academic achievement and functional performance. (Ed. Code, § 56345, subd. (a)(1).) An IEP must contain a statement of measurable annual goals, designed to meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general curriculum, and to meet each of the child’s other educational needs that result from the child’s disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student to enable the student to advance toward attaining the annual goals, and to be involved in and make progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) An IEP must include services, supplementary aids, modifications, or supports that will allow the student to advance appropriately toward attaining the annual goals, and to be educated and participate with other students with disabilities and those who do not have disabilities. (20 U.S.C. § 1414(d)(1) (A)(IV);

Education Code section 56345, subd. (a)(4).)

40. The educational benefit to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School District No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.) When developing an IEP, the team must consider: the student's strengths; the parents' concerns; the results of assessments; and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a); Ed. Code, § 56341.1.)

41. Student prevails on this issue. When Irvine administered the Conners instrument, the results indicated Student was demonstrating significant social and emotional concerns, exhibiting emotional distress, social problems, separation fears, academic difficulties, very elevated physical symptoms, and very elevated levels of worry, social anxiety, and upsetting thoughts. The Multidimensional Anxiety Scale for Children revealed elevated anxiety symptoms, separation anxiety/phobias, and physical symptoms including panic and tension or restlessness. Ms. Cohen concluded that Student exhibited excessive worry, panic, stomach aches, tense body, and restlessness. Student's present level of performance in social emotional functioning was that she had "significant emotional distress in regards to both physical and emotional symptoms of anxiety."

42. Given these concerns, the single goal to "verbally identify feelings that lead to excessive worry, panic, and physical symptoms" was wholly inadequate, as was inferentially admitted at hearing by Ms. Cohen when she stated it was to be a "starting point." The twelve 20-minute counseling sessions also appear entirely inadequate, as

Ms. Meeks by inference acknowledged when she testified at hearing that it was to be only “step one.” Ms. Meeks anticipated that successive additional goals and services would be offered in the future, and that the offer of twelve 20-minute sessions was a “good starting point” and “adequate” to meet the single counseling goal. This testimony of both Ms. Meeks and Ms. Cohen highlights the insufficiency of the offer Irvine made.

43. The modest counseling services Irvine offered were especially inadequate in light of the placement that was being offered, at University High, a large campus with open sports fields, comprised of seven academic building and 15 to 20 total buildings, covering approximately 50 to 60 acres, with approximately 2300 to 2500 other students, where Student would be expected to navigate six or seven academic classes every two days, six periods a day, with open and apparently unsupervised breaks outside, then traversing campus to non-academic or elective classes that could be anywhere on campus. For a student who had been as sheltered as Student, and who exhibited the anxiety she did, it was entirely inappropriate to expect her to navigate such a situation without extensive supports.

44. The “anytime pass” accommodation to “seek out a trusted adult for social-emotional support” was insufficient. It was not specifically thought through in detailed fashion. It was not determined who that person would be, where that person would be located, and how Student would access that person.

45. When Irvine assessed Student during the 2016-2017 school year, while Student attended University High, Ms. Kessy was of the opinion that the placement and services were overtaxing Student’s ability and creating anxiety, as she was unable to perform the tasks demanded of her. Ms. Kessy attributed this to the diploma-track academic demands being placed on Student. However, it appears equally likely that the demands of navigating the large and populous campus contributed to Student’s anxiety. Student’s tutors at hearing all confirmed: that University High would overwhelm

Student; that Student became anxious in large groups; that although there could be benefit to Student in acquiring group skills, a large campus that required navigating hundreds of people during transitions among crowds could overwhelm Student; and that Student should learn to transition and navigate independently from class to class, but a large campus could be extremely difficult for Student, and so anxiety-producing as to be not beneficial.

46. As discussed below, a more restrictive placement sought by Student does not, however, appear necessary or appropriate. Ms. Hill, Student's tutors and Mother all attested to the potential benefits of introducing Student to a social life in a school environment, where she could learn important functional life skills. However, the placement must be supported with appropriate related services to enable Student to advance, make progress and participate in her education.

47. In conclusion, the goal to identify feelings, and the offer of twelve 20-minute counseling sessions, were not reasonably calculated to enable Student to obtain educational benefit appropriate in light of her circumstances and denied Student a FAPE. Student seeks, and is granted, an order that Irvine fund an independent educational evaluation in the area of educationally related mental health to assist the IEP team in developing adequate supports and goals to address Student's social-emotional functioning needs.

ISSUE 4: JUNE 4, 2018 IEP FAILING TO OFFER PLACEMENT IN A ONE-TO-ONE DIRECT INSTRUCTION ENVIRONMENT FOR SOME OR ALL OF THE SCHOOL DAY

48. Student relies on her educational progress under her tutors' instruction and contends that a home instruction placement for at least the core academic subjects would provide Student the greatest opportunity to access her education.

49. Irvine contends it was not necessary or appropriate to offer Student one-to-one direct instruction, and that such a placement would be too restrictive a setting

with no peer interaction, nor would such a setting provide appropriate functional life skills training to Student. Irvine contends Student can receive educational benefit in the directed academics classes it offered her.

50. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program, not the parent's preferred program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with educational benefit appropriate in light of the student's circumstances, comported with the student's IEP, and was in the least restrictive environment, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*; see also *Endrew F.*, *supra*, 580 U.S. ___ [137 S.Ct. at p. 1001].)

51. A school district must ensure that a child with a disability is educated in the least restrictive environment. (34 C.F.R. § 300.116.) To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that (1) children with disabilities are educated with non-disabled peers; and that (2) special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. § 300.114 (a).)

52. If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options.¹¹ (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.)

¹¹ "Mainstreaming" is a term used to describe opportunities for disabled students

The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

53. Irvine prevails on this issue. Home instruction is among the most restrictive options on the continuum, and is to be used only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Student failed to establish this was the case, although as discussed above, the aids and services Student will require must be reassessed.

54. As Ms. Hill established, and as Student's tutors agreed, the social benefits of Student being in a school setting have been overlooked in the home tutoring environment, where Student is missing important milestones. Student should learn to transition from one setting to another, navigate a campus, follow a schedule, interact with others, and learn other important life skills. No evidence established that she cannot accomplish this with proper supports. Student failed to establish that one-to-one instruction, the most restrictive of options, is necessary to provide Student a FAPE.

REMEDIES

1. Student prevailed on Issue 3, establishing that the June 4, 2018 IEP goals and services failed to appropriately address the impact of Student's mental health on her ability to access her education.

to engage in activities with nondisabled students. (*M.L. v. Federal Way School District* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

2. Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington v. Department of Education* (1985) 471 U.S. 359, 374.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

3. Student requests, and is granted an order that Irvine fund an independent educational evaluation in the area of educationally related mental health to assist the IEP team in developing adequate supports and goals to address Student’s needs. The evaluation shall address: social problems, separation fears, academic difficulties, physical symptoms, worry, social anxiety, upsetting thoughts, phobias, panic, tension, and restlessness. The evaluation shall make recommendations as to supports that would be necessary to enable Student to: access the offered placement at University High, navigate the campus; interact with other students; navigate her class schedule; safely participate in breaks outside; and traverse campus to non-academic or elective classes.

4. Irvine is therefore ordered to fund an independent educationally related mental health assessment. Under the time limits set forth in the Order below, Irvine shall contract with a qualified independent assessor of Student’s choice, and shall pay the independent assessor directly to perform and prepare an assessment report. Irvine shall

pay for the independent assessor to attend an IEP team meeting to review the assessment report.

5. The law provides that if an independent educational evaluation is at public expense, the criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment, unless those criteria are inconsistent with the parent's right to an independent educational evaluation. (34 C.F.R. § 300.502(e)(1).) Although Student may choose the independent assessor, it is also equitable to impose a condition that all "criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment."

6. Irvine shall, following independent educational evaluation, convene an IEP team meeting to address Student's special education and related service needs in the area of mental health. At that time, the IEP team shall consider the assessment results and decide upon appropriate services for Student designed to address her unique needs. When a parent obtains an independent educational evaluation at public expense through a request to a school district, or shares the results of a privately funded assessment, the results must be considered by the school district in any decision about the provision of a FAPE to the child if the assessment meets agency criteria. (34 C.F.R. § 300.502(c); Ed. Code, § 56329, subd. (b).) Accordingly, it is appropriate to require the parties to attend an IEP team meeting to discuss the results of the independent educational evaluation obtained by Student as a result of this Decision.

ORDER

1. The June 4, 2018 IEP goals and services denied Student a FAPE by failing to appropriately address the impact of Student's mental health on her ability to access her education.

2. Irvine shall fund an independent educational evaluation in the area of educationally related mental health to assist the IEP team in developing adequate supports and goals to address Student's needs. Irvine shall provide Student with agency criteria for conducting the assessments within 15 days of this Decision. Within 30 days of this Decision, Student shall inform Irvine of Student's choice of independent assessor, provided however that the "criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment." Irvine and Student shall cooperate to facilitate the completion of the assessment pursuant to District criteria and payment procedures for independent educational evaluations. After Student provides Irvine with notice that the independent educational evaluation has been completed, Irvine shall convene an IEP team meeting to address Student's special education and related service needs in the area of mental health. Irvine shall fund the attendance of the independent educational evaluation assessor at an IEP, at a rate of payment consistent with existing District policy.

3. All other relief sought by Student is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student was the prevailing party on Issue 3. Irvine prevailed on Issues 1(a), 1(b), 2, and 4.

RIGHT TO APPEAL

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

DATED: November 20, 2018

/s/

JUNE R. LEHRMAN

Administrative Law Judge

Office of Administrative Hearings