

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

MIPLITAS UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2018100006

DECISION

Milpitas Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on September 28, 2018, naming Parent on behalf of Student.

Administrative Law Judge, June R. Lehrman heard this matter in Milpitas, California, on October 23-25, October 29-31, November 27-30, December 11-13, 2018 and February 6-8, 2019.

Attorney Elizabeth Rho-Ng represented Milpitas. Director of Student Services Carla Crenshaw attended the hearing on all days.

Mother represented Student. Mother appeared on all hearing days.

OAH granted a continuance for the parties to file written closing arguments and the record remained open until March 25, 2019. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES

1. Did Milpitas Unified School District's April 24, 2018 Individualized

Education Program, as amended on May 11, 2018, June 28, 2018, July 9, 2018, August 24, 2018, and September 21, 2018, offer Student a free appropriate public education in the least restrictive environment in light of Student's needs, circumstances, and progress?

2. May Milpitas implement the April 24, 2018 IEP, as amended on May 11, 2018, June 28, 2018, July 9, 2018, August 24, 2018, and September 21, 2018, without parental consent for the 2018-2019 school year?

## SUMMARY OF DECISION

Milpitas failed to meet its burden of proving that its offer of FAPE was procedurally and substantively appropriate. First, Milpitas held two IEP meetings without parental participation and without adequate justification under the facts for doing so. Second, the IEP's, in several respects, did not comprise a clear written offer of FAPE. Third, the offer was developed before Milpitas conducted psycho-educational and language and speech assessments, and was not based on the assessments as the law requires. Fourth, some of the assessments were not appropriate. The speech and language assessment sought no parental input. The psycho-educational assessment did not adequately assess Student's adaptive needs. Milpitas never conducted a health assessment pursuant to the assessment plan. Milpitas never assessed Student's vision and hearing, despite reasonable suspicions of deficits in these areas. Finally, the offer was substantively inappropriate in that it omitted some important goals and services that Milpitas should have offered, particularly with regard to occupational therapy, physical therapy and toileting.

## FACTUAL FINDINGS

1. Student is a six-year-old boy with Down Syndrome and general intellectual abilities, adaptive behavior and academic skills in the low range.

2. On April 17, 2015, Mother responded to a Home Language Survey form from Milpitas. Mother responded that Student spoke Dari (a dialect of Farsi) and English in the home. Milpitas designated Student as an English language learner requiring an English language development goal. Milpitas was required to do so, whenever parents fill out the form that any another language is spoken in the home, regardless of how prevalently. The only exceptions are those who pass a test and get re-classified as "English proficient." In 2017, Milpitas administered an English language proficiency test to Student. Student did not pass. The results incorrectly designated Student's native language as "Arabic."

#### SCHOOL BASED VERSUS CLINICAL OCCUPATIONAL AND PHYSICAL THERAPY

3. Kristine Elizabeth Nakaji is a licensed physical therapist who performed an independent educational evaluation of Student. Priti Shukla is an occupational therapist employed by Milpitas. Ms. Nakaji and Ms. Shukla testified at hearing and explained the difference between "school-based" and "clinical" occupational and physical therapy. Clinical therapies are designed to strengthen, heal, treat or cure an underlying condition. School-based therapies accommodate existing limitations, or adapt the school environment to permit access to the curriculum. For example, to address difficulty sitting up straight due to weak core muscles, clinical therapy might seek to strengthen the core muscles. School-based therapy might adapt seating arrangements with adaptive chairs.

4. There can, however, be overlap between clinical and school-based therapies. For example, standing may be necessary to participate in school. Accommodations that permit a student to stand might also tend to strengthen or treat his underlying condition. Thus, therapy to improve mobility, ambulation, walking, posture, sitting in a chair, playing, endurance and toileting can be viewed as both clinical treatment and school-based therapy. Especially with respect to the activities of daily living, such as ambulating, feeding, and toileting, the distinction between clinical and

school-based therapy is in a grey area and not subject to a bright-line test.

#### “MILD TO MODERATE” AND “MODERATE TO SEVERE” SPECIAL DAY CLASSES

5. From kindergarten onward, California teacher credentialing distinguishes the authorizations to teach students with “mild to moderate” as opposed to “moderate to severe” disabilities. Districts differ in the terminology they apply to the classes that provide different levels of support. The credential is specific, but the terminology applied to the classes and the groupings of students, is not. Milpitas staff used specific terminology, “mild to moderate” and “moderate to severe” classes, that differed in the degree of intervention and services. Mild to moderately disabled students required less intensive supports. Mild to moderate classes had larger numbers of students who functioned more independently.

6. Milpitas’ moderate to severe programs used a published alternate curriculum called the “Unique” curriculum specifically for moderate to severely disabled students.<sup>1</sup> The Unique curriculum is not used in mild to moderate classes, which use a modified common core standards curriculum. Unique is an online platform with daily and monthly lesson plans and materials. Each student is assigned a level based upon a profile that specifies his or her abilities. Each lesson plan is modified to meet that individual student’s profile. One example is fine motor functioning, which can prevent students from accomplishing particular tasks. The Unique program can create modified worksheets for students who cannot write. Milpitas used the Unique curriculum in Student’s kindergarten class, which was a moderate to severe special day class, in last year’s school year, 2017-18 and in his current first grade class, also a moderate to severe

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<sup>1</sup> “Unique” is the name of a publishing company from which Milpitas purchased the curriculum.

special day class, during the 2018-19 school year.

7. Different Milpitas employees were under different impressions regarding whether Milpitas' IEP documents did or did not specify placements as "mild to moderate" or "moderate to severe." Milpitas' computer program that houses IEP's, known as "SEIS," did not differentiate the types of special day classes, so the form-generated IEP document did not contain that information. Student's pre-school teacher in the 2016-17 school year, Ms. Monica Montoya, was firm in her testimony that Milpitas' IEP's do not contain the information as to whether a special day classroom is "mild to moderate" or "moderate to severe." However, Student's kindergarten teacher Vanessa Espitia, was under the impression that Milpitas' IEP's delineated classes as mild to moderate, or moderate to severe, in the IEP notes. Director of Student Services Carla Crenshaw provided a third impression as to how, if or when Milpitas conveys to parents the information that a child is being offered placement in one or the other type of setting. Per Ms. Crenshaw, the distinction "only comes up" when moving students from one type of class to another type. Ms. Crenshaw specifically testified "we do not come out and say it," as a matter of sensitivity to parents. Per Ms. Crenshaw, Milpitas staff does not use the term "severe" when discussing needs or disabilities. Ms. Crenshaw stated that she wants to focus on what a child can do, and what they need in order to make progress.

2016-17 PRESCHOOL.<sup>2</sup>

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<sup>2</sup> Events leading up to Milpitas' offers of FAPE for the 2018-2019 school year are relevant to determine whether Milpitas' offers were substantively and procedurally appropriate on the basis of what was known about Student at the time of the offers. Disputes concerning goals and services that were implemented or not implemented, for the 2016-17 school year, are outside the scope of the present due process proceeding, and are reflected here solely as background to establish the snapshot of information that Milpitas knew about Student at the time of the offers.

8. In the 2016-2017 school year, Student attended preschool in a moderate to severe special day class at Weller Elementary School taught by Ms. Montoya.

9. In the 2016-17 preschool year in Ms. Montoya's class, Student was not ambulatory. He used a wheelchair. He needed support into and out of a wheelchair, with some lifting required. He could stand on his own, and support himself using his hands placed on a table or furniture.

10. During the preschool 2016-17 school year, although Student had physical therapy services on his then-current IEP, he was not actually receiving those services for part of the school year, because Milpitas had difficulty locating a physical therapist to hire. Eventually, in March or April 2017, Milpitas contracted with a physical therapist named Prajatra Chitre. Ms. Chitre is a physical therapist with her own private company called Tita Therapists. She began working with Student during the 2016-2017 school year, and she provided between 60-90 minutes of weekly physical therapy services for the rest of the 2016-17 school year.

11. After a month of servicing Student, Ms. Chitre recommended particular equipment: a crocodile gait trainer (otherwise known as a posterior walker), and a particular type of baby stroller known as a Convaid stroller to transport him, mainly for pickup and drop-off. Milpitas' program manager Marissa Ciardella ordered the Convaid stroller.

12. To Ms. Montoya's knowledge, Student was never assessed for hearing loss, prior to entering her class, while he was in her class, nor as part of Milpitas' assessments leading up to his placement in her class. Ms. Montoya was aware of the results of an assessment from 2015 that had administered to Student a standardized instrument that measures the receptive and expressive language skills of students from birth to age seven years and 11 months. The test was comprised of two subtests, auditory comprehension and expressive communication. The auditory comprehension subtest

evaluated Student's auditory comprehension score to be 55, which gave Student an age equivalent of 15 months, in the first percentile. Ms. Montoya understood the term "auditory comprehension" to refer to receptive language, within the purview of language and speech services that Student was receiving. Ms. Montoya felt she could serve student in her class, and she had no concerns in regards to his auditory comprehension or receptive language skills, but she would have relied on the speech therapist from whom he was receiving services at that time.

13. In January 2017, Mother requested independent educational evaluations. Correspondence ensued regarding the specific areas in which Mother sought independent educational evaluations.

14. Student's annual IEP team meeting occurred on April 27, 2017, to discuss his transition from pre-school to kindergarten in the upcoming 2017-18 school year. The IEP document did not specify the "moderate to severe" type of class he was then in, or was being offered for kindergarten, as such. Mother did not consent to the April 2017 IEP.

15. The April 27, 2017 IEP stated that the next annual IEP date was April 27, 2018, and the next evaluations were May 28, 2018. The April 27, 2017, IEP stated that Student did not require primary language support, and that he would be taught in English.

16. On July 5, 2017, Ms. Crenshaw wrote a letter to Mother regarding the independent educational evaluations. Ms. Crenshaw's letter offered independent educational evaluations in psycho-education, speech and language, and occupational therapy. Milpitas refused to offer independent educational evaluations in physical education or adaptive education, or in central auditory processing disorder, because it had not first assessed Student in those areas, and therefore independent educational evaluations were not legally required. It did, however, offer to conduct Milpitas

assessments in audiology and hearing, to be conducted by an audiologist; motor development to be conducted by a physical therapist; and augmentative and alternative communication to be conducted by an appropriate specialist in that area. It enclosed a proposed assessment plan for Milpitas assessments in these three areas. Regarding audiology, Milpitas explained that Student was too young for a central auditory processing assessment, which should not be conducted prior to the age of eight years old. Therefore, Milpitas proposed to assess him in audiology and hearing. Mother did not consent to the proposed assessment plan, and therefore the assessments in audiology and hearing, and augmentative and alternative communication never occurred.

17. On August 28, 2017, Mother filed a complaint with the California Department of Education regarding various Milpitas actions, both in response to Mother's request for independent educational evaluations, and with regard to other complaints. CDE investigated the complaint.

#### 2017-18, KINDERGARTEN

18. The assessments and IEP's that are at issue in this case occurred during the 2017-18 school year, and into the first portion of the 2018-19 school year. Therefore, Student's functioning during the 2017-18 school year is directly pertinent to his baselines, present levels and the IEP offers made, that are at issue.

19. For the 2017-18 school year, Student matriculated to kindergarten and moved from Weller Elementary School to a "K-2", i.e. kindergarten through second grade, moderate to severe class at Spangler Elementary School, taught by Ms. Espitia.

20. Ms. Espitia, who testified at hearing, was a knowledgeable, experienced, dedicated, competent, warm and a compassionate teacher. The communications between Ms. Espitia and Mother were respectful, and Mother appreciated Ms. Espitia's care for Student. The class had ten students. For 2017-18, Student had a designated



one-to-one aide named Nirayl Coscio. Ms. Coscio was there every single day, and was never absent. When she was on break or lunch, Mark Navarro covered for her. Every student in the class had his or her own individual motivation/token system. Student liked lions and play-doh, animals and the iPad. In Ms. Espitia's opinion, Student did not need a behavior plan. He could comply with her strategies with simple reinforcements, and was easily redirected. Student had some speech, but at the beginning of the 2017-18 school year, it was in one-to-two-word utterances only. He knew his peers by name, and would say their names when he saw them. He would tell "Mickey book" to a peer named Mickey who was getting a book. By the end of the 2017-18 school year, Student could, with prompting, speak a full simple sentence, such as "I want the book please." Student was friendly, social, happy, and well-liked. He interacted with peers, including general education students, on the playground at recess and during physical education. He was popular. Other children gravitated toward him. Ms. Espitia felt he benefited from this socially, by witnessing other students sharing, taking turns, being polite, and considerate. Ms. Espitia taught her students to act kindly toward each other. Sometimes Ms. Espitia and staff facilitated friendships by putting children together, and encouraging them to play. Student did not require this. He made friends spontaneously.

21. Ms. Espitia's understanding was that speech and language deficits warrant a referral to a speech language pathologist, not a school psychologist. Student's speech language pathologist never indicated to Ms. Espitia that Student should be referred to the school psychologist for auditory processing deficits. Ms. Espitia can herself observe and suspect auditory processing deficits—if her questions are not registering, or students do not appear to be hearing her, she might so suspect. But here, she did not so suspect, even though Student sometimes did not understand her.

22. During the 2017-18 school year, Student wore pull-up diapers. He never actually urinated into the toilet. Ms. Espitia and staff would ask him "are you wet or dry?"

He would answer accurately, but after the fact. He would not alert staff of the need to void. Some kindergarten classrooms had attached bathrooms, but not Ms. Espitia's classroom. Therefore, she and staff escorted her students to use toilet facilities elsewhere. At Spangler Elementary School, there were general-use bathrooms down the hall, and many students would get taken there. Student, however, was escorted to a larger, closer, more private option, in one of the other kindergarten classrooms that had an attached bathroom. This room had a changing table and was large enough to accommodate Student's walker. He would walk using his walker to those facilities, except when fatigued, in which case he would be strolled using the Convaid stroller.

23. For 2017-18, Student's method of travel was walker or stroller, depending on if he was fatigued. For the bus, he might be lifted up to the first large step, up from the curb, and from there he could navigate on his own by holding onto the rails for the smaller steps, with an adult standing by to make sure he did not fall. To descend, his one-to-one aide would hold him up by both his hands as he stepped down the bus steps. From there, he would walk with his walker.

24. For the second half of the 2017-2018 school year, from January or February onwards, Student also used a "Kindervest." This was a vest that could be supported by straps by an adult. This equipment allowed Student to walk without using his hands for support.

25. In class, Student could also "cruise," a term that refers to standing up while supporting one's weight on one's hands by holding onto furniture, and moving around the room holding onto tables or other surfaces for support.

26. Ms. Shukla started providing occupational therapy to Student in approximately August of 2017 at Spangler during the 2017-18 school year, while he was in Ms. Espitia's class, and continued working with him through May 2018. Ms. Shukla

informally assessed Student at the beginning of the 2017-18 school year, to assess his progress on what she understood to have been his previous goals.<sup>3</sup>

27. Student's present levels of performance during occupational therapy sessions during 2017-18 were as follows: He could stand up from a chair using the help of furniture to support him. He spoke in two-to three-word sentences, e.g. "I want putty," "I want car." He recognized Ms. Shukla, and said "OT! OT!" when he saw her. He could sing the "abc's" song. He could lace beads onto a pipe cleaner, then later he could use a string. He could cut a five-inch line. Ms. Shukla was working on having Student cut different shapes, such as a square, using a scissor that had built-in springs. To approximate this task, Student needed Ms. Shukla to turn the paper for him. He could copy a circle and plus sign. She was trying to encourage him to write letters.

28. Ms. Shukla did not notice or suspect any visual concerns requiring further assessment. Student did not show distress at light or at sounds. He would sometimes cover his eyes. She saw him lean close to his desk when doing assignments, and was unsure why. He also squinted. Ms. Shukla did not know if his eyes had been checked.

29. On October 30, 2017, CDE concluded their investigation into Mother's complaint. CDE found that the Milpitas was out of compliance with respect to Mother's request for independent educational evaluations. For required corrective actions, CDE told Milpitas that it must, on or before January 30, 2018, provide evidence that it had completed the independent educational evaluations using Mother's choice of assessors,

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<sup>3</sup> Disputes between the parties about the goals that were being implemented, and the level of services Student was being provided, are outside the scope of this due process proceeding and are reflected as background to his present levels of performance.

and had convened an IEP team meeting to discuss the results. Mother's list of requested independent educational evaluations were in psycho-education, speech and language, occupational therapy, physical therapy, behavior, assistive technology and augmentative communication.

30. On December 1, 2017, Mother filed with the Office of Administrative Hearings a request for due process hearing, naming Milpitas. The complaint asserted that Milpitas had denied Student a free appropriate public education in numerous specific ways from December 1, 2015, to December 1, 2017. OAH designated the matter as Case No. 2017120137. Mother was originally represented by counsel but, after January 2018, counsel withdrew and Mother proceeded as a self-represented parent.<sup>4</sup>

#### January-February 2018

31. Sometime prior to January 16, 2018, Milpitas authorized a psycho-educational independent educational evaluation to be performed by Mother's selected assessor Dr. Rebecca Schilling. No document formally reflected this authorization. Emails and telephone discussions ensued between Milpitas and Dr. Schilling, and between Dr. Schilling's office and Mother, concerning scheduling the assessment. Sometime prior to January 16, 2018, Milpitas and Mother were also in confidential settlement discussions.

32. On January 16, 2018, Mother wrote to Ms. Crenshaw confirming that CDE had ordered independent educational evaluations to be completed by January 30, 2018, and asking for direction from Milpitas as to all independent educational evaluations other than Dr. Schilling's. As to Dr. Schilling's authorization, Mother's email requested

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<sup>4</sup> Official notice is taken of the dates of events in the OAH records of the proceedings in Case No. 2017120137. These are pertinent here, solely as they impacted the parties' actions concerning scheduling of the IEP team meetings that are at issue.

clarification, stating that although Milpitas had referred her to Dr. Schilling, the approval had never been formally documented.

33. By email to Mother on January 16, 2018, Ms. Crenshaw reviewed the prior communications regarding Dr. Schilling's independent educational evaluation authorization. Milpitas had not before this email, and still was not in this email, explicitly and with complete clarity, approving the Schilling independent educational evaluation. Approval could be inferred only through scheduling conversations and emails pertaining to it.

34. Ms. Crenshaw also offered Mother independent educational evaluations in speech/assistive augmentative communication, physical therapy, occupational therapy and behavior. Although CDE had ordered independent educational evaluations to be completed by January 30, 2018, this is the first reference, in the evidentiary record in this case, to Milpitas' mentioning, approving or offering any independent educational evaluations other than for psycho-education.

35. Also on January 18, 2018, Ms. Crenshaw emailed to Mother a list of telephone and email communications Mother had with Dr. Schilling's office. Ms. Crenshaw had received the communications log from Dr. Schilling. By responsive email, Mother expressed outrage that Milpitas had access to her communications with an independent educational evaluation assessor.

36. On January 30, 2018, Ms. Crenshaw wrote to CDE to state that Milpitas had not complied with the January 30, 2018 deadline to complete the independent educational evaluations. Milpitas sought to place the blame for this failure on Mother's communications with Dr. Schilling in December, which it documented and reported to CDE from Dr. Schilling's communications log.

37. On or around January 30, CDE granted an extension to Milpitas to complete the independent educational evaluations and hold a resultant IEP team meeting, from the original January 30 deadline, to March 30, 2018. This extension was not formally documented, but was granted orally by CDE to Ms. Crenshaw by telephone.

38. On February 22, 2018, while the independent educational evaluations were still pending, Milpitas generated an assessment plan for its own triennial assessments. The triennial assessment plan noted that Student's native language was "Farsi/Persian." No evidence was presented as to where this information came from. Mother had not indicated either Farsi or Persian as a language used in the home.

39. The triennial assessment plan stated that assessments would be conducted in academic achievement, to be conducted by the special education teacher; health, to be conducted by the school nurse; intellectual development, to be conducted by the school psychologist; language/speech communication and development, to be conducted by the speech pathologist; motor development, to be conducted by the physical therapist and occupational therapist; social/emotional functioning and behavior, to be conducted by the school psychologist and teacher; and adaptive behavior, specifically including "how [Student] takes care of personal needs at home, school and in the community," to be conducted by the school psychologist and teacher.

40. On February 22, Mother raised a question about post-secondary transition assessments, including independent life skills. Mother explicitly asked about independent life skills, toilet training and functional life skills.

41. On February 23, Ms. Crenshaw responded that "transition" assessments referred to post-high school, but that Milpitas would look into Student's life skills in its adaptive behavior assessment.

42. At some point prior to February 27, 2018, Mother selected and Milpitas authorized an occupational therapy independent assessment by an assessor named Michelle Selber. Ms. Selber completed her assessment on or around that date. Mother did not receive a copy until March 20, 2018. On March 20, 2018, Mother sent Ms. Selber's occupational therapy assessment report to Dr. Schilling.

#### SELBER OCCUPATIONAL THERAPY INDEPENDENT EDUCATIONAL EVALUATION

43. Ms. Selber's report, dated February 27, 2018, indicated that she had observed Student in the classroom setting in the morning. He was given a dot to dot task, but did not seem to see the numbers while completing the worksheet, and his coloring was assisted with hand-over-hand support. His head was down leaning on the table often. When he was unable to read a three letter word after three attempts, he showed frustration. He squinted often while working at the table and seemed to struggle to see. He slouched, and his legs were not firmly supported, as he sat in a typical-sized chair in the classroom. Student had difficulty holding a pencil with an appropriate grasp; had difficulty judging the force with which to throw and catch a ball; displayed vestibular insecurity; was unable to oppose his thumb to his fingers sequentially; displayed difficulty with visual tracking and focusing; and displayed limitations in his praxis skills, involving the ability to conceptualize, organize and execute motor tasks. His praxis difficulties included problems with ideation, or formulating the goal for action based upon perception of what is possible in the environment; motor planning, or figuring out specifically how to accomplish the goal through problem solving, sensorimotor awareness of the body and sequencing actions; and coordination.

44. In addition to her clinical observations, Ms. Selber administered the Peabody Developmental Motor Scales, the Sensory Processing Measure and conducted the Sensorimotor Questionnaire Parent Interview.

45. The Sensory Processing Measure employs a rating scale based on how

frequently behaviors occur. Student exhibited "some problems" at both home and school with vision, due to over-responsiveness to visual input. At school Student was frequently seen squinting. He exhibited "some problems" at school and "definite dysfunction" at home with regard to hearing. His school score indicated some issues with over-responsivity, being bothered at times by loud sounds, making noises or humming during quiet class time, and speaking too loudly during transitions. His home score reflected distress at brassy sounds and being distracted by background noises, over-reacting to household sounds, and reacting negatively to loud noises.

46. Ms. Selber summarized Student's sensory profile as exhibiting over-responsive hearing; both over-responsive and under-responsive touch; over-responsive vision noted at school and at home; body awareness and perception difficulties noted at home and school with balance, postural control, and perception difficulties; and ideation and motor planning difficulties at home.

47. Ms. Selber found that Student's main areas of concern via the Sensory Processing Measure at school and home reflected limitations in the processing of proprioceptive input, hearing, vision, and motor planning. His low muscle tone and poor postural control affected his endurance, poor body spatial awareness and poor motor coordination.

48. Ms. Selber made some recommendations that specifically related not to school but to home and clinic. However, Ms. Selber made other recommendations that were specifically for the classroom. Ms. Selber recommended a more supportive seating arrangement with foot support so that Student's feet did not dangle from the chair and his core was supported. Visually, she recommended that Student would benefit from some fluorescent light covers in his classroom to decrease glare, as he was squinting during his table time work at school.

49. Also relevant to the school setting at least in part, she recommended that



Student would benefit from some regular movement per day to move his bowels and to enhance his endurance, such as supported walking, supported swinging, rolling on a mat, supported seating on a ball with bouncing, a handle attached mini-trampoline, etc.

50. Milpitas interpreted all her recommendations as being clinical and not school-based therapies.

March 2018

PSYCHO-EDUCATIONAL INDEPENDENT EDUCATIONAL EVALUATION

51. On March 3, 2018, Dr. Schilling completed a draft of her psycho-educational independent educational evaluation that she had conducted January 26, 2018; February 26, 2018; and March 2, 2018. Although the assessment was complete, she did not finalize her report, which was ultimately later presented to the IEP team in draft form. Mother received drafts on or around March 17, 2018, and on or around April 4, 2018.

52. Dr. Schilling reviewed records, did clinical interviews with Mother and school staff, conducted a classroom observation, and administered the Vineland Adaptive Behavior Scales, third edition; the Behavior Assessment System for Children, third edition; Differential Ability Scales, second edition; the Mullen Scales of Early Learning and the Woodcock Johnson Tests of Achievement, fourth edition.

53. From her interviews with Mother and school staff, she noted behavioral concerns with frustration and meltdowns. She noted tactile aversions to different textures. Mother told Dr. Schilling that Student exhibited signs of anxiety when entering the bathroom, and refused to use the toilet.

54. Dr. Schilling noted that at school, Student's aide transported Student to the bathroom via a wheelchair. When recess was over, the teacher asked Student if his diaper was wet or dry, and Student replied, "dry." The aide took Student to the bathroom to wash his hands. There, he said, "toilet," and the aide asked him if he

wanted to sit on the toilet. He replied by gesturing, "I don't know." He was directly asked if he wanted to sit on the toilet or wash his hands. Student responded, "hands." After washing his hands with support, he transitioned back to the classroom.

55. The Vineland Adaptive Behavior Scales is an assessment tool divided into three domains: communication, daily living skills, and socialization, with a supplemental motor skills domain. Student scored moderately low to low in all areas except one subdomain, indicating overall functioning in the age range of less than three years.

56. The Behavior Assessment System for Children is a questionnaire completed by the child's primary caregivers and teachers, designed to assess emotional, social and behavioral difficulties. Mother reported several significant concerns in the home setting. She noted challenges with social and emotional development, emotional regulation, and executive functioning. Teacher reported fewer overall concerns in the classroom environment, but endorsed concerns with immature social behaviors.

57. The Mullen Scales of Early Learning is a developmental assessment measure that evaluates language and motor ability, visual reception, fine motor, and receptive and expressive language. Student demonstrated visual reception abilities below expected for his age. His fine motor skills were in the range of a two-year-old. He scored "very low" in visual reception, fine motor; and receptive and expressive language.

58. The Woodcock-Johnson Test of Achievement assesses an individual's academic achievement in comparison to a national normative sample, in domains of reading and mathematics. Scores presented are age-based standard scores with a mean of 100. Student's academic achievement was measured to be below expected for his age, with standard scores in all academic areas ranging from a low of 48 to a high of 81.

59. Dr. Schilling concluded that her psychological testing revealed general intellectual abilities, adaptive behavior and academic skills in the low range, consistent with the features of Down Syndrome. She found that diagnostically, Student met the

criteria for moderate intellectual disability and for language disorder according to the medical diagnostic manual, the DSM-5. She found that Student required substantial support to learn academic skills, perform self-care tasks, and navigate daily activities. She found that his adaptive functioning and safety skills should also be areas of emphasis. She further found that adaptive and functional skills should be carefully taught and supported.

60. She did not notice any concerns with his vision or his hearing. She did not feel the need to assess for “auditory comprehension.” He did not present to her as a child with sensory sensitivities.

61. Dr. Schilling’s recommendations included special education with one-to-one instruction, speech and language therapy, occupational therapy, physical therapy, and adapted physical education. She recommended that all continuums of placement, including nonpublic school programs, should be considered. She did not necessarily recommend a nonpublic school, because the propriety of such a placement would depend on what Milpitas could provide. However, she believed Student needed a level of support that Milpitas could not provide, especially in regard to his gross motor deficits. She acknowledged, however, that at a nonpublic school there would be concerns with regard to lack of mainstreaming opportunities to socialize with general education peers.

62. She also recommended technology devices, such as the iPad, and use of a technology-based augmentative and alternative communication. Dr. Schilling was not aware that Milpitas had in 2017 offered assessments in assistive technology and alternative communication, and that Mother had never consented to such assessments.

63. Dr. Schilling opined that school psychologists generally assess for cognitive abilities, but not receptive and expressive language abilities, which would be addressed by speech language pathologists. However, she could not define the precise

line between the cognitive deficits impacting language, as opposed to receptive and expressive language deficits, because both might create challenges understanding what is said or heard.

64. On March 7, 2018, OAH issued an Order in Case No. 2017120137, scheduling mediation on April 10, 2018; a prehearing conference on April 13, 2018; and the due process hearing to commence on April 24, 2018.

65. On March 8, 2018, Mother signed the Milpitas triennial assessment plan.

66. On March 15, 2018, Mother wrote to Dr. Schilling asking for her report. On March 15, 2018, Dr. Schilling responded that the report would not be ready until the following week.

67. On March 15, 2018, Ms. Chitre recorded progress on the physical therapy goals that she had been addressing with Student.<sup>5</sup> At that time, Student was able to stand on his own at the sink; walk using his walker for about 20 steps, with an adult behind the walker for stand-by assistance; and cruise around a room using furniture for support.

68. On March 16, 2018, Student was videotaped walking. He used his posterior gait trainer, holding its handles with his hands for support. Adults were standing close by, but were not rendering hands-on assistance.

69. By March 17, 2018, Mother had received a draft of Dr. Schilling's report. On March 17, 2018, Mother wrote Ms. Crenshaw asking for an IEP team meeting to be set up to review the independent educational evaluations. By that date, both Ms. Selber's occupational therapy and Dr. Schilling's psycho-educational evaluation were

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<sup>5</sup> The progress report is relevant here only insofar as it contains information concerning Student's then-present levels of performance, and not as it may relate to what previous goals were or were not being implemented.

complete. Prior to this date, Milpitas had not scheduled the IEP team meeting that CDE had ordered to occur by March 30, 2018.<sup>6</sup>

70. On March 21, 2018, Mother proactively asked Ms. Crenshaw about the triennial assessment scheduling. Milpitas had taken no action to schedule the triennial assessments, since Mother signed the assessment plan on March 8.

71. On March 22 and 23, 2018, an email exchange evidenced confusion amongst the parties about whether the selected speech independent assessor did, or did not, also perform assistive technology and alternative communication assessments.

72. Also on March 22, 2018, Mother emailed Ms. Crenshaw to formally request an IEP team meeting to review the occupational therapy and psycho-educational independent educational evaluations that had been completed. Milpitas ensued immediately to schedule an IEP team meeting, arranging with the assessors to convene on March 26, 2018. However, Milpitas did not mention to Mother that they were doing so, nor did they clear the date first with Mother.

73. On March 22, 2018 at 11:42 AM, Mother wrote to various Milpitas personnel, saying that the independent assessors were telling her that Milpitas had already scheduled a meeting for Monday, March 26, without telling Mother, and that this was the first she'd heard of it.

74. On March 22, 2018 at 11:43 AM, Mother wrote Dr. Schilling saying she hadn't been told yet by Milpitas about the meeting. At or around this time, Mother also urged Dr. Schilling to consider whether a nonpublic school was an appropriate placement option for Student.

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<sup>6</sup> No findings are made pertaining to the reasons for delays concerning the independent educational assessments, because compliance with the CDE Order is not at issue in this matter.

75. On March 22, 2018, which was a Thursday, at 11:52 AM, Ms. Ciardella wrote an email attaching a Meeting Notice setting the IEP team meeting for the following Monday, March 26, 2018. She re-sent it at 11: 54 AM saying "I just sent you the meeting notice" and "the meeting is scheduled for March 26, 2018 from 9 to 11 am." However, she had never asked Mother about that date, nor had she cleared it with Mother first.

76. On March 22, 2018, at 3:55 PM, Mother wrote back, advising of her unavailability, and wondering how the date had been already confirmed without Mother being told or involved.

77. On March 23, 2018, at 9:07 AM, Ms. Ciardella responded stating that Milpitas was "unable to reschedule," because March 26 was the only day possible to hold the IEP team meeting with the independent educational evaluation assessors in attendance, and that Milpitas had a CDE deadline of March 29. Ms. Ciardella stated that if Mother was unavailable, Milpitas would contact the CDE analyst and get some guidance on whether CDE would grant a further continuance on the deadline, but that this would also extend the process.

78. At hearing, Ms. Ciardella justified scheduling this meeting without contacting Mother first, by saying she attempted to get the independent educational evaluation assessors set first. She also claimed that Milpitas was under "extreme time pressure." Ms. Ciardella, however, waited to begin scheduling any IEP team meeting, to review the independent assessments that had been completed, until Mother's March 22 proactive inquiries. Ms. Ciardella then gave short notice from Thursday March 22 to Monday March 26, in order to accomplish the IEP team meeting in the month of March. Nor, at hearing, could she confirm that March 26 was the only day she could coordinate the rest of the IEP team.

79. On March 23, at 11:04 AM Mother wrote a responsive email expressing

confusion that a March 26 IEP team meeting had apparently been coordinated by Ms. Ciardella with independent educational evaluation assessors without any notification to Mother that this had been ongoing. On March 23, 2018, at 11:18 AM Ms. Ciardella wrote back offering a new date, Thursday March 29.

80. On March 26, at 8:39 AM, Mother responded to Ms. Ciardella's offer of Thursday March 29 as an IEP team meeting date. Mother stated that she was not available until Friday April 6. She stated that, due to her work schedule, she was only free from work every Friday, and that was why she had written on March 22 seeking advance scheduling.

81. By email dated March 27, 2018, Ms. Ciardella then set the IEP team meeting for Friday April 6, 2018.<sup>7</sup>

82. At hearing, Ms. Ciardella testified that Mother stopped working in April 2018, the implication being that she should have made herself available on days other than Fridays. Mother rebutted this with her own testimony that she was employed from April 2017 to 2018; that she took FMLA leave in April and went back to work in July; and that she resigned her employment at Northrop Grumman on August 31, 2018.

83. On or around March 26, Ms. Crenshaw spoke and wrote to CDE about the case. Ms. Crenshaw reported to CDE that Milpitas would not be in compliance with the

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<sup>7</sup>The April 6, 2018 IEP meeting to review independent educational evaluations was designated as an amendment to the prior year's April 2017 IEP. This is not one of the IEP's at which District made an offer of FAPE for the 2018-19 school year, the IEP's directly at issue here. However, the parties' communications regarding scheduling it are important, as they set the stage for later scheduling difficulties.

extended March 30, deadline, representing that the reason was Mother's changing her mind about selected independent educational evaluation assessors.

84. CDE directed Milpitas to document its efforts to comply. Ms. Crenshaw responded by sending CDE communication logs concerning its communications with the independent assessors. Orally to Ms. Crenshaw, CDE extended the March 30 deadline by an uncertain additional amount of time, by stating over the telephone to Ms. Crenshaw that she should do her best to comply. Ms. Crenshaw's understanding of CDE's directives was that, after the March 30 deadline came and went, she was to try to get the independent educational evaluations done as soon as possible. No further communication to or from CDE then occurred until May 20 or 21, 2018, as discussed below.

#### PHYSICAL THERAPY INDEPENDENT EDUCATIONAL EVALUATION

85. Mother's selected independent assessor, physical therapist Kris Nakaji, assessed Student in the area of physical therapy, and generated a report dated March 27, 2018. It is unclear when Mother received this assessment, although it appears she may not have received it until June.

86. Ms. Nakaji's assessment was a school-based assessment, not a clinical assessment, although she did observe Student in the clinic and made some home-based recommendations, too. Ms. Nakaji convincingly and persuasively established at hearing that her report assessed and addressed his school-based functioning according to the American Physical Therapy Association guidelines for school-based physical therapy. The guidelines delineate services into intensive, moderate, minimal and consultative. She recommended intensive services to achieve certain functional goals, then to cease when the goals were achieved. Her priorities for Student were ambulation, transportation on the bus, toileting, and participating in recess.



87. Ms. Nakaji observed Student in the classroom, conducted interviews of teacher and Mother, reviewed prior assessments, and performed standardized assessments. She tested Student to determine his muscle tone, mobility, range of motion and strength. He had severe strength limitations, especially in his trunk and lower extremities. He had global hypotonia, or low muscle tone. Hypotonia is relevant to the school setting because for normal sitting, one holds oneself up against gravity. Because slouching affects alertness in the classroom, this condition is educational and not solely medical. Student also had hypermobility and ligament laxity, which result in lack of control of the joints while standing, walking and on the playground.

88. She noted no sensory concerns other than squinting. When assessing for sensory concerns, she looks at aversion to noises, tactile aversions to textures and the like. She did not notice Student exhibiting these sensory concerns. She did notice "motor planning" issues.

89. At school, she observed that he sat in a typical classroom chair and desk with his feet three inches off the floor. He varied his posture and often leaned forward for support, indicating difficulties with postural endurance. Ms. Nakaji felt that Student required foot support when sitting in a regular chair, such that his feet did not dangle. In other words, his feet needed support either from a raised platform, or to use an adapted chair that would be lower to the ground such that his feet were supported on some surface.

90. For various transitions (up from the floor, to and from standing, from standing to a chair, up from his stroller onto the floor, up from a table and transition to his walker), Student required varying levels of adult assistance. Ms. Nakaji used the terminology "stand-by assistance," "hands-on support," and "contact-guard assist."

91. Ms. Nakaji noted that Student was in diapers and was changed on a changing table. She noted that he was typically carried on and off the bus due to the

time limitations involved in waiting for him to transition in a more independent fashion, and was sometimes lifted out of his stroller. However, on stairs and on the bus, he had the ability to ascend three to four steps while holding onto rails with only minimal support.

92. Student could stand independently with the support of furniture. He was able to ambulate with his hands held, or with assistance at his waist. He could cruise using furniture, slowly but independently. He could cruise on a flat wall with stand-by assistance. He was able to use a posterior walker with a safety belt for up to 45 minutes during school. He needed an adult behind him to hold the safety bar, as the walker could tilt over backwards when Student leaned back. He required various specific levels of adult assistance on carpet, blacktop and bark. He could maintain his upright position, with his hands on the walker, and could balance himself when his pelvic strap was removed, with contact guard assistance for safety. When not using his walker, he needed one or two hands held, or to have his waist held from behind.

93. Ms. Nakaji noted that Student was able to communicate when his diaper was dirty, but not when it was only wet. At school, he was taken toward the bathroom by stroller, then ambulated into the bathroom with his hands held. He did not attempt to take his pants down but was able to assist. He sat down on the toilet to urinate but was not successful.

94. Ms. Nakaji noted Student's then-current equipment. In school, he used a posterior walker with safety belt and a posterior upright bar, a stroller, and foot orthotics to increase the stability of his ankles.

95. Ms. Nakaji found that Student's greatest areas of concern included lack of independent ambulation, lack of independence in transitions, lack of endurance for upright sitting posture; and lack of toileting ability. She recommended that independent ambulation be aggressively pursued to Student's tolerance. She warned that "[i]f a child

is not walking independently by the age of 8 years, the odds of that child obtaining the walking milestone drops dramatically." Specifically, she recommended school-based physical therapy for 45-60 minutes twice a week, to work on strength, posture, balance in standing, independence in transitions and ambulation without support. She recommended that physical therapy be prioritized, because ambulation could make a significant impact on Student's health and well-being.

96. She also recommended that increased demands be placed on Student, with increased staff education for his aide and team to help Student understand what was expected of him. She found that his current physical therapy protocols could be implemented with more consistency. Specifically, she recommended that Student should be directed to keep his hips in neutral alignment as much as possible with the command "point toes forward," with assistance given as needed. She recognized that demanding consistency would require great focus from his aide. She recommended, for ambulation and for the stairs on and off the bus, to allow for adequate time to allow his aide to assist Student's own efforts, instead of carrying him. She recommended that walking without hand-held support should be done as much as possible and should be given priority over other means of mobility. She recommended a vest for Student with a strap that could be held for support, without handholding. She recommended avoiding holding Student's hands up for support. Once his balance improved, the hold on the strap should lighten until not needed.

97. For toileting, she recommended bathroom peer modeling to encourage Student to urinate in the toilet. She recommended he go to the bathroom with his peers to model appropriate behavior. Student should be expected to attempt to push down and pull up his own pants and diaper. She recommended fruit loops in the toilet to "aim" at when urinating. She believed these protocols might help Student develop understanding and interest in using the toilet, and determine if he can sense when he

needs to go. A reward system after success could also be considered. It was unclear to Ms. Nakaji whether Student's issues with voiding were physical, mental or both. It was unclear to her whether he knew the concept of voiding into the toilet. However, since Student was reportedly socially motivated, and motivated by prizes, she recommended having peer modeling with typical kids, in order to tease his abilities out.

98. For equipment, she recommended a Kindervest with straps that would allow an adult to give support for balance without holding Student's hands, and a safety helmet. For posture while sitting, she recommended a seat wedge to facilitate a neutral pelvis for improved posture. She recommended foot support to bring the floor up to Student's feet so they rested flat and comfortably supported. She also recommended a slanted board as a writing surface. She recommended anti-tip supports for ambulation with his walker. The walker that Ms. Nakaji saw him using at school was a posterior walker that did not have anti-tip supports; the aide had to protect Student from falling backwards. Ms. Nakaji advised against using a stroller, which promoted dependence and limited transitions into and out of seating.

99. She recommended specific levels of assistance and goals for transitions into and out of his walker, into and out of a wheelchair or stroller, ambulation with a walker, transitions into and out of a chair, transitions standing to and from the floor, transitions up to and down off the changing table, onto and off playground structures, and use of the tricycle in the playground.

100. She recommended a check of his seating system and encouragement to sit erect, with adjustment of the seating system as needed. She recommended that a journal be kept of how long Student was able to sit with good posture and to increase that time.

101. Ms. Nakaji suggested four specific goals to attain by April 2019. Her proposed first goal was to walk 15 feet in the classroom, with supervised assistance in

three of three trials, with a safety helmet if needed. Her proposed second goal was to walk 15 feet outside the classroom on blacktop with stand-by assistance and no assistive device in three of four trials, with a safety helmet if needed. Her proposed third goal was to transition on and off the bus with stand by assistance on, and minimum assistance off, in three or four trials. Her proposed fourth goal was to sit with an erect posture for 30 minutes in a chair with a seating system in two out of four trials.

102. On March 27, 2018, at 7:30 PM, Mother sent an email to Milpitas staff with questions about the upcoming IEP team meeting and the independent educational evaluation reports, because up until that date the only completed independent educational evaluation she had received was the occupational therapy report by Ms. Selber. On March 28, at 10:51 AM, Ms. Ciardella confirmed that was correct, that the other independent educational evaluation assessors had not completed their assessments yet.

103. On March 28, 2018 at 10:55 AM, Ms. Espitia sent an email that informed Mother that Student's Annual IEP was due by April 27, 2018. She suggested April 24, 2018, as the date for the annual team meeting. This is the first indication in the record that April 24, 2018 was suggested as an IEP meeting date. By this time, April 24, 2018 had been set as the initial date of the due process hearing in OAH Case No. 2017120137. No formal IEP meeting notice was enclosed in Ms. Espitia's inquiry email. Ms. Espitia may have herself been unaware of the fact that her suggested IEP meeting date was the same as the upcoming hearing date.

104. By email dated March 28, 2018, Mother confirmed the April 24, 2018 date for the annual IEP team meeting.

105. Dr. Rebecca Cole became employed as a school psychologist at Milpitas in March of 2018. As part of the triennial psychoeducational assessment, Dr. Cole had a brief informal conversation in March or April with Ms. Espitia. Ms. Espitia described

Student's academic functioning and his adaptive functioning in all areas including functional life skills, including toileting.

April 2018

106. On Wednesday, April 4, 2018, at 9:15 AM, Mother wrote Ms. Ciardella expressing confusion as to how the scheduled April 6 IEP team meeting to review the independent educational evaluation assessments could be held, when the reports were not yet completed. Mother wanted time to review the reports in advance. This position was a reversal from Mother's March 22, 2018, email to Ms. Crenshaw that had formally requested an IEP team meeting to review the occupational therapy and psycho-educational independent educational evaluations that had been completed.

107. On Wednesday April 4, 2018 at 9:18 AM, Mother wrote to Ms. Crenshaw and others concerning a transportation issue. She confirmed her address, and also stated the following as her current telephone number—REDACTED. The evidence did not clearly establish what telephone number Milpitas used to contact Mother. The previous year's April 2017 IEP had the REDACTED number on its cover page. But, all the 2018 IEP documents from April through June all had a different number on their cover pages, REDACTED. This number was not updated, as of April 4, in response to Mother's email. It appears to have been updated much later, to REDACTED, after July 9. A third number, REDACTED, appeared in Milpitas' student-information database, Aries, which is a different system from the database that generates IEP's, which is known as "SEIS." Ms. Crenshaw testified that Aries and SEIS "do not talk to each other."

108. Ms. Ciardella responded to Mother on April 4, 2018 at 9:35 AM, stating that although the independent reports were not all completed, the IEP team meeting could begin on April 6, 2018 as scheduled, and proceed in two parts. Mother again wrote on April 4, 2016, at 11:06 AM, that she was still confused about how a meeting could occur when the assessment reports had yet been submitted. On April 4, 2018 at

11:30 AM, Milpitas' litigation counsel wrote to Mother that there was a mediation scheduled in OAH Case No. 2017120137 for the following week. Milpitas' counsel stated that the mediation was conditioned on convening the IEP team meeting on April 6, 2018. The email continued that it was "imperative" that the IEP team meet to convene and discuss the first of the independent educational evaluations that had been completed. Ms. Ciardella, at hearing, explained that Milpitas felt pressured by the CDE deadline, but she could not explain what the operative CDE deadline was at that time. In fact, as Ms. Crenshaw attested, CDE had already, on March 30, extended the deadline indefinitely. Thus, Milpitas' purported urgency to convene an IEP team meeting to review independent assessor reports that were not yet completed, was not reasonably based in any actual operative deadline.

109. Moreover, Milpitas' sense of urgency was at odds with the fact that by March 17, 2018, it had been Mother who wrote Ms. Crenshaw asking for an IEP team meeting to be set up to review the independent educational evaluations, and that prior thereto, Milpitas had not scheduled any IEP team meeting prior to the then-operative CDE March 30, 2018 deadline.

110. Thus, by early April, the parties' positions with respect to the urgency of the IEP team meeting to review the independent educational evaluations, had apparently reversed, with Mother demurring because the reports were not complete. Meanwhile, even though the CDE deadline had been extended indefinitely, Milpitas began exhibiting a sense of urgency.

111. On April 4, 2018 at 11:36 AM, Ms. Ciardella wrote Mother attaching Ms. Selber's occupational therapy report – it is unclear why she did this, as that report had already been provided to Mother in February or March when it was completed. Ms. Ciardella said that Ms. Nakaji's physical therapy assessment had occurred the prior day, April 3, 2018, and that Ms. Nakaji would share her report at the April 6, 2018 IEP team

meeting. This appears inconsistent with the March 27, 2018 date stated on Ms. Nakaji's actual report.

112. Ms. Ciardella also stated that Mother's selected independent assessor in the area of behavior, Sarah Devore, had attempted to observe Student twice while he was out sick, so she would come back to observe him on the day of the IEP team meeting, April 6, 2018.

113. On April 4, 2018, at 12:30 PM, Mother emailed Ms. Ciardella saying that she was not comfortable getting the reports the day of the meeting, especially the psycho-educational, and that she felt that Milpitas was rushing things.

114. Later that night, the night of April 4, 2018, Dr. Schilling submitted another draft of her psycho-educational independent educational evaluation report to both Mother and Milpitas.

115. On April 5, 2018, at 4:04 PM, Ms. Ciardella forwarded Ms. Nakaji's report to Mother. The report is dated March 27, 2018, and it is unclear to whom or when Ms. Nakaji had provided it.

116. On April 5, 2018, at 6:44 PM, Ms. Crenshaw emailed Mother, asking Mother to confirm attendance at the April 6 IEP team meeting, stating that Mother was being "not fair to keep 15-20 people waiting" by not confirming. Later that night on April 5, 2018, at 11:18 PM, Milpitas' litigation counsel wrote Mother, stating that if Mother did not confirm, Milpitas would cancel both the April 6, 2018 IEP team meeting, and the upcoming April 10, 2018 mediation in OAH Case No. 2017120137. Mother responded the next morning April 6, 2018 at 10:53 AM, confirming that she would attend. Mother confirmed again, by another email April 6, 2018 at 10:54 AM.

#### TRIENNIAL OCCUPATIONAL THERAPY ASSESSMENT

117. Meanwhile, on or around March 23 and April 4, 2018, occupational therapist Ms. Shukla assessed Student in the area of occupational therapy as part of the



triennial assessment, and generated a report. According to her clinical observations, Student displayed normal limits of range of motion, strength, and low muscle tone for school-related activities. He had decreased fine motor skills in his fingers and hands to grasp and manipulate small items to complete functional tasks in the school setting. He had decreased fine motor control, low endurance and decreased dexterity of fingers and hands.

118. She reported that Student was on a bathroom schedule in class. He did not ask to use the bathroom, however when asked whether he was dry or wet, he could respond accurately. He required assistance to sit on the toilet and to be changed. He was able to pump the soap dispenser once, rub his hands and turn on the faucet to wash his hands. He required assistance to get paper towels, however he could wipe his hands and throw away paper in the garbage can.

119. Ms. Shukla administered a Sensory Processing Measure; a Brigance Inventory of Early Development; a Bruininks-Oseretsky Test of Motor Proficiency, and she observed Student in the classroom and playground. She also did an interview with Student's teacher and his aide. She did not interview Mother. Ms. Shukla explained at hearing, that she did not seek a parental interview "because this was not an initial assessment and there had been prior parent input at IEP's."

120. The Sensory Processing Measure is a questionnaire-based assessment of sensory processing issues, praxis (the ability to plan and organize movement) and social participation in children ages five to 12 years old. It consists of two rating forms: the home form, which can be filled out by the parent or guardian, and the school form, which can be filled out by the teacher. These rating forms provide information on a child's sensory functioning at home and school.

121. Only the school form was included in the assessment. Ms. Shukla opined at hearing that the school form can stand alone. The home form is not exactly the same,

but addressed the same areas of need, in the home setting. Ms. Shukla sent the home form twice, via Ms. Espitia. Ms. Shukla followed up with Ms. Espitia, but she never reached out directly to Mother, although she was in possession of Mother's email address. Thus, her entire outreach to Mother for her assessment consisted of giving the form to Ms. Espitia. At hearing, Mother asserted that she never received the home form.

122. Student's scores on the school form filled out by Ms. Espitia indicated some problems in social participation, vision, hearing, touch, body awareness, balance and motion, and planning and ideas. Student occasionally squinted, covered his eyes, complained about classroom lighting or bright sunlight, showed distress at the sight of moving objects, became distracted by nearby visual stimuli, and showed distress when lights were dimmed for movies and assemblies. Ms. Shukla and Ms. Espitia treated these as behavioral responses to non-preferred tasks, so Ms. Shukla felt no need to follow up with further sensory assessments.

123. The Bruininks-Oseretsky Test of Motor Proficiency is a standardized measure of motor proficiency, with fine manual control and manual coordination sections. Student was only able to complete a few of the tasks within the allotted time, and due to the timed components, the assessment could not be completed and scored. Student had difficulty attending to standardized instructions; he frequently required repeated direction, demonstration, and prompting to attend to tasks.

124. Ms. Shukla's assessment concluded that Student had difficulty with fine motor tasks and postural control, and demonstrated some difficulties with his sensory processing needs at school. She recommended a continuation of occupational therapy services on a weekly basis. The report did not suggest particular frequency, duration or goals.

125. Ms. Shukla opined at hearing that Student did not have strength and stability, an important foundational skill in order to maintain a functional upright

posture when seated. Having a functional seated posture, which Ms. Shukla confirmed he did not yet have, would help to promote a stable base of support for the arms and hands during fine motor tasks. Student was able to maintain an upright-seated posture during most seated tasks; however, he demonstrated weak core strength and was observed to rest his head on the desk for paper and pencil activities.

#### APRIL 6, 2018 IEP

126. The April 6, 2018 IEP team meeting to review independent educational evaluations occurred with Mother, Milpitas team members, and four independent educational evaluation assessors in attendance. Three of the independent educational evaluation assessors reviewed their reports: the occupational therapist Ms. Selber, the physical therapist Ms. Nakaji, and the psycho-educational assessor Dr. Schilling. Sarah Devore, the behavioral independent educational evaluation assessor, attended but did not give her report until a later meeting. The purpose of the April 6, 2018 meeting was to review the independent educational evaluations, in accordance with CDE's directives.

127. Ms. Selber shared her report. The IEP Notes state that she "shared that the assessment was completed from a clinical perspective," however this is not borne out by the report itself, at least some of which contained specific recommendations for the school setting. Ms. Ciardella and the other Milpitas attendees treated all of Ms. Selber's recommendations as clinical, not educational.

128. Dr. Schilling, the psycho-educational assessor, reviewed her report. Her recommendations included looking into assistive augmentative communication support and access to a keyboarding device. At hearing, Ms. Crenshaw explained that Milpitas members of the IEP team decided against assistive augmentative communication technology, deciding that the emphasis should be on walking, for which Student needed to use his hands, and not carrying around a device.

129. Ms. Nakaji reviewed her physical therapy report. She reported that

Student's greatest areas of concern included lack of independent ambulation; lack of independence in transitions; lack of endurance for upright sitting posture; and lack of toileting ability. Consistent with her report, she recommended school-based physical therapy for 45-60 minutes, two times per week; and the proposed goals and accommodations as were stated in her report.

130. Milpitas did not make any offer of services in response to the independent educational evaluations at or after this IEP team meeting.

131. By this time, Milpitas had not yet completed its own triennial evaluations. The April 6, 2018 IEP notes state that the independent educational evaluations would be further considered, and recommendations would be made, based on the upcoming triennial assessment "at the May 2018 IEP." It is unclear why the notes state that there was a May 2018 IEP team meeting date. At this time, no meeting notices had been generated for the triennial IEP team meeting. An assessment plan had been signed on March 8, but the notes did not reference the timeline for holding an IEP team meeting thereafter. According to the prior year's April 27, 2017 IEP, the next annual IEP date was April 27, 2018, and the next evaluations were due May 28, 2018. In any event, the triennial IEP team meeting had not yet been scheduled.

132. On April 7, 2018, Mother mailed Ms. Ciardella asking for another IEP team meeting to complete the review of the independent educational evaluations. According to the evidence presented at hearing, Ms. Ciardella and Milpitas did not respond in any manner to this request.

133. On April 10, 2018, the parties participated in mediation in OAH Case No. 2017120137.

#### TRIENNIAL PHYSICAL THERAPY ASSESSMENT

134. On or around March 28, 2018, April 5, 2018, and April 13, 2018, Ms. Chitre conducted Milpitas' physical therapy triennial assessment of Student. She conducted a

clinical observation indoors in Ms. Espitia's classroom at Spangler and outdoors in the play structure. She conducted a records review, did staff interviews, and interviewed Ms. Nakaji. She did not interview Mother. Ms. Chitre attempted to schedule a parent interview in April but it never occurred. The date of April 6 was scheduled and confirmed for an interview, but then cancelled because of the April 6 IEP team meeting. Then, Ms. Chitre suggested April 13, but Mother was unavailable. Ms. Chitre made no further efforts, and the assessment was completed without Mother's input. Ms. Chitre was under the impression that there was a "deadline" at the end of April, and she completed the assessment without parental input in order to meet that "deadline." However, evidence adduced at hearing revealed there was no CDE deadline concerning the triennial assessments, only the independent assessments.

135. Ms. Chitre conducted two formal assessment measures, the School Function Assessment and the Gross Motor Function Measure. With regard to the School Function Assessment, in April, Ms. Chitre had sent Mother via email, the Parent Questionnaire portion of the School Function Assessment. Mother did not respond. There was no further contact between Ms. Chitre and Mother from April to June 3.

136. The School Function Assessment assessed Student's participation, tasks support, and activity performance. Student had full participation in the special education class, with modifications. His participation in playground/recess was constantly supervised. Significant assistance was needed for transportation, toileting, transitions and mealtime. Student needed adult assistance and adaptations for physical tasks such as travel, maintaining changing positions, recreational movement, manipulation with movement, using materials, setup and cleanup, eating and drinking, hygiene and clothing management.

137. Ms. Chitre noted that Student's gross motor skills were impaired as a result of hypotonia, weak muscles and decreased overall endurance. This tended to affect his

ability to function independently in the school environment. He was currently walking within his classroom with an adult supporting him at his hips and hands, as needed.

138. Ms. Chitre noted that Student was able to sit independently in a regular chair, but demonstrated a slumped posture. His posture and trunk control was improved when he sat on a lower chair, with his feet flat on the floor or on a support provided by the teacher. The report stated that Student was able to stand up at his desk and cruise sideways to get into his walker, "without adult assistance," but would ask for assistance to be belted into his walker. Ms. Nakaji at hearing opined that this verbiage in the report was vague, because it did not specify whether or not any mentoring or supervision was required for safety. Ms. Chitre's testimony at hearing clarified that her report was inaccurate -- Student did indeed require adult standby assistance to cruise, and assistance to be belted into his walker.

139. The report stated that Student used his walker to navigate to the bathroom. This conflicted with what Ms. Nakaji observed, when he was taken to the bathroom in a stroller.

140. The report stated that Student used his posterior walker to walk to the outdoor areas. He was able to walk in the walker independently for up to 20 feet with close stand-by assistance and supervision. He tended to lean backwards, hence his aide walked right behind. Without the pelvic strap secured, he could stand holding the walker and take up to six steps forward. Ms. Chitre's report opined that the next progressive goal would be to ambulate independently and safely over longer distances, without the pelvic strap secured. Per her observations in the yard, he was currently walking with his walker or with his hands held. He preferred to have his hands held rather than be supported at the waist. He was able to ascend the steps of a play structure, with an adult supporting him from behind.

141. Ms. Chitre's report stated that for transitions to the bathroom, Student was

generally encouraged to walk to the bathroom in his walker. He was able to walk all the way with adult assistance, as needed from behind the walker. He could walk up to the doors and wait for an adult to reach and open the doors. He would then park his stroller outside (the report says “walker” first and then it changes to “stroller.”) He could walk inside the bathroom by using the wall and furniture or with his hands held. Within the bathroom, he could cruise “without adult assist[ance],” and with “only close stand-by assistance for safety.” He was able to hold the wall, rail, and furniture to turn around to sit down at the commode. He could assist with one hand to lower his pants while he held the rail with his other hand. He sat on the commode but would not generally urinate or have a bowel movement. He could indicate if he had a bowel movement in his diaper and needed to be changed. After having his diaper changed on a changing table, he could cruise along the changing table to the sink, to stand while leaning his tummy on the sink. He needed some assistance to pump soap but could turn the faucet on and wash his hands. He could then reach to get the dry paper towel to dry his hands and then throw it in the trash bin next to the sink.

142. The report stated that Student had met goals<sup>8</sup> to move throughout the classroom and to the bathroom with minimal assistance from staff or gait trainer; to transition from a chair and walk with a walker independently without “any adult assistance” for a distance of 20 feet; to pull up to stand from the floor to any desired support “without adult assistance;” and to stand “without adult support” for 10 seconds. At hearing, Ms. Nakaji opined that this was inaccurate or vague, as Student did require adult assistance for all tasks, even if just monitoring or stand-by.

143. The report stated new baselines as to Student’s then-current level of

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<sup>8</sup> Issues concerning what was being implemented, and whether prior goals provided FAPE, are outside the scope of this hearing.

functioning. Baseline 1 stated that Student currently used hand support at furniture to stand up from his chair and walk sideways against his desk to get into the walker to walk. Ms. Nakaji agreed that this baseline was accurate, but clarified that Student needed stand-by or contact-guard assistance. She therefore opined that this baseline was vague. Baseline 2 stated that to navigate up and down the play structure stairs outside his classroom, Student currently needed at least six verbal cues and moderate adult assistance, consisting of constant tactile support at hips and knees. Baseline 3 stated that Student was currently able to walk outdoors on the blacktop using his walker with hip support for 20 feet and "no adult assistance." Ms. Nakaji disagreed, and opined that Student required some adult assistance in all activities. Baseline 4 stated that Student was able to catch a medium-sized playground ball within three feet of distance when standing supported in his walker.

144. Ms. Chitre's report proposed the following goals: Proposed goal 1 stated that Student would stand up from his chair "without support" and walk at least six feet toward the chart to check his daily schedule, with only close stand-by assist, as observed by staff, in three out of three opportunities. Ms. Nakaji opined that the term in this goal "without support" was vague. Ms. Chitre's proposed goal 2 was that Student would be able to navigate the stairs on his classroom play structure, outdoors with one verbal cue and no adult tactile assists while ascending and up to three verbal and three tactile assists provided at the knees, while descending the stairs for three out of three trials. Proposed goal 3 was that Student would demonstrate "independent travel" with "close adult supervision" and "no assistance" provided by adult or his walker for at least 10 steps to walk toward the play structure outside his classroom, as observed by staff for three out of three opportunities. Ms. Nakaji opined that this goal is vague as it pertains to the types of assistance that were envisaged. Proposed goal 4 was that Student would throw and catch a playground ball to a peer for three out of three consecutive trials,



when standing with an adult in “close stand by assist” and within three feet of distance.

145. Ms. Nakaji opined that the baselines and goals stated in the Milpitas assessment were vague with regard to the words “support” and “assistance,” and required more specific clarity. She would prefer to see specific terms used consistently, such as “stand-by assist,” “contact guard assist,” and “stand-by assist with tactile cueing,” all of which indicate different levels of support or risk prevention. She did not know exactly what Ms. Chitre meant by her terminology of “close adult supervision,” which could mean the adult is one, two, three, five, or more feet away.

146. Ms. Nakaji opined that her own proposed goals in her report were more aggressive. Her proposed goals would require Student to walk more steps and accomplish more on his own.

147. Ms. Chitre’s recommendations for levels of service were, for the most part, consistent with Ms. Nakaji’s: 45 minutes twice a week physical therapy, or a total of 90 minutes a week; a physical therapy protocol to be provided to the staff for consistency within the school routine; a Kindervest; anti-tip accessories on the crocodile gait trainer; a wedge cushion on chair to increase anterior pelvic tilt, when seated with feet on the ground or support; and a bike helmet for safety.

148. On April 13, 2018, the parties participated in a prehearing conference in OAH Case No. 2017120137, confirming that the hearing would commence on April 24, 2018.

149. On April 16, 2018, Mother advised Ms. Espitia that she and Student would be travelling out of state from April 30, 2018 through the first week of May. This was Mother’s first notice to Milpitas of an upcoming absence. It indicated an approximately one-week absence. On April 16, 2018, Milpitas’ litigation counsel responded to Mother, questioning this absence, as it impacted the upcoming April 24 due process hearing date in OAH Case No. 2017120137.

150. On April 17, 2018 at 5:24 AM, Mother wrote Ms. Espitia that the dates of her and Student's upcoming absence were incorrect, and she would re-schedule and let Ms. Espitia know the true absence dates. On April 17, 2018 at 8:49 AM, Mother wrote Ms. Espitia and Milpitas' counsel that she should be in town to proceed with the due process hearing. Thus, Milpitas was aware as of April 17, 2017 of an upcoming absence, although the dates had not yet been confirmed.

151. On April 17, 2018 at 11:34 AM, Milpitas' counsel wrote Mother an email that concerned the "April 24 scheduled annual review." April 24 had never been formally noticed as an IEP team meeting date, but it had been suggested by Ms. Espitia's and Mother's March 28 email exchange. Due to the scheduled due process hearing date in OAH case No 201710137, Milpitas' litigation counsel, Ms. Elizabeth Rho Ng, asked to move the proposed April 24 IEP meeting date. Ms. Rho Ng suggested May 11, 2018. This was tantamount to a cancellation of the proposed April 24 IEP team meeting date, due to the then-current due process schedule. Mother, reasonably, understood this as a cancellation of the proposed April 24, 2018, IEP team meeting. Ms. Rho Ng repeated her request to reschedule the proposed April 24 IEP team meeting, by follow up email dated April 18 at 2:38 PM.

152. April 17, 2018 was the date for production of documents in OAH Case No 2017120137. Emails ensued between Milpitas' counsel and Mother, concerning the method of document production.

153. On April 18, 2018, at 2:02 PM, Mother voluntarily withdrew her complaint in OAH Case No. 2017120137. There is no indication in the record that Mother informed Milpitas of the dismissal.

154. On April 19, 2018, at 10:01 AM, OAH issued an Order of Dismissal of OAH Case No 2017120137 and served it on both parties. This is when Milpitas learned of the dismissal.

155. Thereafter, Milpitas wanted to re-instate the April 24 IEP team meeting date. On April 19, 2018 at 11:15 AM, Ms. Ciardella wrote to Mother stating that Milpitas had learned of the dismissal of the April 24 hearing date and would like to proceed with the annual IEP team meeting on April 24, 2018. Ms. Ciardella attached a Notice of Meeting. This was the first formal meeting notice regarding the April 24, 2018 IEP team meeting date.

156. On April 19, 2018 at 12:49 PM, Mother wrote an angry email in which she denounced Milpitas' IEP team meetings as "corrupt," and in which she declined to attend the April 24, 2018 IEP team meeting.

157. On April 19, 2018, at 3:06 PM, Ms. Ciardella wrote to Mother stating "I am writing to again confirm if you will be attending [Student's] Annual IEP on 4/24. All District team members are available to move forward with the meeting. If you decline/refuse, we may need to hold the meeting without you, due to compliance deadline." Ms. Ciardella offered May 11 as an alternate date. At hearing, Ms. Ciardella reiterated, but was unable to explain what was the operative "compliance deadline," given that the CDE deadline of March 30 had passed, that an IEP team meeting to review three of the independent educational evaluations had occurred on April 6, and that the CDE investigation had, in any case, concerned only the independent educational evaluations and not the annual IEP team meeting date.

158. At hearing, Ms. Crenshaw clarified her viewpoint at the time. Although CDE had never stated a compliance deadline for the annual and triennial, Ms. Crenshaw was treating the annual and triennial dates as urgent. Ms. Crenshaw was concerned that not meeting the annual and triennial dates would generate further complaints from Mother to CDE. Therefore, although there was no CDE "compliance deadline" for the annual and triennial IEP team meetings, Milpitas was acting as though there was. No actual CDE-

imposed deadline existed justifying Milpitas' insistence on the April 24, 2018 date for the annual IEP team meeting.

159. On April 20, 2018 at 8:07 AM, Mother wrote an email asking: "you and your team canceled the meeting already on the 24th. Remind me again what this meeting is for?" This response was reasonable, given Ms. Rho Ng's cancellation on April 17, 2018 of the April 24, 2018 IEP team meeting. Mother's confusion about the annual IEP team meeting was also understandable, because of the interplay between the CDE-mandated independent educational evaluation IEP team meeting, and the annual team meeting.

160. On April 20, 2018 at 8:41 AM, Ms. Crenshaw wrote Mother an email stating that because April 24 was to have been the first day of Mother's due process hearing, and because Mother had dismissed the case, "We are now all free to meet for [Student's] annual. All we need from you is a confirmation that you will be attending."

161. On April 20, 2018 at 8:51 AM, Mother wrote that yes she had cancelled the due process hearing, and that prior to that she had confirmed Milpitas' cancellation of the IEP team meeting. Mother again asked what was the point of further meetings given that Milpitas had not "resolved" the independent educational evaluation IEP by making any offers in response.

162. On April 20, 2018 at 9:32 AM, Ms. Ciardella wrote an email to Mother stating that the annual IEP was "due" on April 27, 2018 and the triennial IEP was "due" on May 28, 2018, and that Milpitas was offering April 24 to have an IEP team meeting to discuss the annual. She also offered as an alternative, May 11 to discuss both the annual and the triennial.

163. A series of emails followed on April 20 and 21, 2018, in response to Ms. Ciardella's email about the annual and the triennial IEP team meetings. In these communications, the parties were talking at cross-purposes, stemming from the fact

that the independent educational evaluation IEP team meeting on April 6, 2018 had led to no offers, and Mother did not understand why Milpitas was simply moving on to the annual and triennial.

164. In one of these emails, on April 20, 2018 at 1:40 PM, Ms. Crenshaw asked “for purposes of clarification, are you saying you would like the meeting rescheduled, or are you refusing to come to any IEP?” On April 20, 2018 at 5:47 PM, Mother responded “I’m simply asking you for status on our unsigned IEP [from 2017]. For purposes of clarification, I’m not refusing anything, one step at a time. We need resolution first.” Mother’s April 20 email makes clear that she was not declining to attend an annual IEP team meeting, but she wanted clarity about prior year’s IEP’s, and “resolution” of the independent educational evaluations to occur first.

#### APRIL 24, 2018 ACADEMIC ASSESSMENT

165. On April 24, 2018 Ms. Espitia performed an academic assessment. She informally assessed Student’s pre-academic and academic functional skills through observation and work samples. Student was able to sort objects by color with 100% accuracy, and sort shapes and sizes 80% correctly in four out of five trials. He could say “just one” and “one more” with 100% accuracy. He could attend and complete tasks during a 15-minute work period with an average of 12 prompts. He was able to count objects to 10 with 100% accuracy and could count objects to 20 with 50% accuracy in four out of five trials. He was able to produce letter sounds for all 26 letters of the alphabet. He could receptively identify all 26 uppercase and 26 lowercase letters of the alphabet. He could read 14 high frequency kindergarten sight words (“mom,” “here,” “a,” “I,” “see,” “is,” “my,” “for,” “are,” “play,” “like,” “have,” and “go.”) He could expressively and receptively identify colors. He could read only two color words: yellow and orange. When asked to identify “more” and “less” with quantities less than zero, Student was able to do so with 50% accuracy in four out of five trials. He needed hand-over-hand

assistance to trace numbers and letters on both math and English worksheets. He was able to color with minimal assistance, but not within the lines.

166. Ms. Espitia administered the Brigance Inventory of Early Development, a formal instrument to determine some areas of Student's academic skills. Student's then-current level of development ranged from the two year, six month range, up to six years, with many skills in the four or five-year-old age range. There were a number of skills for which Ms. Espitia was "unable to test," because Student was completely unable to give a response.

167. Ms. Espitia assessed Student's academic skills and his cognitive skills in literacy, mathematics and science. She did not perform a functional skills assessment. The assessment plan specified that Student's adaptive skills, specifically taking care of his personal needs, were to be assessed by the teacher and the school psychologist. Since Ms. Espitia did not assess for adaptive skills, Milpitas' sole adaptive skills assessment was performed by the school psychologist Dr. Cole, whose triennial psycho-educational assessment is discussed below.

#### APRIL 24, 2018 SPEECH PATHOLOGIST UPDATES

168. Liana Mehawej is a speech pathologist who contracted with Milpitas through her employer, California Therapy Connections, a private speech pathology services provider. Ms. Mehawej provided pull-out speech services to Student throughout the 2017-18 school year. Ms. Mehawej was working on goals with Student from different IEP documents. All in all, she was working on seven different goals.<sup>9</sup>

169. As of April 23, 2018, Ms. Mehawej reported on Student's present levels of

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<sup>9</sup> Issues concerning what was being implemented, and whether prior goals provided FAPE, are outside the scope of this hearing.

performance. He could put two words together, and could use two- and three-word phrases. He could identify a variety of action verbs from a field of three, with 80% accuracy. He had reduced his sound assimilation (mushing words together) to 30% with minimal cueing. He showed understanding of the function of the following objects with 80% accuracy: glasses, garbage can, pen, coloring book, watch, wagon, bike, cake, broom, glasses, bike, cake, saw, paper, pencil, book, umbrella, and scissors. He demonstrated consistent understanding of the function of objects; understanding basic descriptive, location, and quantitative concepts; and could imitate multisyllabic words with age-appropriate sounds. His areas of difficulty included answering simple questions from a story; and expressing his wants, comments, and protests. Examples of Student's spontaneous utterances were: "I like it; Not too much; Oh my goodness; I can't eat that; Excuse me; I can hold it; She is eating bubbles; I want black cat; High in the sky; It's delicious." He demonstrated appropriate greetings and departures and understood the basic rules of conversation, such as eye contact, turn-taking, and changes in intonation.

170. Ms. Mehawej did not believe that Student required assistive technology. She acknowledged that this was a judgment call, requiring an opinion as to whether a student would be able to attain more communication using a device than without it, balanced against dependence on the device and the potential for further development without it. She thought Student would benefit more from working on his articulation and expressive language, rather than developing reliance on a voice output device.

171. Ms. Mehawej, at hearing opined that Down syndrome commonly impairs language acquisition, and was the cause of Student's language development delays. He had both a receptive language impairment, i.e. a deficit in understanding what is said, impairment in expressively being able to express meaning, and a speech impairment which refers to the mechanics of making sounds, i.e. articulation.

172. Ms. Mehawej was aware of the term "processing issue." She defined

auditory processing as: "if you say something to a child it takes them a while in that part of their brain to think about it and comprehend what is being spoken to them." The symptoms of an auditory processing issue are: lack of immediate response; taking some time to hear; having to repeat things multiple times; and answering a "what" or "where" question with a "who" or "what" answer. Ms. Mehawej in her testimony admitted that she has not formally assessed for auditory processing, and in her opinion, such an assessment is done by a school psychologist. Student, in her opinion, presented auditory processing issues that were secondary to the fact that he had receptive language impairment.

173. Ms. Mehawej later revisited her opinion about auditory processing. On the second day of her testimony, she opined that she could not make the judgment whether Student presented with auditory processing issues, that such an opinion was outside her purview as a speech and language pathologist, and was within the purview instead of the school psychologist or audiologist.

174. She also revised her prior testimony to say that she did not mean it was "secondary to receptive language impairment," and that she had "misspoken," because auditory processing is not secondary to receptive language impairments. Auditory processing is diagnosed by an audiologist, and it is not necessarily linked to receptive language impairment.

175. She distinguished "auditory processing" from "auditory comprehension." "Auditory comprehension" is within her purview as a speech pathologist. "Auditory comprehension" refers to receptive language.

176. When asked who should properly refer a child for further assessment, she opined that the teacher should refer the child to the school psychologist.

April 24, 2018 Annual IEP Team Meeting

177. On April 24, 2018, Ms. Crenshaw emailed Mother at 9:33 AM stating that



she was “again, trying to get confirmation that you are attending today’s IEP.” Mother did not respond. Milpitas nevertheless proceeded with the IEP in Mother’s absence. Milpitas tried to call Mother. Ms. Crenshaw opined that the number or numbers called were probably the number that was on the IEP cover page at the time, and also another number from which Mother sometimes texted Ms. Espitia. Milpitas did not keep a log of the numbers at which it attempted to call Mother. Milpitas did not reach Mother.

178. Ms. Crenshaw dictated the first paragraph of the notes of this IEP team meeting to the note-taker. They state that Mother initially confirmed the April 24 date. They also state that “District attempted to reconfirm attendance due to a pending due process hearing.” The notes do not reflect that Milpitas had cancelled the April 24 IEP meeting due to the pending due process hearing, and then attempted to reschedule it when it learned the hearing had been dismissed.

179. Ms. Crenshaw’s interpretation of these events was that she sought, but could not obtain Mother’s confirmation of attendance, and that Mother “would never directly answer the question of whether she was coming to the IEP meeting or not.”

180. Milpitas, at hearing, established that Mother was in town on April 24, 2018.

181. A complete draft of a 41-page IEP document, including draft present levels, goals and an offer of FAPE, was created and existed before the beginning of the April 24, 2018 IEP team meeting. Throughout the remainder of the 2018 IEP team meetings, the document remained unchanged except for notes, and certain minor wording changes that occurred as a result of discussions at later IEP team meetings. The draft present levels and goals were all created in draft form, prior to the April 24, 2018 IEP meeting, except for a math goal that may have been created or updated later. Ms. Espitia’s academic assessment results were written into the draft. Ms. Mehawej’s communication development present levels were also included. The IEP draft also included an occupational therapy update; a social/emotional and behavioral present

level; adaptive and daily living skills and a present level concerning Student's health. The health present level reported that Student's current health status was good, that he took medications for asthma and constipation, and that he had regular follow-ups with doctors in various specialty areas. It reported on allergies and medications. No witness established who drafted the health present level, nor what underlying information it was based on.

182. The IEP draft stated that Student had passed a "hearing date" of December 7, 2017 and a "vision date of" of March 27, 2018. No witness established to what these entries referred, or what they meant.

183. The April 24, 2018 team meeting was designated on the IEP document as the Annual IEP.

184. The team members who attended, in Mother's absence, reviewed Student's progress on previous goals, his present levels of performance, and proposed goals. Ms. Mehawej reported to the present team members that Student had met a prior receptive language goal to point to a verbally presented verb, and that he could identify and use a variety of verbs. He had also met a prior expressive language goal to put two words together into short phrase to describe an item or a picture. Ms. Shukla attended and reported on Student's progress on previous occupational therapy goals. After the discussion of present levels, the meeting was concluded.

185. The April 24, 2018 IEP proposed the following goals: Proposed goals number 1 and 2 were in the area of expressive language, drafted by Ms. Mehawej, and concerned Student's speech production. Goal number 1 was technical in nature, regarding "assimilation," or mushing of sounds together. Ms. Mehawej wanted Student to speak more distinctly when putting words together into phrase, by working on his "assimilation" at phrase level, e.g. "white bunny."

186. Goal number 2 was to answer “who, what, and where” questions, during “structured language activities,” with grammatically correct sentences and phrases of at least three words in length, with moderate cuing in four out of five opportunities. Ms. Mehawej explained that this was about describing pictures using words, such as responding with the words when shown a picture of a cat or a book. Ms. Mehawej also wanted to work with Student on expanding the words into descriptive phrases, such as instead of saying “floor” when asked where the cat was, he should say “on the floor” using a three-word phrase.

187. Goal number 3 was in the area of receptive language. It sought to increase Student’s receptive vocabulary by understanding at least 15 new concepts that he did not yet know (prepositional, quantitative or descriptive) (for example, “more,” “less,” “in,” “out,” “long,” “short”). Specifically, it would require him to follow a one-step command (e.g. “show me the dog with the long nose”) containing the concept using pictures or objects, with 80% accuracy with minimal cuing.

188. Student’s triennial language and speech assessment had not yet occurred.

189. Goal number 4 was in the area of math. The evolution of this goal is unclear from the record. The IEP notes do not specify what was originally proposed on April 24.

190. Goal number 5, in the area of English Language Arts, stated that when reading a “leveled” text, to answer at least four “wh” questions (e.g. what, where or who) in four out of five opportunities. Student’s baseline stated that he could read a level one text and answer only one “wh” question accurately.

191. Goal number 6, in the area of English language development, stated that Student should express his wants and needs with no more than one prompt or reminder, using a complete sentence in four out of five opportunities. Ms. Espitia drafted his baseline, from a language sample she took of his utterances without adult

prompting. His baseline utterances were in two-to-three word phrases, but not complete sentences.

192. Goal 7 was in the area of "academic/behavioral attending." It stated that Student would complete three non-preferred tasks when given a reinforced activity to follow with five verbal and gestural prompts. Ms. Espitia took data on how many tasks Student could complete, and how much prompting he required, to establish a baseline that Student could complete two tasks during a one-minute period with an average of 12 verbal and visual prompts, in four out of five trials. This was the only goal that addressed Student's adaptive functioning or daily living skills. The triennial psycho-educational assessment had not yet occurred.

193. Goal 8 was in the area of cooperative play and social skills. It would require Student to share a toy or object with a peer, and engage in at least four reciprocal exchanges, with no more than two adult prompts or encouragements. Student's baseline, developed by Ms. Espitia's observations, was that he required three adult prompts for every exchange with peers, when engaging in sharing activities or play.

194. Goal 9 was in the area of occupational therapy/fine motor. It stated that Student should trace/imitate the letters of his name in uppercase letters, one stroke at a time, when shown each stroke, with verbal and gestural prompts with fair legibility in four out of five opportunities. His baseline was that he was able to copy a circle and a plus sign, and was beginning to trace letters that approximated three of the letters of his name, but with poor formation.

195. Goal 10 was in the area of occupational therapy/fine motor. It would require Student to cut a four-inch square and circle, within one-half inch outside limits, with modifications and adaptations as needed, in four out of five trials. His baseline was that he was able to cut a five-inch line within one-half inch limits, using modified scissors with a built-in spring. He could cut a square, with assistance to turn the paper

for him, and to redirect his attention to the task.

196. Goal 11, a physical therapy goal drafted by Ms. Chitre, was to stand up from a chair "without support" and walk at least six feet to his visual schedule with only "close stand-by assist." Ms. Chitre intended this to mean that an adult would stand close to Student, but not touch him, unless he needed to be caught for safety. His baseline was that he used either his walker, or adult support, or his hands on furniture, to support his weight. He could stand up and walk sideways against his desk using his hands for support, to get to his walker to walk, i.e., he could "cruise."

197. Goal 12, a physical therapy goal drafted by Ms. Chitre, was to navigate an outdoor stair structure on the playground with one verbal cue, and no tactile assist, by an adult while ascending the stairs. For descending, the goal was to descend, with up to three verbal and three tactile assists at the knees. Ms. Chitre intended the knee support to be taps at the hamstring muscles at the back of the knees. Student's baseline was that he needed at least six verbal cues and "moderate adult assistance" while holding onto railings with both hands to ascend and descend the stairs of the play structure.

198. Goal 13, a physical therapy goal drafted by Ms. Chitre, was to demonstrate independent travel with "close adult supervision" and "no assistance" provided by adult or his walker for at least ten steps to walk toward the play structure. Ms. Chitre intended this to mean no touching, just hovering close by to catch Student if he fell. His baseline was that he could walk outdoors on the blacktop using his walker with hip support for 20 feet with "no adult assistance." As Ms. Chitre clarified at hearing, this baseline was inaccurate when it stated "no adult assistance," because Student's baseline was actually that he required "stand by assist," or "close adult supervision," to catch him if he were to fall.

199. Goal 14, a physical therapy goal drafted by Ms. Chitre, was to throw and catch a playground ball with a peer when standing, with adult in "close stand-by assist"

within three feet. The baseline says he is able to catch a medium sized playground ball within three feet of distance when he is standing supported in his walker, with his hands free and his hips supported in the walker.

200. At hearing, Ms. Nakaji credibly established that the physical therapy goals were ambiguous in the level of adult assistance required. For one example, with respect Ms. Chitre's terminology "close adult supervision," Ms. Nakaji queried, "how close is close?" In other words, the term could mean one, two, three feet, five feet, or ten feet. In goal 14, Ms. Chitre specified three feet, but elsewhere she was vague. Ms. Nakaji would prefer explicit specificity in the level of adult assistance required. For her "contact guard is touching the child but not helping;" "stand by" is not touching;" "minimal" assistance means 25%; "moderate" assist means 50%; "maximum" assist is 75% and "total" assist is 100%. Thus, Ms. Nakaji's testimony established that Milpitas' offer of physical therapy goals was vague.

201. There was no goal that addressed Student's toileting.

202. Following the 14 proposed goals, the IEP contained 12 additional pages, numbered as pages 24 through 35. These additional 12 pages also contain the heading "Annual Goals and Objectives" and were written in the same format as the 14 proposed goals. The additional 12 goals pages are numbered: Goal 7, 6, 8, 5, then another Goal 6, then seven pages of unnumbered goals. This confusing documentation was clarified at hearing as not being intended to propose goals. Student's proposed new goals were the 14 goals described above. These 12 additional pages were previous proposed goals from prior years' IEP's, with progress updates.

203. Milpitas offered the following related services: occupational therapy twice a week for 30 minutes; physical therapy twice a week for 45 minutes, for a total of 90 minutes; speech therapy twice a week for 30 minutes. Home to school transportation was also offered, as were extended school year services.

204. Milpitas offered specialized academic instruction, five times a week for 360 minutes, with a full-time one-to-one aide. The specific classroom, or specific type of class, was not mentioned. The page on the IEP that contains the offer of placement is entitled "Offer of FAPE- Educational setting." It states that the offer is for a "regular classroom/public day school" at Joseph Weller Elementary in a "separate class." The type of class is not specified. Although Ms. Espitia was under the impression that delineation of such classes as mild to moderate, or moderate to severe, in Milpitas' IEP documents was generally in the Notes, she acknowledged that this IEP nowhere described the offered placement as a moderate to severe class.

205. Milpitas offered equipment that was consistent with Ms. Chitre's and Ms. Nakaji's recommendations, with the exception of seating with foot support. The testimony of Ms. Chitre established that the offered equipment did not address Student's feet resting on the floor.

206. There is a page that is entitled "Offer of FAPE-Service" that contains a chart that is commonly known as a "services grid." Consistent with the Notes, the services grid offered specialized academic instruction, 5 times a week for 360 minutes to begin at the inception of the 2018-19 school year on August 16, 2018. A different number of minutes was offered on the grid, for the period of time prior to August 16, 2018, and this difference was not explained at hearing. The offered speech services were consistent with the Notes, 240 minutes monthly, with 180 minutes of direct service and 60 minutes of indirect service. Unlike the specialized academic instruction, the speech services offer was to commence immediately. Consistent with the Notes, the grid offered occupational and physical therapy. However, the occupational therapy was to commence immediately, but the physical therapy was to commence on August 16, 2018. There were two separate entries on the grid concerning physical therapy. The service grid that was to commence on August 16, 2018 was consistent with the Notes, for 45 minutes two

times a week for a total of 90 minutes. The other service grid was for the time period April 29, 2017, and to end July 9, 2018, and it was for 30 minutes once per week. Ms. Chitre could not explain this entry, as it bore no relationship to the number of minutes she recommended. The services grid offer for extended school year was also not consistent with the Notes. The Notes specified extended school year specialized academic instruction and one-to-one aide services of five times 240 minutes. The services grid offered four times 240 minutes.

207. On April 26, 2018, Dr. Cole observed Student for the psycho-educational triennial assessment.

208. On April 27, 2018, Mother advised Milpitas that she and Student would be travelling to participate in an intensive program out-of-state, pursuant to medical advice, attaching a doctor's letter excusing Student's absence. Further email exchanges between Mother and Ms. Espitia clarified that the absence would be for the remainder of the school year.

209. Student stopped attending school within Milpitas on April 27, 2018, and remained absent through May 25, 2018, when he returned at the end of the school year. Mother left with Student for the out-of-state program sometime in early May.

May 2018

210. On or around May 2, 2018, Mother's independent educational evaluation assessor in the area of behavior, Board Certified Behavior Analyst Sarah Devore, generated a report that she provided to Milpitas. There was no indication that anyone forwarded the report to Mother. The three target behaviors assessed were non-compliance, spitting, and tantrum behavior. The behaviors observed at school were non-compliance. Ms. Devore recommended six hours per week of direct behavior support at school. The Devore assessment report appears to have been based primarily upon home



needs. Although observations were conducted at school, and although the ultimate recommendations included six hours per week of behavioral support at school, these recommendations for school-based interventions were not borne out by the report itself, nor was Ms. Devore called as a witness to justify them. The bulk of her report and observations referred to target behaviors at home, not school. Overall, Ms. Devore's recommendation of six hours' behavioral services weekly at school was not supported by her report.

211. On May 4, Mother sent the doctor note regarding an extended out-of-state absence to additional Milpitas personnel. On May 4, Ms. Crenshaw inquired about the duration of the absence, asking if it was for the rest of the school year, and whether Student would be attending extended school year during the summer. Mother responded that Student would be attending extended school year. She had already clarified with emails to Ms. Espitia that Student would be out for the rest of the school year.

212. On May 7, 2018, Ms. Ciardella emailed to Mother a Notice of Meeting for a triennial IEP to be held on May 11, 2018, with a question that asked: "will you be participating?" Although prior emails concerning the scheduling of April 24, 2018 IEP team meeting had mentioned May 11 as an alternative, this was the first notice that scheduled this date for an IEP team meeting. Ms. Ciardella, at hearing, testified that she was "not sure we were aware where Mom was" at this time, but that "yes we were aware there was going to be an absence." Ms. Crenshaw at hearing confirmed that Milpitas did not know where Mother was, and did not get confirmation from Mother regarding the May 11, 2018 IEP team meeting date.

213. On May 8, 2018 at 7:00 AM, Mother sent an email complaining to Milpitas about their alleged FAPE denials, reminding Milpitas that Student was out of school, and stating that she had been forced to take Student to external programs. Importantly, the

email stated: "Therefore please don't send meeting notices when you are well aware of [Student's] concerns and how the school is not working with me. I'm busy taking care of my son's FAPE needs which [are] not being met therefore I have had to leave town and will not be able to attend."

214. On May 8, at 7:59 AM, Mother sent another email asking for an update on the follow-up IEP team meeting to review independent educational evaluations— Mother had requested such a meeting on April 7, and Milpitas never responded to that inquiry. Mother's email asked that the independent educational evaluation IEP team meeting should be segregated from the triennial and resolved separately. She stated "a triennial is not going to help when we have no closure on current concerns. I will not okay a triennial meeting when goals and services have not been updated for over two years, this defeats the purpose of new assessments." Mother also asked about "action plan moving forward" regarding the independent educational evaluations.

215. On May 8, 2018, at 2:08 PM, Ms. Ciardella responded that the independent educational evaluations would be considered at the May 2018 triennial IEP team meeting, as had been reflected in the notes of the April 6, 2018 meeting. She also stated "The district understands you are not in town. Would you like to participate in the 5/11 triennial via phone?"

216. On May 10, 2018 at 9:03 AM, Mother wrote to Ms. Ciardella and others, asking again that the independent educational evaluation IEP team meeting be segregated from the triennial and occur separately. She asked to reschedule the independent educational evaluation meeting in a couple of weeks. She stated that Student was sick and that she could not schedule any meeting for the next couple of weeks. Thus, Mother indicated that she was not available for the May 11 IEP team meeting.

## May 11, 2018 IEP Team Meeting

217. The Milpitas IEP team members met again in Mother's absence on May 11, 2018. Milpitas staff called Mother, however the evidence was not clear as to which telephone number or numbers Milpitas attempted to call. As at the April 24 meeting, Milpitas did not keep a log of the numbers at which it attempted to call Mother for the May 11, 2018 team meeting.

218. The IEP notes reflected Mother's absence and stated that on May 4, Mother had notified Milpitas that Student would be absent for the next few months. The IEP notes indicated that on May 10, Mother had requested to move the IEP team meeting date to June. No substantive conversation occurred among Milpitas IEP team members on May 11, 2018. The meeting was "opened and closed."

219. At hearing, Ms. Crenshaw explained that Milpitas wanted to comply with a "deadline" for the triennial, but she did not establish what was the genesis of that date. Ms. Crenshaw also stated that Mother "did not respond to the inquiries about whether she would be participating" in the May 11 IEP team meeting, and "neither confirmed nor denied" if she would come. Ms. Ciardella testified that Milpitas had not received anything "definitive" from Mother about her attendance on May 11 or non-attendance. She testified that Mother did not share that she was unavailable on May 11. However, the May 8 at 2:08 pm email traffic indicates that Ms. Ciardella was aware that Mother was not available to participate, at least not in person, on May 11.

220. On May 20 or 21, 2018, CDE requested an update on the case from Ms. Crenshaw. Milpitas had not updated CDE since Ms. Crenshaw's March 26, 2018 letter. On May 22, 2018, Ms. Crenshaw spoke with CDE. On May 23, 2018, Ms. Crenshaw wrote to Milpitas' attorney and various team members updating them as to the content of her conversation with CDE. Ms. Crenshaw had represented to CDE the "many reasons why we could not complete the [Student's] independent educational evaluation triennial and

annual (including mom hasn't picked some providers to date, the student is in Nashville, etc.)" She further reported that "[a]fter reviewing six months of documented efforts to fulfill the CDE's order, [CDE] recommended that the District file for due process on this case." CDE further recommended that District not do anything until it had reached out to Mother, but that "if mom is not cooperative (highly likely), [CDE] will ask us to file."

221. On May 24, 2018, at 6:31 AM, Mother emailed Ms. Ciardella, Ms. Crenshaw and Ms. Espitia asking for an IEP team meeting for the following week. Mother advised that Student would be shortly returning to school on a date yet to be determined. Mother wanted to discuss extended school year, transportation, and the independent educational evaluations. She also advised that Student was doing better walking and getting stronger, that "toilet training and functional life skills are being put into daily practice...While still in diapers, he is doing great."

222. On May 24, 2018, Ms. Crenshaw spoke with CDE. CDE requested documentation about Mother's request for the IEP team meeting the following week, and documentation concerning Mother's request to segregate the discussion of the independent educational evaluations from the triennial.

223. On May 24, 2018 at 3:16 PM, Ms. Ciardella wrote to Mother stating that the request for an IEP team meeting the following week could not be accommodated. She enclosed a meeting notice for an IEP team meeting to be held on June 28, 2018. At hearing, Ms. Crenshaw explained that Milpitas team members are generally not available between the last day of school (June 7, 2018) and the first day of extended school year (June 18, 2018). However, the evidence did not otherwise explain why Mother's request for an IEP meeting shortly after May 24 could not be accommodated.

224. Student returned to school at the end of the school year for a short time. He returned to school on May 25 and attended through the last day of the regular

school year, which was June 7. Per Ms. Mehawej, when he returned he was talking better and had new equipment.

225. On June 5, 2018, Ms. Crenshaw wrote to CDE, informing them of the upcoming proposed June 28, 2018 IEP team meeting date. Ms. Crenshaw also informed CDE that Milpitas was unable to fulfill its obligations regarding the independent educational evaluations. Ms. Crenshaw attributed this to Mother's failures to select providers, and attend scheduled assessment sessions.

June 2018

226. June 7, 2018 was the last day of the 2017-18 school year.

227. On June 12, 2018 at 9:53 AM., Mother wrote confirming the IEP scheduled for June 28, and also saying she could accommodate earlier, at any time and date. She again wanted a separate earlier IEP team meeting to discuss the independent educational evaluations, but she confirmed the June 28 date for the triennial IEP team meeting.

228. On June 12, 2018 at 12:55 PM, Ms. Crenshaw wrote Mother an email stating that Ms. Crenshaw had spoken to CDE, and that Milpitas would proceed with an IEP team meeting addressing the triennial, annual, and whatever results from completed independent educational evaluations existed. The clear import of Ms. Crenshaw's email was that CDE had authorized her to proceed with the annual and triennial IEP's together with the independent educational evaluations, rather than segregating them as Mother requested.

229. However, On June 13, 2018, CDE wrote to Mother expressing that the decision whether to combine or separate the independent educational evaluation and triennial IEP's was up to the IEP team, specifically stating that the team making that decision included Mother.

230. On June 14, 2018, Mother wrote to Milpitas staff forwarding CDE's email.

Mother disputed Ms. Crenshaw's interpretation of CDE's directives regarding the segregation, or not, of the IEP team meetings, and again asked for a separate IEP team meeting to address the independent educational evaluations, as soon as possible. In her email she notified Milpitas that Student would be attending extended school year, and she wanted his services to be reviewed beforehand.

231. On June 14, 2018, Milpitas responded with a prior written notice dated June 12, 2018, transmitted by cover email dated June 14, 2018 at 1:14 PM. The purpose of the prior written notice was to make an offer of FAPE for the upcoming extended school year, since Mother had not attended the April or May meetings and extended school year was to begin on June 18, 2018. The letter also restated, from Milpitas' perspective, events concerning independent educational evaluation scheduling, and the combining of the independent educational evaluation IEP team meeting with the annual.

232. Dr. Cole's first email to Mother concerning the Milpitas triennial psycho-educational assessment was on June 14, 2018.

233. On June 14, 2018, at 2:43 PM, Mother wrote another email to Ms. Crenshaw asking for another IEP team meeting to review the independent educational evaluations, and again disputing Milpitas' interpretation of CDE's directives, concerning the combining or segregation of the annual and triennial IEP team meetings, and the IEP team meeting to review the independent educational evaluations.

234. Extended school year in the summer of 2018 ran from June 18-July 19, 2018. Student attended only two days of the program, on June 18 and 20, 2018.

235. By email dated June 19, 2018, Ms. Ciardella wrote to Mother, introducing school psychologist Dr. Cole, whom Mother had never met, and asking Mother to sign a medical release form. Dr. Cole wanted to be able to contact Student's doctors about his health conditions. Mother did not respond to the email.

236. On June 21, 2018, Mother filed a "change of address or contact information" document with Santa Clara court, stating that she was relocating to Antelope, in the Sacramento area. Mother convincingly testified that she owned property there, and was exploring services available to Student, and the possibility of moving. She filed the document to put Father, from whom she is divorced, on notice of a possible move.

#### BEHAVIOR OBSERVATION IN SPRING 2018 AFTER STUDENT'S ABSENCE

237. Although behavior was not an area to which Mother consented to have Milpitas assess student on the assessment plan, Milpitas' Board Certified Behavior Analyst Surabhi Bains observed Student on June 20, 2018, and generated a "Behavior Observation Report" dated June 25, 2018. Ms. Bains reviewed Sarah Devore's behavioral independent assessment. Ms. Bains correctly interpreted Ms. Devore's report as primarily home-based. Ms. Bains conducted one formal observation during extended school year, before the June 28 IEP team meeting. She saw Student being noncompliant, but witnessed no other behavioral concerns. He was easily redirected with use of preferred items, and complied after redirection. Student seemed happy and content, well-liked and not anxious. Ms. Bains wrote her own report on June 25, 2018. She recommended a list of strategies to increase compliance. She suggested a proposed behavior goal. She also recommended a further assessment that she called a "preference assessment." The assessment she recommended was never offered, nor was her proposed goal.

238. On June 22, 2018, Ms. Chitre sent to Mother a draft of her physical therapy triennial assessment report that she had completed in April. Mother responded with her input that very day, June 22, 2018. Mother's comments, similar to Ms. Nakaji's at hearing, were that Student could not independently walk and that Student required assistance at all times. On June 23, 2018, Ms. Chitre wrote Mother back saying: "I

completely agree with you that [Student] needs assistance to walk at all times and is not yet independent at this time. I tried to make the necessary changes to some of the sentences where I thought it may appear to look a little confusing. I hope I got all of them. Let me know.” However, the version of the report in evidence does not reflect such changes. As Ms. Nakaji testified, the Chitre report still appears to state inaccurate present levels regarding Student’s independence and need for assistance. Ms. Chitre, at hearing, could not clarify when, or if, the changes she agreed to make in the report were ever made, nor, if made, whether she ever provided revisions to either Milpitas or Mother.

239. On June 26, 2018, Mother wrote to Ms. Crenshaw requesting a referral to a non-public school located in Sacramento.

240. On June 27, Ms. Espitia emailed her academic assessment results to Mother. The assessment was conducted on or around April 24, 2018, and its results were reflected in the draft April 24, 2018 IEP document, but had not yet been provided to Mother.

#### JUNE 28, 2018 TRIENNIAL PSYCHOEDUCATIONAL ASSESSMENT

241. Dr. Cole generated a triennial psycho-educational report on or about June 28, 2018. Dr. Cole’s report lists Students home language as “Persian.” Dr. Cole got this information from the Milpitas’ on-line student information database.

242. For her assessment, Dr. Cole reviewed records, including prior IEP’s and the triennial assessments that had been completed, Ms. Espitia’s academic results, Student’s grades, and the Schilling psycho-educational, Nakaji physical therapy and Selber occupational therapy independent assessments. She interviewed Ms. Espitia. Dr. Cole attempted by email to obtain parental input on rating scales and health information, but Mother did not respond. Dr. Cole kept a log of her attempted contacts with Mother. The telephone number that she used was from the student information



database system. This telephone number was not the same as the number listed on any of the IEP's.

243. Dr. Cole observed Student in class, recess and during transitions between different school settings, and structured and unstructured time. He responded to teacher inquires as follows: "What color do you want to color the elephant? Color the hat." "Color the elephant. Eye." Eventually he responded appropriately to a question about eye color with the word "black."

244. Dr. Cole used formal assessment tools: the Sutter Eyeberg Student Behavior Inventory, for which the respondent was Ms. Espitia; the Developmental Assessment of Young Children, Second Edition, which similarly used Ms. Espitia as the source of information; the Adaptive Behavior Assessment System, Third Edition, a rating form filled out by Ms. Espitia; and the Eyeberg Child Behavior Inventory. Mother did not return the parental response form for the Eyeberg Child Behavior Inventory.

245. The only adaptive functioning assessment Dr. Cole conducted was the Adaptive Behavior Assessment System. The Developmental Assessment of Young Children can assess in many domains, including physical and communication subtests and motor skills. Dr. Cole used it only for the cognitive domain. She did not use any of the adaptive portions of the Developmental Assessment of Young Children. For adaptive skills, she relied solely on the Adaptive Behavior Assessment System.

246. Mother did not return the parental response form for the Adaptive Behavior Assessment System. Ms. Espitia noted several areas of concern in terms of communication, leisure activities, "school living behaviors," such as putting away work materials and playing quietly, throwing away trash; and self-care, including buttoning clothing, opening food, and drink containers, using silverware, and tying his own shoes. Toileting was not mentioned. All of Dr. Cole's adaptive assessment data came solely from Ms. Espitia's rating form.

247. For cognition, Dr. Cole chose the Developmental Assessment of Young Children. This assessment has a parental response form that Dr. Cole did not attempt to share with Mother, given that Mother had not responded to her other inquiries. The Developmental Assessment of Young Children portion that Dr. Cole did perform, was a structured interview with Ms. Espitia which occurred on June 26, 2018. This was a conversation about the presence or absence of certain skills. Had Dr. Cole used the parental portion it would have been a similar structured interview with Mother, that would have gone over the same skill set areas. Dr. Cole did not feel compelled to do this because she had "sufficient information to determine eligibility," which "was the referral question."

248. The Developmental Assessment of Young Children, like all other cognitive instruments on the market, assesses for cognition, language, attention, memory and "processing." "Processing," according to Dr. Cole, refers to understanding language, understanding what a direction or instruction is telling you to do. It refers to the ability to hear, understand, remember, and attend, particularly relating to multi-step directions. There are different types of "processing," including "information processing" and "auditory processing." Lower cognition calls into question whether an individual has poor cognition, poor processing, or both. If a response is incorrect, one must ask whether the individual understands the question in the first place, as opposed to understanding but having difficulties processing a response. When students have low cognitive skills, one may not be able to tease out whether their functional deficits stem from their cognitive deficits as opposed to processing deficits. Low scores might be reflective of either lower IQ or a processing disorder.

249. The inability to understand or follow instructions can be indicative of low cognition, processing deficits, or of receptive language deficits. Dr. Cole was unable to convincingly explain how, or if, these distinctions can be teased apart in an individual

who may suffer from a combination of deficits. Overall, because she was by all measures convinced of Student's low cognition, she did not suspect that other deficits were also in play or could be discerned, and thus she did not explore them. Moreover, language deficits would be outside her purview in the realm of speech pathology, and auditory processing deficits would be for an audiologist.

250. According to Dr. Cole, the term "auditory processing" has a specific, particular, narrow meaning to her discipline for school psychology. It means the ability to make a connection between the sound of a letter and the symbol for that letter. Dr. Cole did not attribute to the term "auditory processing" any other deficits, such as the inability to translate meaning to noises that are heard; nor forgetfulness; nor being bothered by loud sounds, nor the inability to follow conversations, nor problems taking notes, nor the inability to learn information unless it is written down, nor the need for repeated instructions or prompting, nor the need for visual prompts, nor the need for reminders. Some of these difficulties might, however be indicative of other deficits.

251. Under Dr. Cole's particular definition, if a student was not developing the ability to draw a connection between how letters look and how they sound, she would consider referring that individual to either an audiologist or a speech pathologist. She did not, in this case, feel the need to refer Student for further assessments for auditory processing disorder. She ruled that out, because she believed Student did have the ability to recognize a connection between the symbols and sounds of letters, and he was being given instruction in that skill by Ms. Espitia.

252. "Auditory processing" is one of the skills assessed for in both intelligence and achievement tests. It is a skill one looks at for individuals who have trouble reading. "Auditory processing" is a subset of "verbal comprehension," which is a broad ability to process, reason with, and produce language. "Central auditory processing disorder" cannot be assessed for under age eight, and can only be determined by an audiologist.

253. Dr. Cole's assessment states that Student had passed his most recent vision and hearing screenings on March 27, 2018 and December 7, 2017. Dr. Cole got this information from the student data database. She had no underlying information regarding its accuracy.

254. Dr. Cole presented her report at the June 28, 2018 IEP team meeting, but not in its final form. She later revised two portions of her report in response to input from Mother. In particular, she changed the report concerning whether Student was able to tell his own age from "yes" to the "no" that appears in the final version. She also added medical concerns to the report, including adding a reference to Mother's concern that Student suffered from conductive hearing loss. However, she did not feel the need to refer him for any further assessment. She saw no evidence that hearing loss impacted Student, as he had passed his last hearing screening. She acknowledged that hearing loss, if it existed, might impact an ability to understand directions. The report was completed on July 9, 2018.

255. Dr. Cole concluded that Student's eligibility should be multiple disabilities, based on his intellectual disability and his orthopedic impairment, with a secondary category of language and speech disorder. Dr. Cole's further recommendations to the IEP were nonspecific, to discuss eligibility, placement, and services. She specifically recommended allowing him ample time to practice getting on and off of the bus, with as little adult intervention as possible.

#### June 28, 2018 IEP Team Meeting

256. The team convened on June 28, 2018. Mother attended. Other than the April 6, 2018 IEP team meeting to review independent educational evaluations, this was the first of the relevant IEP team meetings that she participated in. The notes indicate that this meeting was to be for Student's triennial IEP.

257. Ms. Espitia confirmed that no version of the IEP draft document was sent

to Mother prior to the June 28, 2018 IEP team meeting. Although the draft document containing present levels, proposed goals, and the updates on progress from previous goals, existed for the April 24 meeting, it had not been previously provided to Mother.

258. The team began with asking Mother her current concerns related to Student's education. Mother noted that Student's underlying medical factors affected his educational development, and stated that Student could not walk independently at all. Mother stated her opinion, based on Ms. Nakaji's assessment, that Student had a window of two years to walk or else be non-ambulatory. Mother felt Student was unable to process directions during therapies. The team asked for clarification of Mother's request for placement at a nonpublic school in Sacramento, with particular reference to transportation time there and residence within Milpitas. Mother also reported that Student has glasses but that his doctor had the glasses removed for stigmatism correction, and she would follow up with an appointment to reassess the need for glasses.

259. Ms. Devore presented the results of her behavioral assessment, in which she had recommended six weekly hours of direct behavioral support at school. Ms. Bains reported on her behavioral observation. She recommended the use of a token system and visual timer along with social reinforcement. She recommended one behavior goal. The IEP notes indicate this goal had been written and would be reviewed later. This never occurred, and Milpitas never offered such a behavior goal.

260. Ms. Chitre reviewed her physical therapy report.

261. Mother met Dr. Cole for the first time at the June 28, 2018 IEP team meeting. Dr. Cole presented a draft of her psycho-educational assessment at this meeting. Ms. Espitia presented her academic assessment. The team reported progress on Student's previous goals, as they had discussed at the April 24, 2018 IEP team meeting that Mother did not attend.

262. The notes indicate this was a discussion only and that a part two of the triennial IEP team meeting was scheduled for July 9. In the interim, Ms. Mehawej was to conclude her language and speech assessment. The notes indicate that the team would reconvene to determine eligibility and goals, recommended services and “the best location to give [Student] those services.” Placement in a moderate to severe classroom was not mentioned.

263. The meeting ended in conflict. Mother recorded the meeting and attempted to record events after its conclusion. Ms. Crenshaw would not permit this, asked staff to leave, and then asked Mother to vacate the school premises.

July 2018

264. On July 2, 2018, Ms. Espitia emailed a meeting notice to Mother, scheduling another IEP team meeting for July 9, 2018. The meeting notice says “annual and triennial.” As of July 2, the triennial psycho-educational assessment draft had not been finalized. As of July 2, 2018, the speech language assessment had not been completed. On July 6, 2018, Mother waived any remaining independent educational evaluation assessments that had not been completed to-date.

#### SPEECH AND LANGUAGE ASSESSMENT

265. On or around July 9, 2018, speech language pathologist Liana Mehawej generated a speech and language assessment report. Ms. Mehawej did not interview Mother for her assessment. She did not ask for any parental input, with the exception that she had previously gotten some background information by emailing Mother about the use of the Dari language in the home. Ms. Mehawej never reached out to Mother for any other input other than the email inquiry. Ms. Mehawej justified this omission by the time constraints she was under, purportedly due to Student’s extended absence, and the

purported urgency of completing the assessment prior to the July 9, 2018 IEP team meeting.

266. Ms. Mehawej obtained background information from Dr. Cole's psychoeducational report. She conducted observations and a physical examination of the structures of Student's mouth; provided a form for Ms. Espitia to return, and administered the Goldman Fristoe Test of Articulation, third edition and the Preschool Language Scale, fifth edition. The dates in the report indicate that Ms. Mehawej's observations occurred during speech sessions in April, prior to Student's extended absence and for one additional session after his return in May. Although she was working on the assessment prior to July by reviewing records, she still needed 50 minutes to test him, which happened in July.

267. The assessment reported Ms. Espitia's observations, that, compared to his classmates in his "moderate-severe SDC classroom," Student was academically in the middle range. The reference to "moderate to severe" is the only place such terminology was used in any assessment. Ms. Mehawej confirmed in her testimony that the words "moderate to severe" were not uttered to Mother in any IEP, prior to the final IEP at issue here which did not occur until September.

268. Student could produce a variety of two-syllable words but he required cuing to combine the words into phrases. He used jargon, or babbling nonsense syllables, at times when speaking. When excited at conversational level, his speech became more unintelligible.

269. The Goldman Fristoe Test of Articulation, third edition was an individually-administered standardized assessment, used to measure the articulation skills of individuals aged two years through 21 years and 11 months old. This tool assessed sound production of consonant and vowel sounds at both the word and sentence level.

Student's standard scores represented low articulation skills. His overall intelligibility was low.

270. The Preschool Language Scale was used to examine the full range of expressive and receptive language skills across the developmental language spectrum. Student's overall performance on this test indicated language skills below the expected range when compared to other children of the same age. On the Auditory Comprehension portion of this test, Student was observed to understand complex sentences, point to letters, understand sentences with post-noun elaborations, understand negatives in sentences, and identify colors. He had trouble with pronouns, more advanced spatial concepts (under, in back of, next to, in front of); quantitative concepts (more, most). His standard score of 59 and percentile rank of first percentile, indicated low receptive language skills.

271. On the expressive communication portion of the Preschool Language Scale, Student was observed during multiple speech sessions to name letters, use present progressive verb tense, and produce four word utterances. Student showed difficulty with plurals, what and where questions, naming described objects, answering questions logically, and using third person possessives. His standard score of 52 and percentile rank of first percentile, ranked him in the low expressive language skills.

#### July 9, 2018 IEP Team Meeting

272. Part two of the triennial IEP team meeting occurred on July 9, 2018 with Mother in attendance.

273. Ms. Shukla reviewed her occupational therapy report, and Mother questioned the work samples and whether Student required hand over hand assistance, which Ms. Shukla denied, stating that she did not work hand over hand with Student, and that during occupational therapy he worked independently.

274. Ms. Mehawej reviewed her language and speech assessment. Mother, Ms.



Mehawej and Ms. Espitia discussed whether Student talks about himself in the first or the third person, and whether he stutters, and if so what was the proper intervention. There was a discussion of Ms. Mehawej's proposed goal number 2: Mother asked to rewrite the goal to specify that Student would use first person language, instead of third person (e.g. "I go to sleep" instead of "[first name] go to sleep.") Milpitas agreed to rewrite the goal to so specify. The evidence did not establish that this revision occurred, and the final version does not reference speaking in the first person.

275. At the meeting, Mother stated that Student had hearing loss at birth and was given ear tubes. But, Ms. Mehawej did not suspect hearing loss, because the children she serves have "receptive language difficulties," and this can present with the same symptoms as hearing loss, including the need for repetition and redirection. She did not feel the need to refer Student for further hearing assessment, because she was under the impression that Student got a hearing screening every year.

276. Milpitas offered a primary eligibility category of multiple disabilities, comprising intellectual disability and orthopedic impairment. Milpitas offered Speech and Language Impairment as a secondary eligibility category. Mother's view was that Student's root problem was physical, i.e. orthopedic impairment, and that this was his most impactful problem.

277. Milpitas offered the same 14 proposed goals as had been originally stated in the April 24, 2018 draft. The sole exception was the math goal, number 4, which may have been added or revised after April 24. The IEP notes do not specify what the math goal had originally proposed. Mother asked for a revision to specify "learning abstract concepts of numbers." The IEP notes indicate that the math goal would be revised in accordance. It is not clear whether this revision ever took place. The final goal in its final form states that Student will demonstrate understanding of numerals 0-10 by verbally

responding to questions regarding number concepts, with 80 percent accuracy in four out of five trials.

278. Mother asked to add specific dates for the short term objectives dates to the goals; but such dates were sufficiently established already by inference, with reference to specific quarterly reporting periods.

279. The IEP team discussed placement options pertaining to Mother's request for a non-public school, which was rejected by Milpitas. Milpitas recommended a special day class with services "in a typical elementary school." There was no mention at the team meeting or in the Notes, of a moderate to severe special day class; Ms. Espitia, at hearing, explained that the 2017-18 class Student had attended, had been a kindergarten through second grade, "moderate to severe" special day class. Student would normally matriculate to first grade and that is what was being offered, although the words "moderate to severe" were not uttered.

280. At the time of this meeting, Ms. Espitia was expected to remain the teacher of this class. At the time, Milpitas was planning to move all the "moderate to severe" special day classes from Spangler to Weller, and to move the "mild to moderate" classes elsewhere. Milpitas explained at the IEP team meeting that "classrooms have been moved to Weller." Milpitas did not explain, that the classrooms that were being moved to Weller were the "moderate to severe" special day classes.

281. The July 9, 2018 IEP team meeting concluded with no change in the offer of placement or services that had first been made in the April 24, 2018 draft IEP document. The changes that were implemented from the April 24, 2018 draft to the July 9, IEP draft document, in addition to the notes pages reflecting the conversations on April 24, May 11, June 28, and July 9, were only in the verbiage relating to the "concerns of parent related to educational progress to be discussed at meeting," which in the final version was revised at some point to reflect Mother's medical, orthopedic, ambulation

and other concerns. Other verbiage was revised concerning the “goals that were necessary for Student to attain educational benefit”—the final version, added “cooperative play” and “physical therapy” in response to Mother’s stated concerns. Mother’s phone number may have been updated on July 9 from the April 24 draft. The math goal may have been updated. No other changes were made. The baselines, goals (other than math), and offer of placement and services remained unchanged.

282. On or after July 9, 2018, Ms. Espitia drafted a prior written notice document rejecting Mother’s request for a nonpublic school, and reiterating the major points of Milpitas’ offer. The prior written notice misstated the minutes of physical therapy that the IEP was offering, stating two times 40 minutes per week, instead of the actual offer which was two times 45 minutes per week.

283. On July 10, 2018, Mother asked for a copy of the IEP and asked about the move to Weller, asking: “[W]hy is [Student] moving to Weller for his first grade class? Please advise.”

284. On July 10, 2018, Ms. Crenshaw responded: “[Ms. Espitia’s] entire class will be shifting to Weller, not just [Student]. The District wants students not to move so often, so we are organizing classes according to strands. Weller and Burnett will have the more moderate strand and Spangler will have the milder SDC’s.” What Ms. Crenshaw was referring to with the words “more moderate” actually meant “more severe,” i.e. the moderate to severe special day classes were the ones that were moving to Weller.

285. On July 10, 2018, Ms. Espitia emailed to Mother a final version of the triennial IEP.

#### August 2018

286. On August 1, 2018, Ms. Crenshaw wrote a general letter to the parent community regarding the move of the moderate to severe special day classes to Weller, but the letter did not explicitly state that those were the classes that were being moved.

It said:

“your child's class has been moved to a different site. Our special education team has been reflecting on how to better support our students. One of the things we noticed is that students in special day classes tend to move schools approximately every two years. We would like to minimize these moves as much as possible so that our students get greater continuity, and have more opportunity to integrate in the school community. As such, we have clustered classes at different schools this year. While students will need to shift this year, it will be of greater benefit to children in the years to come.”

287. This general move of all moderate to severe special day classes to Weller, instead of decentralizing them in different schools, was intended to have the most vulnerable students not be moving schools from year to year. Milpitas therefore created “strands,” such that all the mild to moderate elementary classes for kindergartener through sixth grade moved to Spangler and all the moderate to severe classes (except one with an autism focus at another locale) moved to Weller. The intent was to have the “strands” housed in the same location to develop community and stability.

288. On August 1, 2018, Ms. Crenshaw wrote a prior written notice letter to Mother reiterating the July 9 offer, confirming that Milpitas was rejecting the nonpublic school option, confirming that Mother had waived the non-completed independent educational evaluations and confirming no offer of compensatory education. The letter, like the IEP itself, did not specify that the offered placement was in a “moderate to severe” special day class.

289. In August, 2018, Ms. Ciardella went out on leave. Ms. Espitia became the interim program manager for Milpitas' special education moderate to severe/autism programs, and stepped down from teaching Student's class.

290. On August 7, 2018 Mother wrote to CDE complaining about the lack of an offer of compensatory education, following the independent educational evaluations. On August 7, 2018, CDE wrote back saying the independent educational evaluations had been completed and discussed. Nothing further was required, and compensatory education was to be left to the IEP team.<sup>10</sup>

#### CURRENT SCHOOL YEAR 2018-19

291. August 16, 2018, was the first day of the current 2018-19 school year, Student's first grade. Because Ms. Espitia was no longer teaching, Student's teacher at the beginning of the school year was Simatra Hirsiger. Student matriculated from Ms. Espitia's prior moderate to severe kindergarten through first grade special day class at Spangler, over to the moderate to severe kindergarten through first grade special day class at Weller.

292. On August 17, 2018, CDE wrote to both parties noting that the June 28 and July 9, 2018 IEP's had resulted in no offer of compensatory services, as confirmed by Milpitas' August 1, 2018 prior written notice. The CDE analyst wrote back, strongly recommending that Milpitas and Mother meet to determine reasonable compensatory services based on the independent educational evaluation assessments. CDE stated that if Milpitas and Mother were unable to reach an agreement by August 31, 2018, CDE

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<sup>10</sup> Later, on August 17, 2018, CDE altered this stance and stated that if no other resolution occurred by August 31, 2018, CDE itself would determine compensatory services owed.

would itself use the recommendations in the independent educational evaluation assessments to determine reasonable compensatory services.<sup>11</sup>

#### August 24, 2018 IEP Team Meeting

293. Another IEP team meeting occurred on August 24, 2018, to review the independent educational evaluations and the offer of FAPE. There was further discussion. Milpitas' offer of FAPE did not change.

294. Mother observed the Weller classroom on August 29, 2018. At this observation, Ms. Espitia told Mother that the placement was "moderate to severe." According to all the evidence at hearing, this was the first time that the words "moderate to severe" had been stated to Mother.

295. Mother did not like the classroom she observed. Mother sent several emails to Milpitas staff on August 29 and 30, 2018, all challenging the moderate to severe placement, the assessments, asking for all "assessment materials," challenging whether parental input had been given to the assessors, asking for the assessors' qualifications, and asking for information about the placement in the moderate to severe class.

296. On August 29, 2018, Mother wrote another email challenging the triennial assessments, alleging that parental input was not requested prior to assessments, and asking why parent was not provided with assessment copies in advance of the IEP team meetings. Mother, correctly, alleged that the language and speech assessment was

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<sup>11</sup> This never occurred. During the pendency of this due process hearing, on November 27, 2018, CDE informed the parties that the corrective action required that independent educational evaluations be completed, and discussed by an IEP team. Since those events occurred, nothing further was required. By letter dated December 6, 2018, CDE closed its investigation file.

conducted without her input. She asked how the assessment requirements were determined and which areas of language and processing were assessed. She raised concerns about the current classroom. Finally, she alleged that Student came home on the previous day, August 28, 2018, with bruising. She complained that her child was six years old and not able to talk.

297. Mother, Ms. Espitia and the principal met at Weller on August 29, 2018. Mother expressed concern for Student's safety. Milpitas undertook an investigation about the allegations of bruising. Ms. Espitia came to the conclusion that there was no bruising, just red paint from art activities. Mother disputed this. At some point in response to the bruising allegation, Mother called police who came to do an investigation. The police report did not substantiate allegations of abuse or neglect. Ms. Espitia felt no need to investigate further. The officer told her he could find no evidence of bruising.

298. On August 29, 2018 at 6:38 PM, Ms. Crenshaw notified CDE of the bruising allegations and Ms. Espitia's conclusion that paint had been on Student's hands. Ms. Crenshaw stated to CDE that although Milpitas would proceed with an IEP team meeting to discuss Mother's concerns about the placement, Milpitas had also determined to file for due process.

299. On August 30, 2018, Mother wrote an email challenging the placement. She wrote that the Weller classroom environment was not the right fit for Student. She claimed he was a "mild child," not moderately to severely disabled. She also claimed that Student had been hit, and that he experienced violent behavior taking place towards him by another student. She asked that he be removed immediately. Ms. Crenshaw responded that Milpitas would investigate the allegations, and would schedule another IEP team meeting to discuss placement.

300. On August 30, 2018, Mother wrote a list of concerns, including that

Student cannot walk; is not being provided with the necessary physical therapy; is unable to process directions. Mother also questioned why Student was being marked as an English language learner. Mother also questioned the assessments and complained that she had not seen any academic assessment report. Mother also complained that Student's present levels were incorrect, and that no behavior recommendations were being made. With regard to his adaptive living skills, Mother complained that Dr. Cole did not contact her.

September 2018

301. Student continued to attend the Weller placement despite the parties' disputes. His protocol for getting onto and off from the bus changed in the Weller placement during 2018-19. At Weller, he was taken to and from the bus via stroller, then used a lift to get onto and off the bus, and was strapped in while on the bus. This was different from the routine during the 2017-18 school year. Although both Ms. Nakaji and Dr. Cole's assessments had specifically recommended minimizing the stroller entirely, the opposite occurred. The change was made to ensure Student's safety while getting on and off the bus. Conversations concerning this occurred at the beginning of the 2018-19 school year amongst the teacher Ms. Hirsiger, the principal Padilla, and Ms. Crenshaw, who informed Mother. No IEP team meeting reflected this discussion.

302. On September 5, 2018, Ms. Espitia notified Mother that the Weller principal informed her that Student had a scratch on his nose. Mother wrote an email asking for further information on what had happened. Ms. Espitia investigated. She learned that Student's one-to-one aide had fallen on top of Student.

303. Ms. Hirsiger left Milpitas' employ on September 12, 2018. Milpitas hired a long-term substitute teacher for the Weller moderate to severe special day class while it searched for a replacement.



## September 21, 2018 IEP Team Meeting

304. On September 19, 2018, Milpitas scheduled a further IEP team meeting for September 21, 2018. The September 21, 2018 IEP meeting was at Mother's request, to discuss Student's placement in a "moderate to severe" special day class. Mother expressed that Student was not a behavioral concern and in her view, the other students in the moderate to severe class at Weller were too aggressive. She also wished for Student to be more challenged, given her view that Student was higher functioning than the peers in that class.

305. At that meeting, Milpitas for the first time in this evidentiary record presented a clear explanation of the difference between a mild to moderate and a moderate to severe special day class. They provided Mother with a chart that showed the continuum of placements from general education, mild to moderate, moderate to severe, then to county programs, nonpublic school and residential treatment, going from least to most restrictive. Milpitas also changed its offer of placement, to move Student to a different set of grade levels, to the moderate to severe grades one through three classrooms at Weller, rather than Kindergarten through first grades.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>12</sup>

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

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<sup>12</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>13</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

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<sup>13</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. In a recent unanimous decision, the Supreme Court addressed and clarified the *Rowley* standard in *Andrew F. ex rel. Joseph F. v. Douglas County School. Dist. RE-1* (2017) (580 U.S. [137 S.Ct. 988, 1000–1001; 197 L. Ed. 2d 335]. The Supreme Court in *Andrew F.* stated that school districts must "offer a cogent and responsive explanation for their decisions" and articulated FAPE as that which is "reasonably calculated to enable a

child to make progress appropriate in light of the child's circumstance." (*Ibid.*) *Andrew F.* provides that an IEP must be reasonably calculated to enable "progress appropriate in light of the child's circumstances." (*Id.* at p. 999.) The Court recognized that this required crafting an IEP that required a prospective judgment, and that judicial review of an IEP must recognize that the question is whether the IEP is reasonable, not whether the court regards it as ideal. (*Ibid.*) Additionally, the Court stated, "for a child fully integrated in the regular classroom, an IEP typically should, as Rowley put it, 'be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" (*Id.* at p. 999 [citing *Rowley, supra*, 458 U.S. at pp. 203-204.]) The Ninth Circuit Court of Appeals recently held that *Andrew F.* did not change, but simply clarified *Rowley*. (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535; *K.M. v. Tehachapi Unified School Dist.* (E.D. Cal. Apr. 5, 2017, 1:15-cv-001835 LJO JLT) 2017 WL 1348807, \*\*16-18.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) 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).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer ex rel. Schaffer v. Weast* (2005) 546 U.S. 49, 62; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

ISSUES 1 AND 2: DID THE APRIL 24, 2018 IEP, AS AMENDED ON MAY 11, 2018, JUNE 28, 2018, JULY 9, 2018, AUGUST 24, 2018, AND SEPTEMBER 21, 2018, OFFER STUDENT A FREE AND APPROPRIATE PUBLIC EDUCATION IN A LEAST RESTRICTIVE ENVIRONMENT IN LIGHT OF STUDENT'S NEEDS, CIRCUMSTANCES, AND PROGRESS, SUCH THAT IT MAY BE IMPLEMENTED WITHOUT PARENTAL CONSENT FOR THE 2018-2019 SCHOOL YEAR?

6. Milpitas contends that it timely convened IEP team meetings and reasonably made efforts to secure parental participation; that its offer of a FAPE in the IEP's dated April 24, 2018, as amended through September 21, 2018, would have conferred educational benefit to Student, that its assessments underlying the offer of placement and services were appropriate; and that its offer of services and placement in the Weller moderate to severe program, with the proposed related services, was reasonably calculated to confer a FAPE.

7. Mother had numerous contentions regarding Milpitas' assessments and FAPE offer. With respect to the assessments, Mother believed that Student had vision problems, auditory processing, and other auditory deficits, and "hidden disabilities" for which he has not been properly assessed. Mother used varying terminology to describe her concerns, including "auditory cognitive deficits," "cognitive needs in regards to auditory processing," and "auditory comprehension or auditory processing deficits." In occupational and physical therapy, she believed Student had "motor planning" and "planning and idea development" deficits, for which he was not properly assessed. With regard to eligibility, Mother agreed that Student is intellectually disabled, but based upon Dr. Schilling's diagnosis, she felt his intellectual disability was mild, not moderate or severe. Mother did not agree that Student's proper eligibility category was "multiple disabilities," arguing that his orthopedic impairment was the driver of all his other apparent deficits. Mother disputed whether Student was properly served in the past and, as it relates to the current dispute, felt that the improper past treatment led to a

misapprehension as to his proper eligibility category. She believed that gross motor deficits can affect cognitive functioning, such that Student's cognitive deficits are attributable to his orthopedic impairments that have not been appropriately addressed through appropriate physical and occupational therapy. Thus, she believed his primary eligibility category should be orthopedic impairment. Mother disagreed that Student was an English language learner. Mother disputed the proposed placement of Student into a "moderate to severe" special day class. Mother also argued that Milpitas' proposed baselines were inaccurate and its proposed goals unattainable.

#### PARENTAL PARTICIPATION

8. If the parent or guardian of a child who is an individual with exceptional needs refuses all services in the IEP after having consented to those services in the past, the local educational agency shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).) There are two parts to the legal analysis of whether a school district offered a pupil a FAPE: whether a district has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate. (*Rowley*, at 206-07.) In a district-filed case, the district has the burden of persuasion to both procedural and substantive compliance with the IDEA, by a preponderance of the evidence. (*Schaffer ex rel. Schaffer*, *supra*, 546 U.S. at p. 62; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

9. Parents are required and vital members of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, § 56341, subd. (b)(1).) The IEP team is required to include one or both of the student's parents or their representative. (34 C.F.R. § 300.321(a).) The IEP team must consider the concerns of the parents for enhancing their child's education. (20 U.S.C. § 1414 (d)(3)(A)(ii) [during development of the IEP], (d)(4)(A)(ii)(III) [during revision of an IEP]; Ed. Code, § 56341.1, subds. (a)(2) [during development of an IEP],

(d)(3) [during revision of an IEP], & (e) [right to participate in an IEP].)

10. The parents of a child with a disability must be afforded an opportunity to participate in IEP team meetings. (34 C.F.R. § 300.501(b); Ed. Code, § 56341, subd. (b), 56341.5, subds. (a) & (b).) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan." (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate, including (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322 (a); Ed. Code, § 56341.5, subds. (b) & (c).)

11. A district may hold an IEP team meeting without a parent in attendance only if the district is "unable to convince" the parent that he or she should attend. (Ed. Code, § 56341.5, subd. (h).) If a district holds a meeting without the parent in attendance, it must "maintain a record of its attempts to arrange a mutually agreed-upon time and place" such as detailed records of telephone calls made or attempted, or copies of correspondence sent to the parent, visits, and the results of these measures. (34 C.F.R. § 300.322(d); Ed. Code, § 56341.5, subds. (g) & (h); *Shapiro ex rel. Shapiro v. Paradise Valley Unified School Dist. No. 69* (9th Cir. 2003) 317 F.3d 1072, 1077–1078.)

12. An agency cannot avoid its affirmative duties under the IDEA by blaming the parents. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047 ("[P]articipating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents."))

13. When confronted with the situation of complying with one procedural requirement of the IDEA or another, the agency must make a reasonable determination

of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. In reviewing an agency's action in such a scenario, the agency is allowed reasonable latitude in making that determination. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1046 ("*Doug C.*").)

14. Under the facts presented here, Milpitas committed a procedural violation when it held two IEP team meetings in Mother's absence. *Doug C.* unequivocally establishes, on similar facts, that Milpitas' convening of the April 24, 2018 IEP meeting without Mother violated both the letter and the intent of the IDEA. Here, as in *Doug C.* the central issue is whether Milpitas' efforts to include Mother in the IEP meetings were sufficient to meet the requirements of the IDEA. A close review of the events leading up to the IEP meeting is therefore critical. (*Id.* at p. 1040.) Milpitas' central argument, like that in *Doug C.*, is that it had to proceed in parent's absence because of the impending annual deadline. Here, as in that case, even assuming that the annual deadline should somehow trump parental participation, the argument fails on the facts of this case. (*Id.* at p. 1045.)

15. On March 28, 2018, Ms. Espitia and Mother's emails agreed to hold Student's annual IEP team meeting on April 24, 2018. Milpitas' vigorous protestations to the contrary, the evidence unequivocally established that on April 17 and 18, 2018, Milpitas' attorney cancelled the April 24, 2018, IEP team meeting due to the then-current litigation schedule. Mother therefore on April 17 and 18, 2018, reasonably understood that the April 24 IEP team meeting was off of her schedule. When, on April 19, a Thursday, Milpitas learned that Mother had dismissed the pending litigation against it, it sought to re-instate the April 24 IEP meeting date, the following Tuesday, and sent the first formal meeting notice to Mother on April 19. This notice was insufficient. The law requires the IEP team meeting to be scheduled at a mutually agreed upon time and place, and that the district give the parents notice of the IEP team



meeting early enough to ensure an opportunity to attend. A unilateral notice on Thursday April 19 for the following Tuesday April 24 did not suffice.

16. Mother, initially, declined to attend, and an outright refusal might have given Milpitas the legal right to proceed in Mother's absence. (*K.D. ex rel. C.L. v. Dept. of Educ., Hawaii* (9th Cir. 2011) 665 F.3d 1110, 1124-25. [If a parent refuses to attend or is entirely unresponsive to the agency's requests to meet, the agency has a duty to move forward with the IEP process.]) However, Mother then asked for information and clarification as to the purpose of the meeting, and thus her initial declination cannot be interpreted as unresponsiveness, nor an outright refusal to attend. In fact, on April 20, 2018, Mother specifically stated she was "not refusing anything."

17. Thus, when Milpitas elected to proceed on April 24, 2018, in Mother's absence, it did so at its own risk. Milpitas' actions cannot be interpreted as being "unable to convince" Mother to attend, as the law requires before proceeding in a parent's absence. Milpitas' closing brief argued that Mother's responses indicated resistance or open hostility to the IEP process, that Mother was biased against Milpitas, and that she had no intention of attending an annual IEP team meeting before the annual due date. Milpitas contends that Mother resisted attempts to hold the annual review, repeatedly objecting to any further IEP review that did not involve resolving her disputes over the prior year's unsigned annual IEP. Milpitas further contends that it was evident that Mother was singularly focused on receiving an offer of services from the independent educational evaluation reports presented on April 6. Milpitas further argues that it was not reasonable for Mother to expect an offer without continuing the IEP process to review all completed independent educational evaluation assessments, along with the district reevaluations in his triennial review. Milpitas interprets Mother's emails as repeated obfuscation of Milpitas' attempts to comply with its procedural obligations to conduct the annual and triennial IEP's.

18. The arguments do not withstand scrutiny. First, both Mother and Milpitas were unwilling to change their views on whether the independent evaluation should be considered separately from, or together with the annual or triennial IEP meetings. CDE determined this was a team decision, specifically including Mother, but it was Milpitas that unilaterally determined to combine them, over Mother's repeated and strenuous objections. Although the parties were talking at cross-purposes, it seems reasonably clear that Mother was unaware or confused that, in order to update old outdated goals, a parent would by necessity have to agree to new ones. Milpitas therefore wanted to proceed with the annual and triennial, but the parties did not understand each other. Mother was understandably confused by Milpitas' attempts to move forward to an annual and triennial IEP, when no offers had been made in response to the independent educational evaluations. Mother's confusion about the "resolution" of the independent educational evaluations, the process for "updating" old outdated goals, and the interplay of the three IEP's (independent educational evaluation, annual and triennial) all in play at this time, was understandable. Her requests for clarification of the purpose of the annual were reasonable. Moreover, as an unrepresented parent, Mother's interpretation of Milpitas' counsel's April 17 and 18 emails as a cancellation of the April 24 IEP team meeting was reasonable. When Milpitas on April 19 and 20 learned of the dismissal of the April 24 hearing date, Milpitas attempted to reinstate the April 24 IEP date on only three business days' notice.

19. Next, Milpitas repeatedly served untimely meeting notices, accompanied by a demand for Mother's compliance, as reflected in the March 22 notice of a March 26 meeting, the April 19 notice of the April 24 meeting, and the May 7 notice for May 11. These events cannot be interpreted as Mother's obfuscation of Milpitas' attempts to comply with its procedural obligations.

20. Moreover, a parent's "bias or hostility" is not relevant to whether Milpitas

itself complied with its own obligations under the IDEA. The law could not be clearer that, under these facts, moving ahead with the April 24 and May 11 IEP's in Mother's absence was procedurally inappropriate.

21. Milpitas cites to the OAH decision in *Parents On Behalf of Student v. Sacramento City Unified School Dist.*, Cal.Ofc.Admin.Hrngs. Case No. 2013060562, arguing that case found "no procedural or FAPE violation when the IEP team convened and proceeded with an IEP meeting when a parent refused to respond or reply, used repeated delay tactics, and effectively refused to attend an IEP meeting." The case is distinguishable. First the hearing officer in that case found that parent's actions did amount to frustration of the IEP process. No such finding is appropriate here, where both parties were steadfast in their respective positions regarding how to bring the independent educational evaluation review process to a conclusion; and Mother's position that they should be segregated from the annual and triennial was no less inherently reasonable than Milpitas' position. Second, the cited OAH case found *against* the school district with respect to one of the IEP meetings at issue, holding that, *despite an unreasonable parent*, that district failed to give adequate notice of an IEP meeting and as a result committed a procedural violation. Lastly, that case was a Student-filed case in which the parent rather than the district bore the burden of proof. In this district filed-case, the burden is on Milpitas to prove its own procedural and substantive compliance, which, on this point, it did not meet.

22. Moreover, there was no reasonable justification for Milpitas' insistence on the April 24, 2018 date for the annual IEP team meeting. Although Milpitas repeatedly relied on "compliance deadlines" to justify its actions, there was no operative CDE deadline that necessitated going forward with the IEP team meeting on April 24, 2018. At hearing, Ms. Ciardella reiterated, but was unable to explain, what was the operative "compliance deadline," given that the CDE deadline of March 30 had passed, that an IEP

team meeting to review three of the independent educational evaluations had occurred on April 6, and that the CDE investigation had, in any case, concerned only the independent educational evaluations and not the annual IEP date. At hearing, Ms. Crenshaw clarified her viewpoint that although CDE had never stated a compliance deadline for the annual and triennial, Ms. Crenshaw was treating the annual and triennial dates as urgent. There was, thus, no actual CDE-imposed deadline justifying Milpitas' insistence on the April 24, 2018 date for the annual IEP team meeting.

23. Even if there had been, *Doug C.* addressed the question of what a public agency must do when confronted with the difficult situation of being unable to meet two distinct procedural requirements of the IDEA. Here, as there, the reasonable course of action is the one that promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. Here, as in *Doug C.*, given the vital importance of parental participation in the IEP creation process, the decision to prioritize strict deadline compliance over parental participation was not reasonable. (*Doug C.*, *supra*, 720 F.3d at p. 1046.)

24. The situation is even clearer with respect to the May 11, 2018 IEP team meeting. The May 11 meeting notes reflect that Mother wanted to reschedule to June. At hearing, Ms. Crenshaw testified that Milpitas wanted to comply with a May 11 "deadline" for the triennial, but she did not establish what was the genesis of that date. Ms. Crenshaw also stated that Mother did not respond to the inquiries about whether she would be participating in the May 11 IEP team meeting, and neither confirmed nor denied if she would come. Ms. Ciardella testified that Milpitas had not received anything definitive from Mother about her attendance on May 11 or non-attendance. Ms. Ciardella was "not sure we were aware where Mom was" at this time, but that "yes we were aware there was going to be an absence." And Ms. Crenshaw testified that Milpitas did not know where Mother was, and did not get confirmation from Mother regarding

the May 11, 2018 IEP team meeting date.

25. Their testimony is simply not credible, given the clarity of the record of the May 8, 2018, at 2:08 p.m., email traffic, which established that Ms. Ciardella was well aware that Mother was not available to participate on May 11. Moreover, May 11 was offered by Ms. Ciardella as an alternative to the April 24 date, but Mother never agreed to that date. The first notice of the May 11 meeting was sent by Ms. Ciardella on May 7, *after* Mother told Milpitas about an upcoming out-of-state absence. Although the date of the absence was at first unclear, Mother on May 8 clarified beyond dispute that she would be out of town and unable to attend. On May 8 at 2:08 PM, Ms. Ciardella responded "The district understands you are not in town. Would you like to participate in the 5/11 triennial via phone?" On May 10, 2018 at 9:03 AM, Mother wrote to Ms. Ciardella and others, stating that she could not schedule any meeting for the next couple of weeks. Thus, Milpitas was well aware that Mother was not available for the May 11 meeting.

26. Here, as in *Doug C.*, under the IDEA, the attendance of a parent must take priority over other members' attendance. An agency cannot exclude a parent from an IEP meeting in order to prioritize its representatives' schedules. (*Id.* at p. 1046-47.)

27. Milpitas argues that its re-convening of IEP team meetings on June 28 and July 9 absolved it of having proceeded in the absence of parent. *Doug C.* shows that this argument is untenable. "[W]here an agency violates the IDEA by producing a new IEP without the participation of the child's parents, "[a]fter-the-fact parental involvement is not enough" because the IDEA contemplates parental involvement in the "creation process." (*Id.* at p. 1047 [citing *Shapiro ex rel. Shapiro, supra*, 317 F.3d at p. 1078].)

28. At hearing, Milpitas attempted to prove that Mother was in town on April 24, and should have been more available. However, the burden in this district-filed case

was not Mother's, to establish that her unavailability was reasonable. It was Milpitas' responsibility to ensure that, no matter how Mother acted, Milpitas itself sought to ensure parental participation to the maximum extent possible, and to proceed in parent's absence only when it could prove that it had no other choice. Milpitas simply failed to meet its burden.

29. Moreover, the law requires that if a district holds a meeting without the parent in attendance, it must maintain a record of its attempts to arrange a mutually agreed-upon time and place, such as detailed records of telephone calls made or attempted, or copies of correspondence sent to the parent, visits, and the results of these measures. (34 C.F.R. § 300.322(d); Ed. Code, § 56341.5, subs. (g) & (h); *Shapiro ex rel. Shapiro, supra*, 317 F.3d at p. 1077–1078.) Here, Milpitas' documentation of the telephone numbers it used to try to reach Mother on April 24 and May 11 is completely inadequate to sustain its burden of proof that it complied. Milpitas did not keep a log, could not confirm what numbers it called, and could not establish that its databases contained accurate contact information.

#### CLEAR WRITTEN OFFER

30. An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional 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 education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.) When appropriate, the IEP should include short-term objectives that are based on the child's present levels of academic achievement and functional performance, a

description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(iii); Ed. Code, § 56345, subd. (a)(3).) 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. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) and (i).)

31. A school district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decision based on it. (*Id.*) In *Union*, the Ninth Circuit observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Ibid.*)

32. Here, the offer was not clear. First, the document encompassing the April

24, May 11, June 28, and July 9 offer contained 14 proposed goals, followed by 12 additional pages, that also contained the heading "Annual Goals and Objectives" and were written in the same format as the 14 proposed goals. However, these additional 12 goals pages were clarified at hearing as not being goals at all. They were in fact merely progress updates on old goals. This written offer of goals is confusing and unclear.

33. Next, the physical therapy and occupational therapy minutes are unclear, given the inconsistencies in the offer in the notes, and the dates of service stated on the services grid. And, the offer in the IEP was for 45 minutes twice a week, but Ms. Espitia's prior written notice, written on or about July 9 to reiterate the offer, stated 40 minutes twice weekly, an amount that had never been offered.

34. Next, the subsequent August IEP did not change or update the offer, but the final September IEP did. The September IEP, for the first time, delineated the offered placement as the "moderate to severe" special day class, and contained a full discussion of the continuum of placement options. However, it did not restate any baselines, goals, services or accommodations. Thus, to glean the offer, one must parse the more than 40 pages comprising the August 24, May 11, June 28, and July 9 meetings (ignoring the stray 12 pages of goals mentioned above). One must then ignore the August document, which did not change the offer. Finally, one must understand the September IEP, as revising the final and actual offer of placement, but leaving the baselines, goals, accommodations and related services unchanged.

35. Moreover, the genesis of the final placement offer renders it inherently unclear. Milpitas always intended to offer Student a moderate to severe special day class, and in fact placed him in one from kindergarten onwards. But it never uttered the words "moderate to severe" to Mother until she visited Weller in August 2018. These specific words are, in this context, important. Milpitas used the terminology to indicate important distinctions in the curriculum (the Unique curriculum was used only in



moderate to severe special day classes); the severity of the students' needs; and the credential that was required to teach them. These facts would be important to render the IEP offer sufficiently clear for a parent to understand it, and to make an intelligent decision based on it.

36. Until the August meeting, Milpitas did not explicitly state that Student needed a moderate to severe placement. Thus, no IEP for Student during the relevant time period referenced his placement, program, or class as "moderate to severe," not even in the Notes, until the IEP amendment meeting on September 21, 2018. As Ms. Crenshaw specifically testified, "we do not come out and say it." The closest the subject was broached was at the July 9 meeting, when Milpitas explained that "classrooms have been moved to Weller." What Milpitas did not explain was that only the "moderate to severe" classes were being moved to the Weller school campus.

37. On July 10, Ms. Crenshaw responded to Mother's inquiry about the move, saying "we are organizing classes according to strands. Weller and Burnett will have the more moderate strand and Spangler will have the milder SDC's." What Ms. Crenshaw did not say was that "more moderate strands" really meant "moderate to severe." By avoiding an accurate description of the class as "moderate to severe," Milpitas denied Mother her parental participation rights.

38. Ms. Crenshaw's August 1, 2018 general letter to the parent community also did not state the pertinent terminology. Although perhaps stemming from kindness and sensitivity, these communications were euphemistic and did not clearly impart information that Mother was clearly entitled to be told, about the severity of Student's needs.

39. Milpitas, very unpersuasively, argues that the single reference in Ms. Mehawej's July 9 assessment to the terminology "moderate to severe" fulfills Milpitas' obligation to make a clear offer of FAPE. It did not.

## OFFER NOT BASED ON THE ASSESSMENTS

40. The law specifically provides that the IEP team must consider the assessments in determining the child's educational program. (34 C.F.R. § 300.324(a)(1)(iii).) Here, however, the baselines, goals (with the possible exception of the math goal), related services and accommodations were completely generated in draft form, prior to the April 24, 2018 IEP team meeting, and not significantly revised thereafter. While creating a draft IEP is generally permissible, two crucial assessments were not completed until months later. The evidence did not establish that the team considered these two assessments in determining Student's educational program.

41. Specifically, Dr. Cole's psycho-educational assessment was not completed in draft form until the June 28, 2018 IEP team meeting, and was not finalized until the July 9, IEP team meeting. The only consideration of the psycho-educational report, by the IEP team, concerned eligibility categories. No evidence suggested that Dr. Cole's report was considered with respect to placement, baselines, goals, services or accommodations.

42. Ms. Mehawej's language and speech assessment was not completed until the July 9 IEP team meeting. The language and speech goals were written months prior to the assessment, and not significantly revised thereafter. No alleged revisions reflected that the team gave any consideration to the July 9 assessment report.

43. In sum, after the April 24 IEP team meeting, the minor changes that were made to the IEP document did not reflect that the two assessments completed three months later in July, were considered in determining Student's educational program. Although the assessments were reviewed at the June and July team meetings, Milpitas offered no persuasive evidence that the IEP team actually considered these assessments in determining Student's educational program, as the law requires.

44. Furthermore, no health assessment ever occurred, and no evidence established how the IEP's present levels in health were developed.

#### SOME ASSESSMENTS WERE NOT APPROPRIATE

45. A local educational agency must assess a special education student in all areas of suspected disability, including if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56320, subd. (f).)

46. 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).)

47. 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).)

48. 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.

49. The law specifically requires that assessors use a variety of assessment tools and strategies to gather relevant information, including input from parents. (20 U.S.C. § 1414 (b)(2)(A) & (c)(1)(B); Ed. Code, § 56381, subd. (b).)

50. 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, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031–1033.)

51. The following improprieties in Milpitas' assessments are sufficient to establish that it has failed to meet its burden of proof concerning the procedural and substantive propriety of its offer of FAPE. The most important deficits are noted here. First, Ms. Chitre's physical therapy assessment report stated inaccurate present levels regarding Student's independence and need for assistance. The report was never revised to clarify the levels of adult assistance that Student required, although Ms. Chitre acknowledged the inaccuracies, and stated to Mother that she would do so. As a result, the proposed physical therapy goals in the IEP were also ambiguous in the level of adult assistance Student required.

52. Second, Ms. Mehawej assessed Student's speech and language skills without seeking parental input. Ms. Mehawej never reached out to Mother for any input other than an inquiry into the use of Dari in the home. Ms. Mehawej justified this

omission by the time constraints she was under, purportedly due to Student's extended absence, and the purported urgency of completing the assessment before the July 9, 2018 IEP team meeting. But, the law specifically required the assessors to use a variety of assessment tools and strategies to gather relevant information, including input from parents. (20 U.S.C. § 1414 (b)(2)(A) & (c)(1)(B); Ed. Code, § 56381, subd. (b).) The justification is unpersuasive, particularly Ms. Mehawej's "time constraints" related to the July 9 IEP team meeting, for which the evidence established no deadline. The lack of parental input rendered the assessment fatally flawed.<sup>14</sup>

53. Milpitas argues that Mother interfered with the triennial assessment process. This argument is unpersuasive where, as here, Milpitas chose to assess without parental input, rather than to file against Mother for due process with OAH, to enforce its right, and duty, to appropriately assess Student.

54. Third, Dr. Cole's psycho-educational assessment was woefully inadequate with regard to Student's adaptive needs. 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 assessment plan specified that Student's "adaptive skills," specifically including "how [Student] takes care of personal needs at home, school and in the community," were to be assessed by the teacher and the school psychologist. On February 22, Mother specifically inquired about assessing Student's life skills and toilet

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<sup>14</sup> Given the other significant procedural errors noted here in Milpitas' assessments, this Decision does not determine the legal sufficiency of Dr. Cole's, Ms. Shukla's and Ms. Chitre's attempts to reach Mother, and their decisions to proceed with their assessments without her input.

training. On February 23, 2018, Ms. Crenshaw responded that Milpitas would look into Student's life skills in its adaptive behavior assessment.

55. Because Ms. Espitia did not assess for adaptive skills, Milpitas' sole adaptive skills assessment was performed by the school psychologist Dr. Cole. Because Ms. Espitia described Student's functional life skills and toileting needs to Dr. Cole, Dr. Cole should have examined Student's services needs in the area of functional life skills.

56. However, Dr. Cole's inquiry into Student's adaptive skills was cursory. The only adaptive functioning assessment Dr. Cole conducted was the Adaptive Behavior Assessment System teacher rating form. Several areas of concern were noted, but toileting was not even mentioned; nor did Dr. Cole perform any other adaptive skills assessment. Dr. Cole's lack of thorough inquiry into Student's adaptive needs, may be explained by her view that eligibility, as opposed to services, "was the referral question." The assessment was not appropriate in the area of adaptive skills.

57. Partly as a result of Milpitas' failure to appropriately assess Student's adaptive needs, and partly as a result of its failure to focus on Ms. Nakaji's recommendation that lack of toileting ability was one of Student's greatest areas of need, Milpitas offered Student no goals or accommodations to address toileting, an obvious and crucial area of need.

58. Fourth, Milpitas did not conduct a health assessment pursuant to the assessment plan it generated and provided to Mother. The assessment plan specified that a school nurse would assess Student's health. Milpitas never even attempted to have a school nurse assess Student's health needs related to his education. The IEP's at issue contained a "present level" concerning Student's health, but were silent as to who wrote it, or on what data it based the present level.

59. Milpitas attempted to shift the burden of providing relevant health information onto Mother, arguing that Dr. Cole asked Mother to sign a medical release

form to contact Student's doctors about his health conditions, and that Mother did not respond to the email. Milpitas cites no law establishing that Mother's refusal to share confidential medical information absolved Milpitas of performing the health assessment described in the assessment plan.

60. The IEP document states that Student had passed a "hearing date" of December 7, 2017 and a "vision date of" of March 27, 2018. No witness could establish to what these entries referred, or what they meant.

61. Student's vision and hearing abilities were questioned by numerous assessors, justifying further inquiry which never occurred, despite the undone "health assessment" on the plan. Ms. Selber noted that, at school, Student exhibited problems in vision and was frequently seen squinting. He also exhibited problems at school with regard to hearing. Ms. Espitia's responses to Ms. Shukla's assessment indicated problems in vision, hearing, and other sensory concerns. Ms. Shukla also noted that Student would sometimes cover his eyes, lean close to his desk, and squint. Both Ms. Shukla and Ms. Espitia treated these as behavioral responses to non-preferred tasks and felt no need to follow up with further sensory assessments. Their presumptions were unexplained and unpersuasive.

62. Similarly, Dr. Cole reported Mother's concern that Student suffered from conductive hearing loss. However, Dr. Cole did not feel the need to refer Student for any further assessment. She saw no evidence that hearing loss impacted Student, as he had passed his last hearing screening. Ms. Mehawej did not suspect hearing loss, because the children she serves have "receptive language difficulties," and this can present with the same symptoms as hearing loss, including the need for repetition and redirection. She did not feel the need to refer Student for further hearing assessment, because she was under the impression that students get a hearing screening every year. Dr. Cole acknowledged that hearing loss, if it existed, might impact an ability to understanding

directions. Thus, in the absence of any evidence that Milpitas conducted a hearing screening for Student, this area of functioning should have been assessed, especially pursuant to the assessment plan regarding health.

63. Finally, the testimony concerning auditory concerns was inconsistent and unreliable. Every Milpitas witness, from Dr. Cole to Ms. Espitia to Ms. Mehawej and others, had a different definition of auditory processing, and of whose responsibility it was to suspect or assess for it. The evidence established that central auditory processing disorder should not be assessed prior to age eight, and thus there was no procedural violation in failing to specifically assess for central auditory processing disorder. However, the definitions presented by Dr. Cole, Ms. Mehawej, and Ms. Espitia concerning "central auditory processing disorder," "auditory processing," "processing," "poor cognition," "sensory processing," and "receptive language deficits" were very inconsistent, as was each of their interpretations of which professional's job it was to suspect and recommend further assessment for auditory concerns. Dr. Cole attributed Student's deficits to poor cognition, rather than poor processing, but she was unable to convincingly explain how, or if, these distinctions can be separated in an individual who may suffer from a combination of deficits. Overall, because she was convinced of Student's low cognition, she did not suspect that other deficits were also in play or could be discerned, and thus she did not explore them.

64. In sum, although Student may have been too young to conduct an assessment specifically for "central auditory processing disorder," Milpitas did not establish that his hearing or vision were ever screened. The failure to assess for health pursuant to the assessment plan was a procedural violation.<sup>15</sup> Nor, if Milpitas felt

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<sup>15</sup> Milpitas' offer the prior year, on July 5, 2017, to conduct assessments in audiology and hearing, to be conducted by an audiologist, to which Mother never



thwarted by Mother in its attempts to assess, did it ever seek the available remedies through the OAH due process system.

#### SUBSTANTIVELY NOT AN OFFER OF FAPE

65. Given the many procedural deficits noted above, it is unnecessary to review every respect in which the IEP was substantively appropriate or inappropriate. The most notable substantive errors are described here, and render Milpitas unable to meet its burden of proof.<sup>16</sup>

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consented, did not fulfill Milpitas' obligations pursuant to the February-March 2018 assessment plan.

<sup>16</sup> The most important problems are noted such that District cannot sustain its burden of proof. It should be noted that the eligibility category of multiple disabilities, disputed by Mother, appears correct. In any event, the IDEA's emphasis is not on the eligibility category. And, the categorization of Student as an English language learner also appears correct, although District should clean up its recordkeeping with respect to which language other than English is spoken in the home. As attested to by Ms. Espitia, District had a duty and did not err by categorizing Student as an English language learner. And, despite Mother's contention, no behavioral goal or services were warranted by Ms. Devore's report. Finally, given the severity of Student's needs, it does appear that a moderate to severe placement would have been the appropriate placement, had this been explicitly stated and offered in a procedurally compliant IEP document. Finally, Milpitas established good reasons for not offering a nonpublic school, and for not exploring assistive technology at the time. In short, many aspects of District's offer were substantively appropriate. However, the material deficits, described here, defeat District's burden of proof.

66. First, the IEP should have offered Ms. Selber's classroom-specific recommendations. Milpitas discounted Ms. Selber's report as being solely clinical, and thus failed to offer the specific recommendations that were specifically for the classroom. Thus, for the classroom, Ms. Selber recommended a more supportive seating arrangement with foot support so that Student's feet did not dangle from the chair, and his core was supported. The IEP did not, as Ms. Chitre acknowledged, offer any such accommodation. Multiple assessors, including Ms. Selber, Dr. Schilling, Ms. Nakaji, and Ms. Chitre herself, noticed that Student slouched and required support underneath his feet when sitting. This simple accommodation should have been part of Milpitas' offer.

67. Ms. Selber also recommended, specifically for the classroom, that Student would benefit from some fluorescent light covers in his classroom to decrease glare, as he was squinting during his table time work at school. This other simple accommodation should have been, and also was not, offered.

68. Next, occupational therapy goals Numbers 9 and 10 were insufficient in light of Ms. Selber's other recommendations that were relevant to the school setting at least in part, that Student would benefit from some regular movement required per day to move his bowels and to enhance his endurance, such as supported walking, supported swinging, rolling on a mat, supported seating on a ball with bouncing, a handle attached mini-trampoline, etc. In short, Milpitas' offer of occupational therapy inappropriately ignored and failed to offer the reasonable school-based recommendations of the independent assessor.

69. The physical therapy baselines and goals were, as Ms. Nakaji opined, vague in the level of adult support that was envisioned, especially with respect to goal 11, which mentioned standing "without support," and goal 13, which mentioned "no adult assistance." For a child with as much orthopedic impairment and safety risk as Student, clarity in the physical therapy goals was essential.

70. Most importantly, except for Ms. Espitia's goals Numbers 7 (behavior/attending) and 8 (cooperative play/socials skills), no goals addressed Student's functional living or adaptive skills, which were to have been assessed by Dr. Cole. Thus, there was no goal that addressed Student's toileting. Every assessor mentioned Student's toileting issues, and Ms. Nakaji had some specific recommendations that should have been followed. For toileting, she recommended bathroom peer modeling to encourage Student to urinate in the toilet. She recommended he go to the bathroom with his peers to model appropriate behavior. Student should be expected to attempt to push down and pull up his own pants and diaper. She recommended fruit loops in the toilet to "aim" at when urinating. She believed these protocols might help Student develop understanding and interest in using the toilet, and determine if he can sense when he needs to go. A reward system after success could also be considered. It was wholly inappropriate, that no attempts were being made to educate Student in this crucial adaptive skill.

71. Ms. Nakaji also had specific recommended levels of assistance and goals for transitions into and out of Student's walker, into and out of a wheelchair or stroller, ambulation with a walker, transitions into and out of a chair, transitions standing to and from the floor, transitions up to and down off the changing table, onto and off playground structures, and use of the tricycle in the playground that should have been, and were not, offered in the IEP.

72. In summary, Milpitas has failed to meet its burden of proof, based upon multiple procedural violations and its failure to develop an IEP reasonably calculated to offer Student a FAPE.

## ORDER

1. Milpitas Unified School District's April 24, 2018 IEP, as amended on May 11, 2018, June 28, 2018, July 9, 2018, August 24, 2018, and September 21, 2018, did not

offer Student a free and appropriate public education in a least restrictive environment in light of Student's needs, circumstances, and progress.

2. The April 24, 2018, IEP, as amended on May 11, 2018, June 28, 2018, July 9, 2018, August 24, 2018, and September 21, 2018, may not be implemented without parental consent for the 2018-2019 school year.

3. All other relief sought by Milpitas 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 all issues.

### 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: April 2, 2019

/s/

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JUNE R. LEHRMAN

Administrative Law Judge

Office of Administrative Hearings