

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018050736

DECISION

Parent on Student's behalf filed a due process hearing request with the Office of Administrative Hearings, State of California, on May 16, 2018, naming Long Beach Unified School District. On May 25, 2018, Long Beach Unified filed a response to the complaint. OAH continued the matter for good cause on June 13, 2018. Administrative Law Judge Adrienne L. Krikorian heard this matter in Long Beach, California on November 27, 28 and 29, and December 5 and 6, 2018.

Attorneys Janeen Steel, Carol Jung and Kyra Clipper represented Student. Father attended a portion of the first morning of hearing; Mother attended all hearing days and testified. She was assisted by a Spanish language interpreter for all hearing days. Student did not attend the hearing. Attorney Cynthia Yount represented Long Beach Unified. Director of Special Education Rachel Heenan attended the hearing on behalf of Long Beach Unified on the first three hearing days, and Program Administrator Angela Suttles attended on the last two hearing days.

The ALJ granted a continuance to January 14, 2019 for the parties to file written closing arguments. Upon timely receipt of written closing arguments and additional

evidence through stipulated facts, the record was closed on January 14, 2019, and the matter was submitted for decision.

ISSUES¹

1. Did the tolling agreement between Long Beach Unified and Student, dated February 14, 2017, extend OAH's jurisdiction to adjudicate this matter pursuant to Ed. Code section 56505(l) absent a showing that Student is entitled to extend the statute of limitations pursuant to Ed. Code section 56505(l)(1) or (2)?

2. Did Long Beach Unified deny Student a free appropriate public education within the statutory period by predetermining Student's placement and services based upon public programs available within the Long Beach Unified?

3. Did Long Beach Unified deny Student a FAPE during the statutory period by failing to offer:

- a. an appropriate behavioral program or services;
- b. an appropriate social skills program or services;
- c. an appropriate communication program or services;
- d. an appropriate safety awareness program or services;
- e. an appropriate speech and language program or services; and
- f. appropriate social interaction opportunities?

4. Did Long Beach Unified procedurally deny Student a FAPE during the

¹ A prehearing conference was held on November 19, 2018. Student withdrew the issues identified in her due process complaint as Issues 4 and 5(b) on the record. OAH issued a PHC order on November 21, 2018. The issues as stated in this Decision are those agreed upon by the parties at the prehearing conference and on the first day of hearing; the issues have been renumbered from the original complaint.

statutory period by failing to:

- a. complete individualized educational program documents for Student; or
- b. provide written notice prior to termination of transportation services?

SUMMARY OF DECISION

The parties' private agreement to toll the statute of limitations did not extend the time in which Student was required to file the complaint in this case, because Student did not meet her burden of establishing that OAH was required to hear her claims based on a filing date of September 29, 2015. Student also did not prove either exception to the statute of limitations applied.

Student did not prevail on Issue 2, because Student offered no persuasive evidence that Long Beach Unified predetermined her placement and services. Student did not prove that, by bringing a pre-populated individualized education program draft to the IEP team meetings, anything was "predetermined" as contemplated by the Individuals with Disabilities Education Act. Parents, and their attorneys in 2018, actively participated at all of the relevant IEP meetings, understood their options for placement, agreed to the S.U.C.S.E.S.S. program in elementary school and chose to send Student to a School of Choice setting with a moderate/severe program for middle school.

Student prevailed on Issues 3(b), 3(c), 3(e), and 3(f), all of which related to Student's significant deficits in language and communication development, and social skills. The evidence was persuasive that Student historically made minimal progress in those areas. The frequency and amount of speech therapy services Long Beach Unified offered was not reasonably calculated to enable Student to make progress appropriate in light of her circumstances. Dr. Hollar's testimony was credible and most of her recommendations for compensatory speech, communication and social skills services, and services and supports at school were reasonable based on the evidence of Student's deficits. The outcome on these issues would have been no different if the statutory

period had extended back to September 2015 under the tolling agreement because the remedies recommended by Dr. Hollar were, with limited exception, awarded.

Student did not prevail on Issues 3(a) and 3(d). Regarding Issue 3(a), Student had significant behavior issues in elementary school that interfered with her learning. The S.U.C.S.E.S.S. program in elementary school included embedded supports and interventions addressing behavior; it had behavior interventionists in the classroom, and they and the classroom teacher worked, under supervision of a behaviorist, with Student and on her goals using her behavior intervention plan. While other strategies and methodologies existed in the field of behavior, Student did not prove that the programs Long Beach Unified had in place for Student during the fifth grade were deficient such that they denied her a FAPE. By fifth grade her behavior improved, and she made enough progress in her behaviors that her IEP team focused on her academic challenges when she matriculated to middle school. Testimony from the school psychologist who conducted the 2017 psychoeducational assessment suggested Student had very low cognitive functioning, which contributed to her academic struggles. In light of that evidence, Student did not prove that her behaviors in middle school were an impediment to her academic progress. Regarding Issue 3(d), Student offered no persuasive evidence that Parents ever asked for a safety awareness program or an assessment for that need, or that Student demonstrated behaviors at school that put her safety at risk, such that Long Beach Unified should have offered Student a safety awareness program.

Student did not prevail on Issues 4(a), regarding incomplete IEP documents, and 4(b), regarding prior written notice. Regarding Issue 4(a), although some IEP documents had errors or omissions, Student offered no persuasive evidence that those errors impeded Parents' opportunity to participate in the decision-making process or Student's right to a FAPE, or deprived Student of educational benefits. Similarly, in Issue 4(b), Long

Beach procedurally violated the IDEA by failing to provide prior written notice regarding its decision to withdraw transportation as a related service. However, Student offered no persuasive evidence that the lack of prior written notice impeded Parents' opportunity to participate in the decision making process or Student's right to a FAPE, or deprived Student of educational benefits.

FACTUAL FINDINGS

1. Student is a 12-year-old female who resided within Long Beach Unified School District with Parents and siblings at all relevant times. Her primary eligibility for special education was autism. She was attending seventh grade at Stanford Middle School within Long Beach Unified at the time of hearing.

BACKGROUND

2. The Los Angeles Unified School District initially found Student eligible for special education under the eligibility of autistic-like characteristics. Parents subsequently moved to Long Beach Unified. Student attended third and fourth grades through the end of the 2014-2016 school year at Holmes Elementary School, within Long Beach Unified. She was placed in the S.U.C.S.E.S.S.² classroom, which was a classroom specifically designed for children with autism and behavioral issues. Student's special education teachers, Lauren Brown (third grade), Alayne Pickens (fourth and fifth grade), speech therapist Lisa Florendo, and behavior intervention supervisor Jenny Lin, testified at hearing about Student's performance during the third, fourth, and fifth grades, which encompassed the 2013-2014, 2014-2015, and 2015-2016 school years.

² "S.U.C.S.E.S.S." was used throughout the hearing by all witnesses and the parties. The acronym refers to Systematic Utilization of Comprehensive Strategies for Ensuring Student Success.

3. The S.U.C.S.E.S.S program was developed by an outside agency for, and implemented by, Long Beach Unified at its elementary schools. Long Beach Unified staff received training on implementation of the program from the outside agency and by Long Beach Unified personnel. Classroom staff included a special education teacher, multiple full-time in-class behavior intervention specialists, and a supervising board-certified behavior analyst, in addition to service providers for related services, as called for in the children's IEPs. The behavior interventionists were trained in applied behavioral analysis. The classroom consisted of no more than 10 students and the ratio of students-to-adults was two-to-one. The children in the classroom had IEPs and had a range of behaviors depending on their disability. The environment was highly structured with embedded behavioral and other support. The program used evidence-based multi-modal teaching for behavior and academics, a modified curriculum for math and English language arts, and included parent training. Curriculum was visual and response-based.

4. The physical classroom had a central area for group work with the special education teacher. The remainder of the classroom was physically divided into several modules/stations, where children would rotate throughout the day. Each module had a table for two children, where staff worked on various tasks and skills with the students. Students occasionally worked one-on-one with a teacher or behaviorist on specific skills and tasks. The behavior interventionists received consultation and supervision from Ms. Lin. They implemented the children's behavior goals and behavior intervention plans, and took data, which they reported to Ms. Lin. They also collaborated with the classroom teacher, who also took data on behaviors.

5. Student was largely nonverbal during third grade. She received speech therapy, occupational therapy, and participated in adaptive physical education. She demonstrated frequent behaviors that interfered with her access to her education, including self-stimulatory behaviors that included generating sounds and distracting

body movements. These behaviors manifested themselves when Student was avoiding non-preferred tasks during instruction. Student was heavily prompt dependent, requiring prompts to begin, continue and end tasks, and verbal communication. She was a sweet likeable girl, but was socially limited. Most of her social interactions were with adults. She did not engage in elopement or behaviors that put her safety at risk. At the end of the third grade, she met her academic goals and made progress toward her behavior goals.

6. Student met her academic and occupational therapy goals during the first half of fourth grade, as of her February 2015 annual IEP team meeting. She met two of her behavior goals and made progress toward her goal of requesting a break. She interacted with other students, one in particular, played on the playground with facilitation for appropriate interaction and play, and sought out adult interaction. She remained largely non-verbal.

7. Student's February 2015 IEP included goals for behavior, speech and language, and occupational therapy, a behavior intervention plan, and extended school year. The behavior plan targeted behaviors including verbal protesting, yelling, screaming, whining, and self-stimulatory behaviors. It included interventions that targeted Student's baseline behaviors as identified in her behavior goals. The interventions included prompting and replacement behaviors.

8. The February 2015 IEP team recommended continued placement in the S.U.C.S.E.S.S program (for the remainder of fourth grade and first half of fifth grade) until the next annual IEP team meeting, because Student had low skills in academics, social skills, and behavior. The program provided her with intense support, helped her work toward independence, and was very structured. In comparison, Long Beach Unified elementary schools also had two other potential programs. The first was a mild/moderate class consisting of students who performed closer to grade level,

required small group and less adult support, worked more on academic goals, could read site words, had enough vocabulary to carry on conversations, and had a basic understanding of math. The second type of program was in moderate/severe classrooms that addressed students who were capable of learning, but performed below their chronological age, had skills at the pre-kindergarten level, and had less communication skills. Parents consented to the IEP offer, including continued placement in the S.U.C.S.E.S.S program.

February 2016 IEP

9. On February 25, 2016, Long Beach Unified held the first session of Student's annual IEP. Student was in the fourth grade at Holmes in the S.U.C.S.E.S.S program and Ms. Pickens was her special education teacher. Due to a limitation on time, the IEP team agreed to convene a second meeting. The IEP team met again on April 14, 2016. All required IEP team members, including Parents and a Spanish interpreter, attended. Parents actively participated in both meetings. Student met her writing goal, made 70 percent or more progress toward her language arts and mathematics goals, and 50 percent progress toward her behavior goal.

10. The IEP team offered continued placement in the S.U.C.S.E.S.S program, with group speech therapy twice a week for 30-minute sessions, occupational therapy consultation 30 minutes a month, adaptive group physical education 30 minutes a week, and transportation from home to school. The proposed IEP included goals in adaptive physical education, writing, reading sight words, language arts, mathematics/addition, academics, speech and language (semantics and syntax), behavior goals to address her self-stimulatory behaviors and her resistance to non-preferred tasks, and a behavior intervention plan. Long Beach Unified also offered extended school year for the 2016 summer. Extended school year included group speech therapy and adaptive physical education each for 30 minutes once a week. Parents did not agree to the IEP. Parents

wanted to wait for the results of a pending assistive technology assessment.

11. On June 6, 2016, the IEP team met again to discuss the recent assistive technology assessment. The assessment results indicated Student had communicative intentions but could not use speech functionally. She could mimic a model and knew sight words. The assessor recommended the use of a communication device to assist Student with communication at school. Long Beach Unified team members agreed to provide Student with an iPad for classroom use. Parents agreed to the February 2016 IEP as amended. The IEP team held one training session for Parents on use of the communication device.

2016-2017 SCHOOL YEAR

12. Student attended fifth grade at Holmes in the S.U.C.S. E.S.S. special day class. Ms. Pickens was her teacher and speech and language therapist Ms. Florendo was her speech therapist. Ms. Lin provided supervision to the classroom behavior intervention staff. When Student did not make progress toward her behavior goals, Ms. Lin went into the classroom to observe teaching strategies and recommend changes to assist Student in meeting goals.

Functional Behavioral Assessment

13. Ms. Lin conducted a triennial functional behavioral assessment beginning in December 2016. Ms. Lin summarized her findings in a report dated January 27, 2017, which she presented during Student's 2017 triennial IEP team meeting.

14. Ms. Lin was a licensed board-certified behavior analyst and was a behavior intervention supervisor for Long Beach Unified since 2008. She had a master's degree in counseling with an option in applied behavioral analysis. Her prior work experience included working as a paraeducator, behavior consultant/technician and behavior consultant. She took 32 hours of continuing education every two years to maintain her

certification. Her job duties included training staff, teachers and parents, providing clinical services to Long Beach Unified students, and supervising Long Beach Unified's S.U.C.S.E.S.S classrooms. She was familiar with Student from the time Student was in second grade, participated in the development of her behavior plans, and trained Parents on the supports in her behavior plan. She testified at hearing and demonstrated that she was qualified to assess Student and offer opinions regarding Student's behavioral needs, interventions and strategies.

15. Ms. Lin's assessment included a records review, parent and teacher interviews, indirect assessment tools, and data collection through multiple observations, totaling seven hours in a variety of school settings. The assessment looked at Student's challenging behaviors impeding her learning, to help determine what interventions could be developed to address those behaviors. Student's problem behaviors included making unintelligible sounds and mimicking songs and repeating phrases from television under her breath at a low volume. When presented with a preferred or non-preferred task, or when left alone, Student engaged in self-stimulatory behaviors, which occurred throughout the day and anywhere on campus. The behaviors occurred on average 55 percent of the time across a random of 10 samples, lasted a few seconds to five minutes if she was not redirected and were of mild intensity. Ms. Lin hypothesized that Student maintained her self-stimulatory behaviors by engaging in automatic sensory reinforcement. She maintained her verbal protesting behaviors by engaging in escape as a form of reinforcement.

16. Classroom staff completed the Reinforcer Assessment for Individuals with Severe Disabilities, which obtained data through structured interviews to determine Student's most preferred activities. Student's most preferred activities included dancing, playing on the iPad, watching movies, listening to music, and dressing up. Edible reinforcers included chips, fruit snacks, candy, and cookies. Attention reinforcers

included social praises, clapping, and “high-fives.” Sensory reinforcers included dancing and twirling.

17. In her report, Ms. Lin proposed modifications to Student’s behavior intervention plan, which included interventions and strategies similar to prior years, including strategies for prevention prior to behavior teaching, instead of redirection after the behavior. Her recommendations included training Mother on the use of the “token system” for reinforcement. The methodology would be the same as during each prior school year, but the number of tokens needed for reinforcements changed as determined by the behaviorist working with Student, depending on her need for reinforcements.

18. Ms. Lin opined that, although the proposed behavior intervention plan for the 2017 IEP was very similar to Student’s previous behavior intervention plans, the interventions were working for Student, whose behaviors were slowly improving. As a comparison, she noted when Student was younger, she would run from class crying, screaming and protesting, and demonstrated aggression during her first year in the S.U.C.S.E.S.S classroom. By fifth grade, Student said “hello” to Ms. Lin, wanted to be with people, her protesting and self-stimulatory behaviors decreased to a very low volume, and she did not show aggression. Therefore, based on Student’s progress, although the strategies relied on various levels of prompting and reinforcement techniques, Ms. Lin saw no reason to substantially modify the types of intervention strategies and techniques included in the plan.

Multidisciplinary Psychoeducational Assessment

19. In December 2016 and January 2017, Long Beach Unified school psychologist Bridgette Myers, conducted a multidisciplinary psychoeducational assessment with input from Student’s teacher and a behavior specialist. Parents participated in the assessments, using tools that were translated into Spanish, including

the Behavior Assessment Scale for Children, Third Edition, and interviews. The assessment results were summarized in an assessment report dated January 11, 2017.

20. Ms. Myers was a licensed educational psychologist and worked with students with disabilities as a school counselor, school psychologist, and case manager since 1999. Her job duties with Long Beach Unified included assessments, counseling, consultations with teachers and staff, staff trainings, community outreach, and collaboration with service providers. She conducted approximately 150 assessments each year. Ms. Myers testified at hearing and demonstrated that she was qualified to assess Student and to offer credible opinions about Student.

21. At the time of Student's assessment, Ms. Myers understood that Student's eligibility was based on a diagnosis of autism. She was knowledgeable about the distinction in criteria between autism and intellectual disability. Ms. Pickens expressed concerns to Ms. Myers about Student's cognitive ability, her slow rate of academic progress, her level of understanding when interacting with others, and her age as related to her level of academic skills. Ms. Pickens's concerns suggested to Ms. Myers that she should assess for eligibility under the category of intellectual disability.

22. Ms. Myers's assessments included testing instruments to address Student's cognitive levels. She administered multiple standardized testing instruments and observed Student in the classroom three times. Student's academic skills were significantly below her age and grade level; she functioned overall at kindergarten to first grade level. Student's executive functioning scores were elevated, suggesting she had problems with planning, organization, and behavioral initiation. These skills were important for successful academic performance. Student's reading comprehension was at kindergarten level; her math skills were a relative strength, although she worked at first grade level. Her writing skills were very low. She performed simple tasks in a safe efficient manner.

23. Ms. Myers administered the Adaptive Behavior Assessment to evaluate eligibility for intellectual disability. The assessment looked at Student's ability to function independently, considering parental input regarding home and community participation, and teacher input on school functioning. Because of Student's limited language skills, she was unable to access verbal components of the Differential Abilities Scales II. As a result, Ms. Myers used nonverbal tools which gave a better look at Student's cognitive abilities. On the Test of Visual and Perceptual Skills, Third Edition, Ms. Myers discontinued four of the seven subtests, because Student did not understand the initial test items. She could not achieve an overall score, although the test was nonverbal. She could not access the subtests, because she did not understand what she was asked to do. Ms. Myers attributed Student's inability to understand directions to her low level of cognition. Overall scores were unattainable. Ms. Myers concluded Student demonstrated sub-average cognitive ability.

24. Overall, Ms. Myers reported Student remained primarily eligible for special education as a child with exceptional needs under the category of autism. She also concluded that, because Student demonstrated sub-average cognitive ability and significantly delayed social adaptive behavior, she met the eligibility criteria as a child with an intellectual disability. She deferred to the IEP team for placement decisions. She included numerous recommendations to support Student's learning or to increase her academic performance.

Triennial Speech Assessment

25. Ms. Florendo assessed Student in the area of speech and language and reported her findings in a report dated February 2, 2017. Ms. Florendo was a credentialed certified American Speech Language Hearing Association speech therapist. She held a master's degree in communication sciences and disorders, a multiple subject teacher credential, and a certificate in assistive technology. She has worked for Long

Beach Unified since 2015. She provided Student with speech therapy in the fourth and fifth grades and attended her 2016 IEP meetings. She delivered speech therapy services to Student with the entire class and in a small group with one other student. She also collaborated with Ms. Pickens on Student's baselines for speech goals. She testified at hearing and demonstrated she was familiar with and qualified to assess Student and render credible opinions regarding Student's needs in speech and language and assistive technology.

26. The assessment, administered in English, consisted of a review of documents, observations, standardized testing, and informal testing. Although the report does not reflect that Parents were interviewed for this assessment, Ms. Florendo credibly testified that she routinely sent a packet home to parents in preparation for the assessments, which requests input from parents on a child's wants and needs. Parents did not always return the packet, and, in Student's case, she did not note if she received a response from Parents in her report. Although also not reflected in her report, Ms. Florendo also routinely obtained as part of her assessments input from teachers regarding a student's current baselines, strengths and needs, and reviewed previous speech and language reports, and assessments. She selected her assessment tools based upon her impression of Student's areas of need.

27. Given that Student's responses to testing were too low to convert to a standard score, Ms. Florendo reported Student's abilities in narrative form. She concluded that Student's speech consisted of echolalia (repetition of another person's spoken words), scripting (mimicking from a video or television show), jargon, and intelligible speech. Her areas of need were in semantics (meaning of words) and syntax (arrangement of words/phrases). She benefited from verbal prompts to speak in complete sentences. Her overall listening and oral expression were well below average, but she made gains in her language over the past three years. She understood more

linguistic forms and could express herself more independently. She required direct instruction on how to communicate more effectively. Ms. Florendo did not test for pragmatics or social skills. Instead, she reached her conclusions in that area based upon her observations of Student and teacher reports.

28. Ms. Florendo recommended speech and language therapy, teaching sequencing skills, encouraging Student to speak in complete sentences, teaching vocabulary in context and real-life situations, and encouraging her to use her language. Ms. Florendo opined that Student would benefit from an alternative augmentative communication device, such as an iPad with appropriate applications, like Proloque2Go, because she did not communicate with speech alone.

February 2017 IEP

29. Long Beach Unified held Student's triennial/annual IEP on February 9, 2017. The draft IEP presented to Parents at that meeting was dated February 4, 2017, although no meeting occurred on that date. The draft IEP also identified Student's school of attendance as Stanford, although Student was still attending Holmes at the time of the meeting. Long Beach Unified office staff populated certain information on the draft of an IEP document presented at IEP meetings before the meeting began. Other information was populated by teachers and service providers. The IEP remained in draft form and available to Long Beach Unified staff to make changes, until a parent signed the IEP, at which time it was closed and became final. This procedure was used for Student's draft IEPs.

30. All required Long Beach Unified IEP team members attended the February 9, 2017 team meeting. Parents attended and actively participated with assistance from a Spanish interpreter. Long Beach Unified offered Parents their procedural rights, and Mother asked for clarification of the meaning of "alternate programs," as referred to in the procedural safeguards. Long Beach Unified IEP team members provided Mother

examples of alternate programs. Mother asked questions, received answers, and acknowledged she had no further questions about procedural rights.

31. The adaptive physical education teacher reported Student's present levels of performance, and the IEP team discussed goals in that area. Ms. Myers presented her triennial psychoeducational report and informed the IEP team of her conclusion that Student had an intellectual delay. Mother disagreed with the finding of intellectual disability, explaining she was not convinced that Student had an intellectual disability.

32. Ms. Pickens reported on Student's academic present levels of performance in the classroom. She noted that Student made academic progress over the past three years. In language arts, she achieved 40 percent of her blending sounds goal, 70 percent of her reading sight words goal, and 80 percent of her writing goal. The IEP team developed a new goal in phonemic awareness, reading comprehension, and writing. Student achieved 80 percent of her mathematics/addition goal. The IEP team developed new math goals in identifying figures (triangle, circle, square and rectangle), and in subtraction.

33. The IEP team discussed placement options for middle school, including those schools closest to Student's home with a moderate/severe special day class. Mother asked questions about other programs and received answers. Prior to the IEP team meeting, she had the opportunity to visit other programs and schools, in addition to her observations of Student in her classroom at Holmes. Mother observed Student at Holmes approximately five times over two years. During Mother's observations, Student did not participate in classroom activity or she engaged in a preferred activity of painting her nails with adult assistance.

34. Long Beach Unified administrator Wendy Rosenquist credibly testified at hearing. Ms. Rosenquist explained Long Beach Unified middle schools did not have S.U.C.S.E.S.S classrooms similar to those in elementary school. Children from the

S.U.C.S.E.S.S. program who matriculated to middle school were typically placed in a moderate/severe special day classroom. The nearest school with a relatively similar S.U.C.S.E.S.S program for middle school students was a non-public school operating on a Long Beach Unified middle school campus. It was privately run and staffed with non-district staff. However, admission was determined by the non-public school, and the students in the program had no interaction with general education students attending the public school programs at the Long Beach Unified campus on which it operated.

35. Long Beach Unified's policy was to offer a student with an IEP placement for middle school at the closest district school to their home with an appropriate program for the child. Student's home school for middle school was Lindburgh Middle School. It did not have a moderate/severe classroom, which IEP team members agreed was the appropriate setting for Student. The next nearest middle school to Student's home was Hamilton Middle School or Hughes Middle School, both of which had moderate/severe special day classes. Typically, Long Beach Unified IEP teams considered a more restrictive environment for a special education student, including a non-public school, if a moderate/severe program was not available that could address a student's needs.

36. Under Long Beach Unified's School of Choice Program, the school district notified all parents in writing in January of the year before middle school that, if they chose to enroll their child with an IEP at their school of choice, other than the home school or the school nearest to home with the appropriate program for the child, the parents were responsible for transportation. The program was optional and included a deadline for enrollment.

37. At hearing, Mother denied ever receiving the School of Choice Application Summary. Mother reported she felt pressured to select a school at the February 9, 2017 meeting. She did not have enough information to pick a school so quickly. A school

counselor by the name of "Ms. Delgado" reportedly told Mother she had a deadline to pick a school if she wanted to participate in the School of Choice program. She was also concerned that the IEP team was not offering transportation if she participated in the School of Choice program.

38. Parents requested at the end of the February 9, 2017 IEP team meeting that Long Beach Unified consider their application for Stanford, Hoover, or Bancroft Middle Schools. Stanford had a moderate/severe special day class. By applying to Stanford, Hoover, and Bancroft Middle Schools, Parents were electing to participate in the School of Choice program. The IEP team offered Student middle school placement at Stanford, without transportation, as the least restrictive environment. The IEP team adjourned the meeting to March 9, 2017. The meeting lasted two to three hours and ended at 12:20 p.m.

39. The IEP team reconvened on March 9, 2017. All required team members attended. Parents were present and a Spanish interpreter assisted them. They actively participated in the meeting. The IEP team discussed Student's adaptive physical education goal, responded to Parents' questions about the goal, and told Parents that the adaptive physical education teacher would be advised of Parents' concerns and would clarify the goal. The occupational therapist reviewed her report. The IEP team reviewed and discussed triennial assessment reports by Ms. Lin, the occupational therapist, and Ms. Florendo.

40. Ms. Florendo reported Student met 80 percent of one of her two goals in semantics, made 10 percent progress toward the second semantics goal, and 20 percent progress toward her syntax goals. Mother expressed concern that Student did not meet all of those goals. Mother disagreed that Ms. Florendo's speech and language assessment was complete, but requested to go forward with developing goals in that area.

41. The IEP team discussed that Student should use her assistive communication device over all settings; Mother reported she rewarded Student for using the device at home. The Long Beach Unified IEP team members expressed concern that Student required more training on the device to encourage her to use it more frequently to communicate. The IEP team agreed to adjourn the meeting and rescheduled it for two hours on March 23, 2017.

42. On March 23, 2017, the IEP team reconvened and continued to discuss Student's present levels of performance and her goals, and answered Parents' questions. Long Beach Unified offered Parents their procedural rights. Mother declined, stating that she had a copy and did not need to review another copy.

43. The IEP team discussed whether Student was using the iPad; Mother expressed concern that not all service providers were using the iPad with Student. The team discussed using the device more during classroom time. Ms. Florendo reported that Student was slowly making progress in speech and language; the team discussed development of four speech and language goals in articulation, pragmatics, semantics, and syntax, with Parent collaboration. The articulation goal focused on production of the letter "f." The pragmatics goal focused on the skill of greeting another person and asking a question verbally or with a communication device. The semantics goal focused on Student's ability to describe three attributes of a picture or object using verbal language or a communication device. The syntax goal focused on Student's ability to construct a sentence using verbal language or a communication device. The IEP included a goal for social play, where Student would engage in structured play activities with others (adults and peers), for at least 70 percent of the time in a three-minute time frame across two consecutive weeks. Long Beach Unified staff were responsible for that goal. Ms. Florendo offered Ms. Pickens suggestions on how to use the communication

device in the classroom. The meeting was adjourned to May 11, 2017, from 9 a.m. to 12 p.m.

44. On May 11, 2017, the IEP team reconvened, offered parental rights, and continued to discuss development of goals for Student. Mother asked questions about the psychoeducational assessment. Ms. Myers responded to Mother's questions. The IEP team developed new behavior goals in initiation of work with one gestural prompt with an average of 80 percent or higher across two consecutive weeks; and a goal for on-task behavior.

45. Long Beach Unified presented its offer of FAPE, which included the goals described above, placement in the moderate/severe special day class at Stanford, specialized academic instruction, speech and language services twice a week for 30-minute sessions in a group and direct service in the speech therapy clinic, adaptive physical education once a week, and extended school year. For extended school year, the IEP document identified one session of speech therapy a week for 30 minutes, adaptive physical education once a week, and specialized academic instruction "1 session a week." During hearing, Long Beach Unified witnesses clarified that the "1 session a week" was a typographical error in the draft IEP that Long Beach Unified provided to Parents. Student actually received specialized academic instruction daily during extended school year. Supplementary aids and modifications included supervised breaks during classroom instruction, extra time for testing, and one-to-one supervision. The IEP included a behavior intervention plan, which included similar interventions to previous plans, but addressed current behavior goals. The IEP team members informed Parents that the middle school moderate/severe class focused more on academics than behavior. At hearing, Ms. Pickens and Ms. Lin concurred that the moderate/severe program was appropriate for Student, as her behaviors had improved, and she required more focus on academics.

46. The draft IEP document provided to Parents marked “no” for special transportation. Mother inquired about transportation to Stanford at the May 2017 IEP team meeting, and asked for confirmation that Student would not receive transportation if the family participated in the School of Choice program. The IEP team confirmed that her understanding was correct for middle school, because she participated in the School of Choice program. The IEP notes included that Student would receive transportation through the 2017 extended school year, before Student enrolled in middle school, but transportation through the 2017 extended school year was not noted on the service page of the IEP draft provided to Parents for signature.

47. Mother claimed at hearing that, at the end of the fourth meeting in May 2017, she remained confused about which school was closest to home with an appropriate classroom for Student. She understood that the home school did not have an appropriate program. She felt the S.U.C.S.E.S.S. program worked for Student. Mother understood that the nonpublic school S.U.C.S.E.S.S. program for middle school consisted of children with more severe behaviors than Student. She did not understand what type of transition support Student would receive as she moved to a middle school moderate/severe special day class. Mother claimed at hearing that the IEP team did not recommend another school at subsequent meetings after the February 9 IEP team meeting. She acknowledged at hearing that the IEP team members informed her that Student would not receive transportation to a school of parents’ choosing if a closer school had the appropriate program for Student.

48. Parents declined to sign the February 2017 IEP. Student’s February 2016 IEP remained the operative IEP through her transition to middle school, with transportation through summer 2017. Student attended extended school year at Holmes, with transportation services, and matriculated at the end of fifth grade to middle school at Stanford.

2017-2018 SCHOOL YEAR

49. Student attended middle school in sixth grade and seventh grade in special education teacher Florence Guzman Wolfe's moderate/severe special day class. Before becoming a special education teacher, Ms. Wolfe worked as an instructional aide/paraprofessional at an autism center. She began working at Long Beach Unified in August 2009. Her job duties included developing and implementing IEPs, managing classroom staff in implementing IEPs, scheduling of lesson plans, and data collection for development and monitoring of IEP goals. She testified at hearing and offered credible opinions about Student's performance at school.

50. Student's classroom had 14 students and seven adults. It was self-contained, with children who had disabilities, including autism, developmental delays, and physical disabilities. Instruction included whole group, small group, and one-to-one, with use of visual supports, and repetition to maintain skill levels. The moderate/severe classroom offered more adult support and more opportunities for small group and one-to-one instruction than the mild/moderate classroom, which was less appropriate for Student given her academic level. She participated with general education students in adaptive physical education, during lunch and breaks. She received speech therapy twice a week in the speech therapy room and occasionally in the classroom. She had access to a student cohort with needs similar to hers to encourage socialization.

51. Student came from elementary school needing to adjust to the new environment and routines at school. She required a lot of prompting to get to know the classroom routine. As she adjusted, she learned where things were in the classroom, became familiar with school staff, and became very independent with classroom routines. She required less prompting during unstructured activities and made progress initiating a comment about something she observed. Her behavior was compliant, and the number of times she whined over non-preferred activities decreased.

52. Mother twice observed Student in the classroom at Stanford during fall 2017. For one twenty-minute observation, Student sat in the back of the class at a table with other children. The children worked on a lesson about salt and sugar; Mother did not observe anyone working directly with Student, except when she was inattentive. An adult prompted Student to redirect her to the lesson and then returned to the front of the classroom. Student continued through the lesson without paying attention. On the second observation, Student worked one-to-one with the speech therapist. Mother observed Student and school staff during sixth grade, sitting in class with the iPad in front of her, without engaging in the class activities by using the device.

Independent Functional Behavioral Assessment

53. Dr. Mitchell Taubman conducted a functional behavioral assessment for Student in December and January 2018. Dr. Taubman earned a Ph.D. in Developmental and Child Psychology in 1980. He was the executive director of Actum Clinical and Behavioral Services at the time of hearing. He has worked and taught in the field of clinical psychology since 1972. He has observed hundreds of classrooms, during which he looked for staff interaction with students, including whether they were being taught, versus facilitated with guided assistance. His resume included an extensive list of research and papers which he wrote or co-authored. Most recent publications included collaborative research papers in the area of applied behavioral analysis for children with autism. Dr. Taubman attended two IEP meetings for Student in 2018. He testified at hearing and qualified as an expert in the area of behavior.

54. Dr. Taubman reviewed records, including Student's 2016 IEP, the unsigned 2017 IEP, a report from Student's private speech provider at California State University at Long Beach Speech and Hearing Clinic, and Student's 2017 triennial assessment reports. He visited Student's home in December 2017, observed Student and interviewed Parents. Parents reported Student had no behavior problems at home, she needed

friends, rarely interacted with her sister, and was a happy, pleasant child. Parents reported Student had an applied behavioral analysis provider from Trumpet Behavioral Services, who helped with self-care.

55. Dr. Taubman visited Stanford on January 11, 2018; Student was absent that day. He observed three classrooms, including a mild/moderate classroom, Ms. Wolfe's moderate/severe classroom and another moderate severe classroom, during which he interviewed that teacher. On January 24, 2018, he visited Student's classroom and interviewed Ms. Wolfe. He observed Student during classroom time and lunch for a total of one and a half hours. He noted Student did not interact with adults or peers during the entire observation period, other than when following Ms. Wolfe's instructions. Student engaged in an activity based on facilitation by another person, which he opined was not independent learning. He observed a high volume of prompting without fading. He did not observe any systematic planned program for fading prompts. He opined at hearing that for learning to occur, prompts needed to be faded. The methodology of "facilitation guidance" and assistance was not appropriate to provide Student meaningful benefit because the objective should be to fade prompts. Dr. Taubman also visited two classrooms at Stanford, before he attended Student's IEP meetings, and one or two on other campuses, so he could acquire a sense of those programs as they related to serving Student's needs.

56. Ms. Wolfe reported to Dr. Taubman during his visit to Student's classroom that Student was generally compliant, but could be unresponsive and inattentive due to self-stimulatory behavior which required redirection by adult staff. Student only responded vocally when requesting something preferred and obviously present. When "peer buddies" said "hi" to Student, she liked the interaction and responded back, but did not initiate interactions. She adapted quickly to routines and learned quickly.

57. Dr. Taubman prepared a written report dated February 9, 2018, which included impressions and recommendations. He concluded Student displayed interfering behavior and a range of skill deficits that negatively impacted her educational access and success. She consistently exhibited inattention; staff dealt with her inattention in a reactive manner, with prompts, reminders, and redirection. In his opinion, because staff did not fade the reactive strategies, they constituted an ongoing facilitation, assistance and guidance, and did not represent efforts that would result in substantial independent growth in attention and reduction of stereotypic behavior. He opined that the inattention and stereotypic behavior "likely" impacted her in the areas of socialization, communication and awareness/safety.

58. Dr. Taubman was critical of the delivery method of academic instruction in Student's middle school classroom. Lessons were delivered to all or nearly all of the students. He did not see the relevancy of the content of the lesson to some, if not all of the students. The delivery/method of teaching was uniform, with assistance from one-to-one aides, and use of prompting. He noted that individual needs and behaviors did not appear to be addressed or embedded systematically or in a planned manner during academic lessons and did not seem to drive the activity or learning. He opined that Student's mild verbal protesting "appeared" to have the purpose of escape/avoidance and may have had communication and emotion release functions. He noted Student made recent consistent progress, but criticized the methodology of facilitation, guidance, and assistance in the moment. He also noted substantial deficits in the areas of social awareness, interaction, communication, learning, and relatedness. He opined that, as Student grew older, her deficits in social skills and language, and her persistent engagement in "awareness-precluding stereotypic behavior," meant her vulnerability and safety were becoming an area of increasing concern.

59. Dr. Taubman opined at hearing that Student showed the capacity for growth based on recent progress in language and learning new skills. He opined that, with systematic programming and instructional efforts throughout the school day, she could make meaningful and relevant quality of life gains in various areas of educational need. He also opined that none of the classes he visited at Stanford offered the level of systematic and individualized instruction and programming that would be necessary to adequately attend to Student's needs.

60. Dr. Taubman criticized Student's behavior intervention plan, opining it had not led and would not lead to any change for Student. He opined his data contradicted that collected by Long Beach Unified staff; his data reflected that Student's behaviors were more pervasive during his observations. He opined Student's behavior intervention plan did not "appear to be" individualized.

61. Dr. Taubman's recommendations included a series of behavior goals, which were not supported by baseline behavior. He also recommended reduced use of prompting through systematic instruction; progressive and proactive programming to address verbal protests; a motivation system to support behavior instruction efforts; concentrated systematic instruction provided in social, recreational and leisure, communication, and general initiation areas; segmented academic instruction; additional goals consistent with the behavioral and instructional recommendations; reconsideration of current goals reliant on prompts; and placement in a classroom geared to the recommended programming and emphasis, with a student cohort that presented social opportunities for Student.

62. Dr. Taubman opined that the moderate/severe classroom at Stanford was not suitable for Student. He recommended that Long Beach Unified create a program for her and other students with similar needs, if a program consistent with his recommendations did not exist. He recommended training for all instructional staff to

understand and apply his recommended programming and skill instruction techniques. He also recommended weekly communication forms between school and home, monthly team meetings with staff, Parents, and private service staff, to allow for sharing and continuity between home and school.

63. Dr. Taubman opined Student's prognosis for progress was poor if she remained in the same program. Based on the historical data he reviewed, he opined Student's "learning how to learn" would not expand and self-stimulatory behaviors would not improve if she remained in the same type of program.

Independent Speech And Language Assessment

64. Speech therapist Susan Hollar conducted a speech and language assessment of Student in January and February 2018. She summarized her findings and recommendations in a report dated February 9, 2018. Ms. Hollar, who testified at hearing, received a post-graduate fellowship in Neurodevelopmental Disorders in Children in 1997-98 and a master's degree in communicative disorders. She was certified by the American Speech Language Association and was the principal in Hollar Speech/Language Services since 2001. Ms. Hollar's resume included teaching experience, numerous publications, presentations, certifications, and continuing education. Over the past 18-20 years, she has attended IEP meetings, conducted school-based observations, and performed 30-40 school-based assessments each year through contracts with school districts to perform independent educational evaluations. She qualified at hearing as an expert in the area of speech and language in connection with Student's diagnosis of autism and speech and language delay.

65. Ms. Hollar's assessment included a review of Student's past and current IEP's and other records provided by Mother. She opined that the records reflected minimal growth. Ms. Hollar reported that Student's individual speech therapy sessions

had been discontinued and time for therapy reduced.³ Ms. Hollar also interviewed Mother, observed Student at school and administered a battery of testing instruments, to the extent Student could complete them. She spent five hours with Student during her assessment. She demonstrated significant attention/focus skills, stimulatory behaviors, and vocalizing without communicative intent, and singing at times inappropriately. Student's functioning was too low for her to administer standardized testing. She required the tools to help her develop the skill of retaining information so she could be assessed.

66. Ms. Hollar was critical of the speech and language goals in Student's IEPs. She opined the goals as written would not help Student initiate and engage, because she was prompt dependent. She recommended goals in the areas of pragmatics, receptive language, expressive language, and speech production.

67. Ms. Hollar concluded Student had significant attention and focus issues and engaged in stimulatory behavior, including vocalizing and singing at inappropriate times. She performed extremely below average, at a 12-16-month level, when using all components of non-verbal patterns. She performed very low when participating in the one-word picture vocabulary test. Her articulation was weak; she scored 45 compared to a standard score of 85 or above. During classroom observations, Ms. Hollar did not see anyone interacting with Student, facilitating her interaction with other peers, or prompting her to initiate communication. Student engaged in behaviors including manipulating a pencil, playing with a spinner, flapping arms, using scripted sounds

³ Ms. Hollar's report on this issue was inconsistent with hearing testimony from Long Beach Unified speech therapist Amy Kutis, who credibly testified she provided individual speech therapy to Student in the speech therapy clinic twice weekly for 30 minutes a session during sixth and seventh grades.

(mimicked from videos), frequent redirection that that did not result in sustained attention, and no interaction with others. In her opinion, Student had the vocabulary, but needed to learn how to use it.

68. Ms. Hollar diagnosed Student with pragmatic language disorder, mixed receptive/expressive language disorder, and a speech disorder (articulation). She opined that a child's language could grow regardless of the child's intellectual cognitive ability. Given Student's deficits in articulation and pragmatics, Ms. Hollar opined she needed intensive intervention to develop her communication skills. She made several recommendations of strategies for the classroom regarding developing expressive language, peer-communications, and vocabulary development. She also recommended an assessment by a certified specialist in the area of an alternative and augmentative communication device. She noted Student had an iPad, but rarely used it during her observations, and it was not programmed appropriate for Student's level of functioning.

69. Ms. Hollar recommended in her assessment report: speech therapy four times a week for two 15-minute sessions daily; direct parent training; social language and play intervention including floor time activities; and specific applications such as Hamaguchi's Phrase Two, Toontastic, and Springo for auditory processing of one and two-step commands. She also recommended social language and play intervention programs such as Relationship Development Intervention; or Floortime (available through Regional Centers and private clinics); or PLAY program, to train caregivers in the development of pragmatic language skills and appropriate social play interactions. She recommended a one-to-one aide to support speech and language development in the educational setting. At hearing, Ms. Hollar opined that Student could tolerate an increased amount of speech therapy and needed it to increase her language skills. She also opined Student would benefit from 100 hours of compensatory speech and language services by a speech pathologist, who would focus on new goals that

addressed social engagement and pragmatics. In connection with that recommendation, she opined Student could easily manage speech services in a frequency of one hour a day, three times a week.

January 31, 2018 IEP

70. Long Beach Unified started Student's annual IEP on January 31, 2018. Student's 2018 annual IEP was developed on multiple dates. For purposes of consistency, this Decision refers to the IEP developed at those meetings as the "January 2018 IEP." Mother was unable to attend the January 31, 2018 meeting. She consented to allow the meeting to open, and Long Beach Unified staff signed in but did not make any changes to the IEP. The IEP team met again on March 28, 2018. All required Long Beach Unified staff and its attorney, Parents and their attorneys, Dr. Taubman and Ms. Hollar (telephonically) attended the meeting. A Spanish interpreter assisted Parents.

71. Student's middle school occupational therapist submitted a report recommending that Student no longer required occupational therapy services, because she met her 2016 IEP goals. She continued to receive occupational therapy at Stanford based on her 2016 IEP. However, the occupational therapist reported that her needs could be addressed by her teacher and did not require occupational therapy.

72. Ms. Hollar presented her speech and language report and recommendations for services and goals. The Long Beach Unified IEP team members noted Ms. Hollar's goals did not include baselines.

73. Long Beach Unified speech therapist Amy Kutis attended the January 2018 IEP meetings. She credibly testified at hearing. Ms. Kutis worked as a licensed speech therapist for 19 years and had a certificate of clinical competence from the American Speech Language Association. She first started providing therapy to Student at Stanford twice a week in early September 2017, using the goals from Student's 2016 IEP. She provided therapy on an individual basis in the speech therapy room and occasionally

went into the classroom and breakfast room and sat with Student. She also consulted with Ms. Wolfe with strategies to help Student communicate in all settings at school.

74. Ms. Kutis proposed three new goals in articulation, functional communication, and pragmatics for the January 2018 IEP. She considered Ms. Hollar's recommendations. Most of Ms. Hollar's strategies and techniques were unfamiliar to Ms. Kutis. However, she opined that Ms. Hollar's assessments were appropriate, and the information she obtained about Student's levels of functioning in the area of speech was generally consistent with Ms. Kutis's knowledge of Student. However, Ms. Kutis opined that, because Ms. Hollar only observed Student one time at school, she did not see Student "at her best." Student was more attentive and responsive consistently throughout the day than what Ms. Hollar observed. Although Ms. Kutis found Ms. Hollar's conclusions were accurate, the report did not change Ms. Kutis's opinions on the 2018 proposed goals. She opined that the draft goals she developed for the January 2018 IEP were what Student needed in January 2018, were based on her needs, and were not significantly different from Ms. Hollar's, although Ms. Kutis's goals included baselines which were necessary to provide a basis for the goal. Ms. Kutis opined that when drafting communication goals for Student, she considered Student's level of cognition to determine how high the level of achievement of the goal would be. She wanted Student's goals to be developmentally appropriate based on her needs and did not want to set goals too high.

75. Student made progress on her need for prompting during speech therapy. Ms. Kutis faded prompts during therapy sessions. Student required less prompting during a very structured activity. She required visual prompts for social exchanges, and verbal prompting to complete sentences. In contrast, when Ms. Kutis began working with Student in the sixth grade, Student needed modeling and prompting the majority of the time. Ms. Kutis opined at hearing that, based upon her time working with Student

and on Student's progress, the IEP speech goals and services offered by Long Beach Unified were appropriate for Student. During the 2017-2018 school year, Student met her three speech goals by 80-90 percent achievement from the 2016 IEP. She continued to struggle with articulation of the letters "r" and "l." Receptive language was an area of strength for Student, although she needed work on responding appropriately to questions.

76. At the time of the January 2018 IEP, Student required only modeling for articulation of some sounds, which Ms. Kutis attributed to the nature of the strategies she used during her therapy sessions. Student required visual prompts in social situations but had made progress in calling her peer's name and making visual contact with the peer. Student also made progress in the level of prompting needed during receptive and expressive language. At the January 2018 IEP meetings, no one disagreed with Ms. Kutis's report on progress toward speech goals.

77. Ms. Kutis recommended that services be changed to individual therapy once a week, group therapy once a week, and 20 minutes of consultation between the speech therapist and teacher. In her opinion, the overall goal was for Student to be more independent when interacting with peers, where she did not require prompts to complete a sentence or respond to questions and engaged in reciprocal exchanges with adults and peers. Ms. Kutis opined that Student would benefit from group speech therapy because she needed to work on her social skills and reciprocal exchanges with peers. She recommended to the IEP team that Student would benefit from two 30-minute sessions of group speech therapy weekly. Ms. Kutis observed at hearing that Student gravitated toward one peer in the classroom, sat with her and observed the peer without engaging in conversation. She required less prompting during unstructured activities and made progress initiating a comment about something she observed.

78. The IEP team reported that Student had opportunities to engage socially with typical developing peers for 20 percent of the school day. She participated in general education physical education daily. Other mainstreaming opportunities included school assemblies, pep rallies, concerts, twice a month Best Friends program, and working with a general education student aide in her special day class.

79. After a report from the adaptive physical education teacher, the IEP team adjourned and reconvened on April 16, 2018. All required Long Beach Unified staff attended, in addition to Parents, an interpreter, and the parties' attorneys. Dr. Taubman also attended. The IEP team continued to discuss present levels of performance and goals in the areas of language arts and behavior.

80. The IEP team considered Dr. Taubman's functional behavioral assessment report and developed a behavior goal focusing on self-stimulatory behavior. The goal focused on Student independently refraining from self-stimulatory behavior during preferred and non-preferred classroom activities for a three-minute period with 90 percent success across a two-week period. The IEP team considered Dr. Taubman's concerns and report/recommendations, which they attached to the IEP. They developed a behavior intervention plan which included ongoing interventions of a reinforcement system, visual support, priming (providing reminders before taking desired items away), using verbal and visual cues, functional communication, a token board, and "Premack Principle" (using more desirable behaviors as a reinforcement for engaging in a less desirable behaviors). It also included preferred items, activities or people to be used as incentives, including dancing, wearing jewelry, makeup, coloring, drawing, and games; edibles such as cookies, gummies, chips and candies; and attention, including social praises, "high fives" and smiles.

81. At the meeting, Dr. Taubman recommended follow-up training and consultation for staff twice a month for the first two months, later reduced to once a

month. The IEP team did not adopt his proposed goals because they lacked reference to Student's baselines. Dr. Taubman objected to any goals or interventions developed by the IEP team that involved prompting. He opined at hearing that Student's IEP team was committed to the use of prompts, he saw no program in place to reduce self-stimulatory behavior other than prompts, and the methodology used was not sufficient to reduce the behavior because it only interrupted it. He criticized the IEP team's approach as "mainstay," opining they were not interested in alternative more systematic proactive behavior to address Student's needs.

82. Ms. Wolfe opined that, at the time of the January 2018 IEP meetings, Student did not fully meet her behavior goals from her 2016 IEP. She improved in accepting corrective feedback but continued to engage in vocal protests while complying. In connection with the behavior goal, classroom staff first modeled the correct behavior, then worked on the goal, and monitored how she performed in normal class routines and preferred activities. Student succeeded in reducing her behavior during preferred activities, when she was successfully involved in those activities. Student also required reminders to have quiet hands/quiet mouth during class time, but she could comply with instructions independently when adult staff gave her directed supports at the beginning of a lesson session when she was sitting quietly for a period of time.

83. In response to Dr. Taubman's report that he observed Student in class needing a lot of prompting, Ms. Wolfe noted his observations occurred while Student was still adjusting to the new school, activities, and routines. As Student became more aware of her environment and surroundings, her need for prompts decreased. Student exhibited self-stimulatory behaviors during Dr. Taubman's single observation of Student in the classroom. However, Ms. Wolfe explained that what he observed did not represent Student's overall behaviors in the classroom. Student was aware of what the

classroom staff expected of her and ceased the self-stimulatory behaviors when she observed an adult preparing to start another activity. She responded to Ms. Wolfe's instructions, occasionally requiring, along with the rest of the class, a verbal reminder at the beginning of an activity. Student responded well to the positive attention and encouragement she received when she independently responded without prompting. She learned through repetition through multiple activities.

84. Student's spontaneous language grew from the time she began the sixth grade. She was more independent with classroom work. Her social skills improved; she was more aware of her peers in the classroom, learned their names, made spontaneous encouraging comments to specific peers when she observed the child having a difficult time, showed independent interest in a new student in the class, and sought out play with that student without prompts. She made progress toward her goals. In Ms. Wolfe's opinion, if the percentage of completion of goals increased by 10 percent from the prior year, that was an indicator of progress.

85. Ms. Wolfe agreed at hearing that Dr. Taubman shared good insight at Student's 2018 IEP meetings regarding Student's incidental learning by what she observed. Ms. Wolfe did not agree, however, with Dr. Taubman's recommendation that Student should be placed in a mild/moderate classroom with a mild/moderate peer cohort, because the classes were at higher academic level than Student was performing. She agreed with Dr. Taubman that Student required a level of prompting when beginning a task, but she pointed out that, based on her observations, Student could independently perform tasks after she received a higher level of prompting at the beginning of the task. In her opinion, the technique of fading the prompt encouraged development of independence as Student performed the desired task. Student's behavior had always been generally compliant once she received support, and Ms.

Wolfe observed a decrease in whining and vocal protesting from the time Student began attending her class.

86. Long Beach Unified behavior intervention supervisor Pearline Renfro testified at hearing. She had a bachelor's degree in communicative disorders, 53 units of training including 23 hours of applied behavioral analysis training from Chicago School of Professional Psychology, and was pursuing a master's degree in applied behavior analysis at the time of hearing. She worked as an instructional aide and behavior interventionist for several school districts before beginning her current employment with Long Beach Unified in 2013. Her experience included functional behavioral assessments, development of behavior programs, and training staff to implement the plans, participation in triennial assessments, and providing one-to-one behavioral support. She had not read any of Dr. Taubman's published articles or peer reviewed articles regarding students with autism. Although she was familiar with Student because she worked in one of Student's classes, she never provided services to Student and did not attend any of the IEP team meetings where the IEP team developed the January 2018 IEP.

87. Ms. Renfro was critical of Dr. Taubman's reported conclusions. She opined that his conclusions regarding Student were based on insufficient data. She also opined that his report did not clearly identify how long he spent observing Student. He narratively discussed how long Student was on a task, but included no percentages indicating her skill level, how much of the task she completed independently, and reported no clear data for areas of difficulty where she exhibited independence. Ms. Renfro would have liked to have seen the number of tasks Dr. Taubman observed, and clear data of how much of the task was completed independently or with assistance. His report lacked details, using instead words like "many" and "numerous." In her opinion, details were important to show a baseline where Student was performing in order to

develop goals. In her opinion, Dr. Taubman's report lacked sufficient information for the IEP team to use to develop a behavior intervention plan.

88. The IEP team considered a continuum of placement options and Long Beach Unified team members agreed that the moderate/severe program in a special day class was appropriate for Student. Dr. Taubman disagreed that the moderate/severe program was appropriate as currently implemented.

89. The IEP team agreed to develop a behavior intervention plan in an amendment IEP after further considering Dr. Taubman's recommendations. Long Beach Unified also agreed to an independent educational occupational therapy evaluation based on Mother's objection to terminating that service.

90. Long Beach Unified offered the following: placement in the moderate/severe special day class with specialized academic instruction five sessions a week; participation in general education for physical education, lunch, recess, passing periods, and school day activities; speech and language services consisting of one individual session weekly for 30 minutes, and one group session weekly for 30 minutes; 20 minutes of speech therapy consultation weekly; adaptive physical education 20 minutes a week; and extended school year. The IEP included goals in adaptive physical education, writing, reading, money math, speech and language (articulation, functional communication and pragmatics), and behavior/self-stimulatory behavior; and the March 28, 2018 behavior intervention plan. The IEP also included classroom and testing accommodations, supports and services, including use of an iPad with Parent training, small group instruction, flexible settings, and extended time. Long Beach Unified did not offer transportation.

91. Parents left the April 2018 IEP meeting with a copy of the draft January 2018 IEP. After the IEP meeting, Ms. Kutis revised the articulation goal on the computer. Additionally, Long Beach Unified changed references to the end dates of previous

annual goals in the present levels of performance in the January 2018 IEP, the notes reflecting the start and end time of one of the meetings, and it corrected the offer of specialized academic instruction from five sessions a week to add duration and frequency of 265 minutes/4.25 hours per session. Long Beach Unified provided the revised draft to Student's attorney. Long Beach Unified did not hold another IEP meeting to discuss the changes. On May 4, 2018, Parents consented to implement the final draft of the IEP, with corrections, but disagreed with the discontinuation of occupational therapy services and transportation and disagreed that it was an offer of FAPE in the least restrictive environment.

92. Mother opined at hearing that Student could write her name; could not write a paragraph with three to four sentences, could count to 100, could not get three items from the refrigerator, could only do single-digit addition, and did not have friends at home. Student knew the difference between a red and green traffic signal and understood the red light meant she had to stop but could not independently walk to a bus stop or cross the street and approached strangers.

93. Student received some private speech therapy through California State University of Long Beach in the spring and fall of 2017. A letter dated February 2, 2018, from the University speech and language department, asserted that it provided speech and language services on unspecified dates and for unspecified durations for the fall/spring of 2017 and spring 2018, and invoiced Parent \$425. No one from the California State University program testified at hearing. Mother did not credibly elaborate on the number of sessions Student attended or whether the services were individual or group. She did not have a clear recollection of how much she paid for those services. Mother credibly testified, however, that she paid \$310 to California State University Long Beach; her testimony was corroborated by two receipts identifying "CSULB" dated April 23, 2017, and September 27, 2017. Mother could not corroborate

the difference in amounts between the \$425 noted in the February 2018 letter and the two receipts she authenticated for \$310.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) 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. (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

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central Sch. 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 p. 200, 203–204.)

4. In a recent unanimous decision, the Supreme Court addressed and clarified the *Rowley* standard in *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1* (2017) (580 U.S. ___ [137 S.Ct. 988, 1000–1001; 197 L. Ed. 2d 335]. The Supreme Court in *Endrew F.* stated that school districts needed to "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.*) *Endrew 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 Sch. Dist.* (9th Cir. 2018) 726 Fed.Appx. 535; *K.M. v. Tehachapi Unified Sch. 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).)

6. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student was the filing party and carried the burden of proof.

ISSUE 1: PRELIMINARY JURISDICTIONAL ISSUE - STATUTE OF LIMITATIONS AND TOLLING

7. On November 26, 2018, the parties jointly filed a "Motion to Start the Issues from September 29, 2015 Based on an Agreement by the Parties to Toll the Statute of Limitations." The joint motion was duplicative of Issue 1, as defined above and in a November 19, 2018 Order Following Prehearing Conference. This Decision considers the joint motion and Issue 1 together as a preliminary procedural issue.

8. The issue stems from a due process complaint filed by Parents on Student's behalf naming Long Beach Unified on September 29, 2017, designated OAH case number 2017100089. Long Beach Unified filed a due process complaint on November 8, 2017, designated OAH case number 2017110466. OAH consolidated the matters on November 17, 2017. On February 14, 2018, the parties entered into a Tolling Agreement agreeing to extend the statute of limitations so that the parties could explore resolution of their mutual disputes and alternative placements for Student. Each party dismissed their respective complaints without prejudice. OAH dismissed case number 2017100089 and OAH case number 2017110466 on March 9, 2018.

9. The parties entered into another agreement, referred to as an Amended Tolling Agreement on April 13, 2018, agreeing that Student could refile her due process complaint within thirty days after completion of a pending IEP team meeting. The IEP was completed on April 23, 2018, and Student filed the complaint in this case on May 16, 2018. The parties agreed in the Amended Tolling Agreement that "the newly filed matter shall be deemed filed as of September 29, 2017" or, if not filed within 30 calendar days after completion of an independent evaluation, the matter would be deemed filed as of the date of the new filing.

10. On the last day of the due process hearing, the ALJ requested the parties to submit briefing on the issue of tolling as it impacted the applicable statute of

limitations. The parties filed a joint closing brief addressing their joint motion and Issue 1 on January 10, 2019.

Authorities And Discussion

11. The parties request that OAH accept their written waiver tolling the two-year statute of limitations under the IDEA.

12. The Administrative Procedure Act states that, “[t]he governing procedure by which an agency conducts an adjudicative proceeding is determined by the statutes and regulations applicable to that proceeding.” (Gov. Code, § 11415.10, subd. (a).) The parties rely on California Code of Civil Procedure section 360.5 to support their argument that OAH should enforce their tolling agreement and allow Student to raise claims dating back two years based upon the filing date of her prior complaint, September 29, 2017. Although the Code of Civil Procedure does not directly apply to cases within the jurisdiction of OAH, provisions of the Code of Civil Procedure are often looked to for guidance in areas for which the Administrative Procedures Act, contained in the Government Code, or the Education Code, do not have a specific provision.

13. Part 2, Title 2 of the Code of Civil Procedure addresses the time for commencing civil actions. Code of Civil Procedure section 360.5 states: “No waiver shall bar a defense to any action that the action was not commenced within the time limited by this title unless the waiver is in writing and signed by the person obligated.” Code of Civil Procedure section 22 defines an “action” as “... an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.” However, no express binding authority exists that mandates the application of waivers contemplated by Code of Civil Procedure section 360.5 to IDEA due process hearings before OAH.

14. The IDEA mandates that the hearing officer issue its decision in a Student-

filed case within 75 days from the filing of the due process complaint, unless the hearing officer grants a continuance based on good cause. (34 C.F.R. § 300.515 subd. (a) and (c).) The clear intent of the IDEA, and its directive to hearing officers, is to ensure that disputes involving children with special needs are adjudicated promptly and expeditiously. To that end, there is no requirement in special education law, as there is in civil cases, that parties must bring all claims at the same time in one action. In the interests of speedy resolution of special education cases, both the federal and California legislatures have limited the statute of limitations in IDEA cases to two years, and provided only two very specific exceptions. The parties' tolling agreement is at odds with the mandate of the IDEA for speedy resolution of special education claims. (See Ed. Code § 56505 subd. (f)(3).)

15. A parent or agency shall request an impartial due process hearing within two years of the date the parent or agency "knew or should have known about the alleged action that forms the basis of the complaint," or, "if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows." (20 U.S.C. § 1415(f)(3)(C).) The California statute of limitations for due process requests is also two years. (Ed. Code, § 56505, subd. (l).) A request for a due process hearing "shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request." (*Id.*) With two limited exceptions, the statute of limitations in both federal and California law precludes claims where Parents had knowledge or reason to know about the facts or alleged action forming the basis of the complaint more than two years before the date of filing the request for due process. (Ed. Code § 56505(l); 20 U.S.C. § 1415(f)(3)(C); *M.M. v. Lafayette Sch. Dist., et al* (9th Cir. 2014) 767 F.3d 842, 859 ("*M.M.*").)

16. Title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (j), establish exceptions to the statute of limitations in cases

where the parent was *prevented* from filing a request for due process due to 1) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or 2) the local educational agency withheld information from the parent that was statutorily required to be provided to the parent. (*M.M., supra*, 767 F.3d at p. 859.) Title 34 Code of Federal Regulations section 300.507(a)(2) mirrors the two-year filing deadline described in section 1415(f)(3)(D). It specifically provides in relevant part that, if a state has an explicit time limitation for filing a due process complaint, the two exceptions to the filing timeline described in title 34 Code of Federal Regulations section 300.511(f) apply.

17. In *G.L. v. Ligonier Valley Sch. Dist. Authority* (3rd Cir. 2015) 802 F.3d 601 (*G.L.*) the court concluded that sections 1415(f)(3)(D and 1415(b)(6)(B)⁵ of the IDEA function together “as a filing deadline that runs from the date of reasonable discovery, not as a cap on a child’s remedy for timely-filed claims that happen to date back more than two years before the complaint is filed.” (*G.L., supra*, 802 F.3d at p. 616.) The Ninth Circuit Court of Appeals recently affirmed the “knew or should have known” approach in *G.L. (Avila v. Spokane Sch. Dist. 81* (9th Cir. 2017) 852 F.3d 936.) Neither of these cases address, however, whether the parties may waive the timelines in which a party must file a claim under the IDEA.

18. Common law or equitable exceptions to the statute of limitations do not

⁵ Title 20 United States Code section 1415(b)(6)(B) addresses the right of a parent to present a complaint that addresses violations of the IDEA that occurred “not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint” subject to a state’s explicit timeline and the exceptions stated in title 20 United States Code section 1415(f)(3)(D).

apply to IDEA cases. (*D.K. v Abington Sch. Dist.* (3rd Cir. 2012) 696 F.3d 233, 248.) “The legislative and regulatory history of the 2004 amendments to the IDEA make clear that only the enumerated statutory exceptions may exempt a plaintiff from having his claims time-barred by the statute of limitations.” (*Ibid.*) “The committee does not intend that common law determinations of statutes of limitations override this specific directive.” (71 Fed. Reg. 45,540, 46,697 (Aug 14, 2006).)

19. The Tolling Agreement and the Amended Tolling Agreement effectively *suspended* the statute of limitations for a specified period of time to allow the parties to explore settlement. (See, *Don Johnson Productions, Inc., v. Rysher Entertainment, LLC* (2012) 209 Cal.App.4th 919, 927. “Under California law, tolling generally refers to a suspension of a statute of limitations.” [Citations omitted].) By their joint motion, the parties are requesting an equitable exception to the statute of limitations based on the parties’ tolling agreement. However, neither California special education law nor the applicable Federal statutes or their enabling regulations provide any authority to support a finding that OAH is bound by an agreement to suspend the statute of limitations for IDEA claims under equitable provisions. (See, *D.K. v Abington Sch. Dist.*, *supra*, 696 F.3d at p. 248.)

20. On the contrary, Congress made clear in 2004, through specific comments by the Department of Education, that although states were permitted to enact their own statutes of limitations, it did not intend for parties to equitably extend the IDEA statute of limitations beyond the two specific statutory exceptions. It did so by i) not including an equitable tolling exception, and ii) specifically directing that the two statutory exceptions in section 1415(f)(3)(D) apply to state enacted statutes of limitations. (34 C.F.R. 507(a)(2).) Education Code section 56505 subdivision (l) was enacted before the 2004 amendments to the IDEA. It originally provided for a three-year statute of limitations. However, after the 2004 federal amendment, in 2005 the California

legislature amended its statute to be consistent with section 1415(f)(3)(D), incorporating the two statutory exceptions. The 2005 California amendment referred to the 2004 amended Federal statute, and its two statutory tolling provisions, conforming the California statute to the federal statute, without further comment in either the statute or its enabling regulations. While both the California legislature and Congress expressly provided for two exceptions to the two-year statute of limitations under the IDEA, neither provided for expanding those exceptions through private contracts for equitable tolling. Relatedly, the United States Supreme Court addressed statutory construction and legislative intent when considering whether Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. §§ 251-260), which enumerated specific exceptions to negotiated procurements, affected construction initiated under the Buy Indian Act (41 U.S.C. §47). The Court held "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." (*Andrus v. Glover Construction Co.* (1980) 446 U.S. 608, 616.)

21. *Salmon Protection & Watershed Network v. County of Marin* (2012) 205 Cal. App. 4th 195, 203 (*Salmon*), cited by the parties in support of a common law tolling agreement, is notably distinguishable from cases arising under the IDEA. *Salmon* involved land use and environmental issues and a 30-day filing requirement. Finding that tolling agreements between the parties in that specific case and under those facts were valid to address public concerns, the court noted: "The statute contains no such prohibition [to extend the limitations period] *and we have been directed to no legislative history* [italics added] suggesting the Legislature intended to preclude the agency from pursuing such a course." (*Ibid.*) Similarly, *Brisbane Lodging v. Webcor Builders, Inc.* (2013), 216 Cal. App. 4th 1249, 1261, also cited by the parties, is not applicable. That case involved a latent construction defect pertaining to a sophisticated

commercial construction project, and the applicable statute of limitations. Both cases were civil actions brought under California civil law and are not analogous to administrative claims arising under the IDEA.

22. In this case, the tolling agreement was a contract entered into between Parents and Long Beach Unified, before Parents filed the current due process complaint, to extend the statute of limitations, rather than an agreement to provide Student FAPE. The parties argue that nothing in the federal or California legislative history bars them from entering into a contractual agreement to toll the statute of limitations in special education matters. However, such private agreements do not require OAH to extend the statute of limitations in all cases that would otherwise fall outside the two-year statute of limitations or the two statutory exceptions. OAH is directed by federal and California law to timely hear claims alleging a denial of FAPE falling within the applicable statute of limitations as impacted by, if applicable, the two specific statutory exceptions. (34 C.F.R. § 300.511(b); 5 Cal. Code. Regs. § 3082(a).)

23. The parties have offered no applicable statutory or other authority that supports a finding that OAH must decide IDEA claims arising before the two-year statute of limitations in the absence of evidence that either of the two statutory tolling provisions apply.

24. Student did not meet her burden of establishing that OAH was required to hear her claims based on a filing date of September 29, 2015. Student also did not prove either exception to the statute of limitations applied. This Decision does not preclude the parties from privately honoring their agreement, but OAH is not required to accept the agreement. The parties joint motion to start the issues on September 29, 2015, is denied. Accordingly, because this was a joint issue raised by the parties' joint Motion, neither party prevailed on this issue.

ISSUE 2: PREDETERMINATION OF PLACEMENT AND SERVICES

25. Student contends Long Beach Unified came to Student's 2017 and 2018 IEP team meetings having predetermined Student's placement and services based upon only those programs available within Long Beach Unified. Thus, Student argues the offer was predetermined and deprived Parents of a choice of appropriate placement and services, resulting in a denial of FAPE to Student.⁶

26. Long Beach Unified contends the relevant IEP teams, including Parents, and their legal representatives who attended the IEP team meetings held to develop the January 2018 IEP, engaged in thorough discussions regarding appropriate placement options and programs in the least restrictive environment for Student. Long Beach Unified further argues that Parents and their legal representatives had the opportunity to observe alternative placement options, were provided with written documentation of parents' rights in English and Spanish, had opportunities to receive clarification or explanation of parents' rights, and fully participated in the development of the IEPs, including the determination of placement. Finally, Long Beach Unified contends Student

⁶ Student's closing brief added an issue that was not identified in her complaint, at the Prehearing Conference or when the ALJ reviewed the issues with the parties on first day of hearing. In summary, Student argued that, *even if* the ALJ found no procedural violation caused by predetermination, the placement offers constituted a substantive denial of FAPE. Because that substantive issue was not pleaded in Student's complaint, Long Beach Unified did not agree at hearing to add that substantive issue for consideration, and it was not fully litigated at hearing, this Decision does not decide that issue. (*M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

offered no evidence that anyone proposed a placement option for Student that the school district refused to consider.

27. An IEP is a snapshot, not a retrospective which at any given time must sufficiently capture a child's educational needs. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has participated in the development of an IEP in a meaningful way when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

28. In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G., et al. v. Bd. of Trustees of Target Range Sch. Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1484 ("*Target Range*"), *superseded in part by statute on other grounds.*) The hearing officer "shall not base a decision solely on non-substantive procedural errors, unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).)

29. Procedural violations that interfere with parental participation in the development of the IEP “undermine the very essence of the IDEA.” (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) An IEP cannot address the child’s unique needs if the people most familiar with the child’s needs are not involved or fully informed. (*Ibid.*) A school district cannot independently develop an IEP without input or participation from the parents and other required members of the IEP team. (*Target Range, supra*, 960 F. 2nd at p. 1484.)

30. An education agency’s predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)

Predetermination occurs “when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives.” (*H.B. v. Las Virgenes Unified Sch. Dist.* (July 3, 2007, No. 05-56486) (9th Cir. 2007) 239 Fed. Appx. 342, 344-345 [nonpub. opn.]; see also, *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, *superseded on other grounds by statute* [“A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification.” (citing *Target Range, supra*, 960 F.2d at pp.1483-1484)].)

31. A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement. (*K.D. ex rel. C.L. v. Dept. of Educ., Hawaii* (9th Cir. 2011) 665 F.3d 1110, 1123.) A school district is obligated to ensure that a continuum of alternative placements is available to meet the child’s needs including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R § 300.115(a).) However, school officials need not come to an IEP meeting with a blank

mind; they “can, and should, have given some thought” to placement before the meeting. (*Doyle v. Arlington County Sch. Bd.* (E.D. Va. 1992) 806 F.Supp. 1253, 1262.) They do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP team meeting. (*Knox, supra*, 315 F.3d at p. 693, fn. 3.) District personnel may bring a draft of the IEP to the meeting as long as parents are provided an opportunity to discuss their questions, concerns, and recommendations before the IEP is finalized. (*Fuhrmann, supra*, 933 F.2d at p.1036.)

32. School district IEP team members may come to IEP meetings with opinions regarding a proposed program for the child, as long as they remain flexible and are willing to consider parents' objections and suggestions. (*Fort Osage R-1 Sch. Dist. v. Sims* (W.D. Mo., Sept. 30, 2010, No. 09-563-CV-W-F-JG) 2010 WL 3942002, at *17.) In *M.C.E. v. Bd. of Educ. of Frederick County* (D. Md., July 11, 2011, No. 09-3365) 2011 WL 2709196, at *8-9), school district IEP team members arrived at the meeting believing a particular therapeutic placement was best for the student, but the court held that they did not engage in predetermination because they listened to parents' views at the meeting with an open mind. Considering a presentation by parents that the student was doing well in the private school preferred by parents supported a finding that school district IEP team members did not predetermine the placement they offered. (*Student v. Solana Beach Sch. Dist.* (2008) Cal.Offc.Admin.Hrngs Case No. N2007070255.)

33. Student did not prove that Student's IEP teams procedurally violated the IDEA at any of the IEP team meetings in 2017 or 2018, by predetermining her placement and services based upon the lack of other public programs available within Long Beach Unified. Student offered no evidence that the offers of placement made in February 2017, and January 31, 2018 IEP's were not the result of a collaborative efforts of the entire IEP team, including Parents. Student offered no evidence that Long Beach Unified IEP team members came to any IEP meetings with a closed mind, unwilling to consider

alternatives, and unwilling to have a fruitful discussion with Parents about placement.

34. First, addressing Dr. Taubman's opinions on placement, Student relied on Dr. Taubman's criticism of Long Beach Unified methodology and its public programs to support his argument that Long Beach Unified had no other suitable program for Student, thus rendering the placement offer "predetermined." Dr. Taubman opined, based on brief observations of three middle school classrooms, that unless Long Beach Unified had a program it could modify to meet Student's needs based on his recommendations, it should develop a new program for Student incorporating his recommendations. His testimony was not persuasive as to the issue of predetermination. Long Beach Unified held two sets of IEP team meetings for Student's annual IEP's, in 2017 and 2018. Student's contention that either or both of the 2017 or 2018 placement offers were predetermined because no appropriate "public" placement was available was unsupported by any credible evidence.

35. Addressing the February 2017 IEP, the IEP team discussed Student's placement for middle school at the February 9 and May 11, 2017 IEP team meetings. At the February 9, 2017 meeting they discussed Mother's options to participate in the School of Choice program and explained which of those schools had programs for Student. Mother had the opportunity to visit the schools available to Student for middle school. She chose the school that Student would attend for middle school, availing herself of the program, and knowing that Student would attend a moderate/severe classroom. Student offered no evidence that Mother was deprived of parental participation by predetermination, when, in fact, she chose the school and program Student would attend at the February 9, 2017 IEP team meeting.

36. At the May 11, 2017 meeting, the IEP team again discussed placement options, including comparing the mild/moderate and moderate/severe classrooms. They discussed that the moderate severe classroom focused more on academics than

behaviors, which was suitable for Student's needs. Mother understood Student would remain at Holmes in the S.U.C.S.E.S.S. program through the 2017 extended school year. It was an available public program in which Student was successful, as documented in Student's IEPs and established by the testimony from Long Beach Unified witnesses. Mother also understood that Student would attend a moderate/severe classroom at Mother's school of choice, Stanford, for sixth grade. Mother observed Student in her classroom at Stanford more than once during the first semester of 2017-2018 school year. Thus, as to the February 2017 IEP offer, there was no evidence that the IEP team members came to any of the four 2017 IEP team meetings with their minds made up or that they refused to consider Mother's questions, concerns, or objections regarding placement. Mother actively participated in the discussions, and the IEP team answered her questions and addressed her concerns about schools and classrooms.

37. Long Beach Unified staff testified at hearing that the school district had access to a non-public school that ran a similar type middle school S.U.C.S.E.S.S. program to Holmes; however, it was not appropriate for Student. That placement was more restrictive, because Student had no opportunity for mainstreaming with typical developing children. Student offered no evidence that Mother specifically asked for placement for Student in a non-public school or that the 2017 IEP team members would have refused to consider such a request had one been made.

38. Similarly, during the January 2018 IEP team meetings, the IEP team met twice, in March and April 2018. Student's attorneys were present, along with Dr. Taubman. Parents and Dr. Taubman had the opportunity to and visited the moderate/severe classroom on multiple school campuses. Dr. Taubman did not feel the placement options he observed were appropriate for Student. Based upon Ms. Wolfe's experience working with Student, she felt the moderate/severe program at Stanford was appropriate for Student. Student was making progress at school to the extent of her

abilities and continuing to learn to manage her behaviors. The IEP team considered Dr. Taubman's recommendations for development of a new program for Student, with training, and they did not come to either of the two 2018 IEP meetings with a closed mind.

39. Multiple attorneys represented Parents at, and their experts attended, the 2018 IEP meetings. Parents and their representatives actively participated in all of the 2018 meetings. The Long Beach Unified IEP team members listened to Parents' concerns, as well as those of their attorneys and experts, answered questions, discussed recommendations, and explained their reasoning for the proposed placements in the moderate/severe special day class for middle school. Student offered no evidence that the school district's 2018 IEP team members came to the meeting with their minds made up regarding placement options or that they did not consider input from Parents.

40. In summary, Student did not prevail on Issue 2. The IEP team appropriately considered alternative placements, including Dr. Taubman's recommendations, as part of the decision to offer a moderate/severe special day class at a Long Beach Unified public middle school. Student did not prove that Long Beach Unified procedurally violated the IDEA by predetermining Student's placement, before or after May 16, 2016, or in the January 2017 or the January 2018 IEP offers. Student did not prove that Long Beach Unified predetermined its offer of Student's placement and services because it had no appropriate public programs for Student. Student did not prove that Long Beach Unified violated the IDEA by predetermining placement resulting in depriving Parents of the ability to meaningfully participate in a placement decision, impeding Student's right to a FAPE, or depriving her of educational benefit.

ISSUE 3(A): BEHAVIORAL PROGRAM/SERVICES

41. Student contends Long Beach Unified denied her a FAPE by failing to offer related services in the 2017 and 2018 IEP's consisting of an appropriate behavioral

program or services. Long Beach Unified contends Student's IEPs had behavior goals, a behavior intervention plan, and behavior services in each of the relevant IEPs; she made progress in behavior during the relevant time period, and therefore Long Beach Unified did not deny her a FAPE.

42. The evidence was persuasive and undisputed that Student had behavioral challenges as a result of her disabilities that required intervention to allow her to achieve progress in light of her circumstances. Overall, the evidence was also persuasive that the programs and services Long Beach Unified designed to address Student's behavior were effective. Student accessed her educational program in the fifth grade and sixth grade and made progress in her behavior in light of her circumstances.

43. Specifically, Long Beach Unified witnesses, including Ms. Lin, Ms. Pickens, and Ms. Wolfe, persuasively and credibly testified that Student made noticeable progress in her behaviors in fifth and sixth grades. They relied on Student's reported levels of progress toward her behavior goals, Ms. Lin's December 2016 functional behavioral assessment, and Student's performance in the classroom and on campus. Both Ms. Lin and Ms. Pickens noted, for example, during Student's first year in the S.U.C.S.E.S.S classroom when she was younger, she would run from class crying, screaming and protesting, and demonstrated aggression. By fifth grade, Student said "hello" to Ms. Lin, wanted to be with people, her protesting and self-stimulatory behaviors decreased to a very low volume, and she did not show aggression. They attributed her progress to the embedded supports in the S.U.C.S.E.S.S. program while she was in elementary school, implementation of her behavior intervention plan throughout the day, and her behavior goals.

44. Student argued that her behaviors were significantly impeding her learning, which she claimed was documented in each of the relevant IEPs. However, testimony from Ms. Myers raised the question of whether Student's academics were

impacted only by her behaviors, or in conjunction with her low cognitive ability, or just the latter. Student offered no evidence, including expert testimony, that directly addressed Ms. Myers findings, or refuted her conclusions and opinions that Student had an intellectual disability which impacted her academic progress. Thus, Student did not prove that her behaviors impeded her academic progress, because Long Beach Unified's behavior programs and interventions denied her a FAPE.

45. Student also argued that, in the S.U.C.S.E.S.S. program at Holmes, no one took data or otherwise monitored whether behavioral strategies used by staff were effective, and no other teaching strategies were initiated other than those in her behavior intervention plan. Ms. Pickens credibly testified that, although she did not personally take data, the behaviorists regularly recorded data and shared the information with Ms. Lin during their collaborations. Student was critical of Ms. Lin for not being more attuned to Student's day-to-day behaviors. However, Ms. Lin's testimony was credible. She monitored Student's behavior intervention plan and progress toward goals, and she supervised the behaviorists at Holmes and collaborated with them, Ms. Pickens, and Ms. Florendo. She also assessed Student's behaviors in December 2016, obtaining sufficient data to make recommendations to the 2017 IEP team. When Student did not make progress toward her goals, Ms. Lin went into the classroom to observe teaching strategies and recommend changes to assist Student in meeting goals. In contrast, Dr. Taubman did not observe Student in the S.U.C.S.E.S.S. program at Holmes, and therefore did not offer relevant opinions of the behavior program there.

46. Student argued that the moderate/severe special day middle school class did not have the intensive behavior support like the S.U.C.S.E.S.S. class, in the form of multiple classroom behaviorists. However, Student's argument was contradicted by her own expert. Dr. Taubman was critical of the heavy use of prompting and reinforcements

as part of Student's behavior program, and he did not include in his recommendations the assignment of a behaviorist to Student in the classroom or more intensive monitoring. He objected at IEP team meetings to any form of adult prompting or prompt dependent goals.

47. Dr. Taubman's conclusions regarding Student's behavioral needs in 2018 were not inconsistent with those of the Long Beach Unified staff who worked with Student and testified. Ms. Renfroe's criticisms of the bases for Dr. Taubman's conclusions in his assessment report were less credible than Dr. Taubman's opinions based upon his experience and expertise. Ms. Renfroe never directly worked with Student and she was significantly less experienced in the area of behavior in comparison to Dr. Taubman.

48. Additionally, Ms. Wolfe credibly testified that Student's behavior in her classroom was compliant and she was well-behaved. Her self-stimulatory behaviors had reduced and did not interfere with her access to her educational program. Ms. Kutis observed Student gravitated toward one peer in the classroom, sat with, and observed the peer without engaging in conversation. She required less prompting during unstructured activities and made progress initiating a comment about something she observed. Long Beach Unified witnesses also credibly testified they focused more on Student's academics while developing her IEP for middle school, specifically because her behaviors improved.

49. Student also argued that the interventions in the 2016 and 2017 behavior intervention plans developed for Student were unchanged and did not address her needs. Student's arguments were unpersuasive to prove the failure to offer an appropriate behavior program or services. Ms. Lin credibly explained at hearing how the IEP team arrived at the interventions in Student's 2017 behavior support plan, how those were implemented, and opined that the use of prompts, faded as needed, to encourage

Student to change her behavior, were beneficial. Although the strategies relied on various levels of prompting and reinforcement techniques, Ms. Lin saw no reason to substantially modify the types of intervention strategies and techniques included in the plan, because Student was making progress. Her testimony was credible, because she worked regularly with Student for several years until Student matriculated to middle school, and she observed Student's progress in behavior through elementary school.

50. Mother testified that when she observed Student at Holmes during fifth grade, Student did not participate in classroom activity, or she engaged in a preferred activity of painting her nails with adult assistance. When Mother observed Student at Stanford, Student sat at a table with other children during a group lesson and only received adult attention when she was inattentive. An adult redirected Student's attention to the task and then returned to the front of the classroom. Student continued through the lesson without paying attention. Student argued these observations suggested no one was addressing Student's needs, which was contradicted by the credible testimony of Ms. Pickens, Ms. Wolfe, and Ms. Lin. Ms. Wolfe and Ms. Pickens both worked daily and directly and regularly with Student, as her classroom teachers. Both teachers had her in their classrooms for more than one school year. They were aware of her goals and implemented those goals directly, and in collaboration with other adults and service providers. Ms. Lin monitored Student's behavior intervention plan and her goals at Holmes, collaborated with adult behaviorists, and made changes in their approach to Student when necessary. Their collective observations about the interaction of school staff with Student were more persuasive than Mother's, because Mother's visits to the classroom were limited in number and time.

51. The IEP team met twice to develop the January 2018 IEP. The 2018 IEP team thoroughly considered Dr. Taubman's input at both meetings. He shared his opinions about Student's goals and placement. Dr. Taubman encouraged Student's

independence from adult prompting and redirection. He opined that Student's mild verbal protesting "appeared" to have escape/avoidance and access purposes and may have had communication and emotion release functions. He noted Student made recent consistent progress, but criticized the methodology of facilitation, guidance, and assistance in the moment. The January 2018 IEP team developed appropriate behavior goals considering Dr. Taubman's recommendations, and incorporated some of his suggestions, including developing less challenging and less prompt dependent goals, and modifying the behavior support plan to rely less on prompting. The IEP team considered Dr. Taubman's proposed goals, noted they lacked necessary baselines, and agreed to collect data toward those goals so the IEP team could revisit his suggested goals at a subsequent IEP team meeting. There was no evidence that the behavior goals, as developed by the 2018 IEP team, were not appropriate to address Student's behavior needs at the time, in conjunction with the behavior intervention plan. The IEP team's decision to revisit Dr. Taubman's proposed goals after collecting data for baselines was also not unreasonable or inappropriate, nor did the decision to do so result in a denial of FAPE.

52. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209; *Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley, supra*, 458 U.S. at p. 202).) Here, Dr. Taubman's opinions focused on Student's placement; he criticized the moderate/severe classrooms, the methodologies used in those classrooms, the behavior intervention plan designed for Student, and the school district IEP team members' attitude toward his recommendations. He recommended an entirely new program designed for Student, and other unknown children with similar needs. He recommended intensive training for Long Beach Unified staff in the specific strategies and methodologies he promoted. While informative, Dr. Taubman's opinions

did not support a finding that the overall behavior goals, interventions, strategies, and methodology employed by Long Beach Unified staff for Student amounted to a denial of FAPE.

53. In summary, Student did not prove that Long Beach Unified denied her a FAPE because it failed to offer Student an appropriate behavior program or services in the February 2017 or January 2018 IEP's, or that those IEP's were not reasonably calculated to enable Student to make appropriate behavior progress in light of her circumstances. (*Andrew F., supra*, 137 S. Ct. at pp. 1000-1001]. Student did not prevail on Issue 3(a).

ISSUES 3(B), (C), AND (F): SOCIAL SKILLS, COMMUNICATION PROGRAM, SOCIAL INTERACTION

54. Student contends Long Beach Unified denied her a FAPE by failing to offer or provide an appropriate social skills program or services; communication program or services; safety awareness program or services; speech and language program or services; and social interaction opportunities. Long Beach Unified contends it offered Student pragmatics and social/peer interaction goals in the February 2017 IEP, but Parent did not consent to that IEP. It also contends no one on the IEP team requested goals in the areas of social skills that were refused by Long Beach Unified. Long Beach Unified also argues Student successfully participated in a general education physical education class during the 2018 school year, either independently or with a peer coach. Finally, the school district argues Student made progress in each area with the goals and services provided in her IEP's, and Long Beach Unified did not deny Student a FAPE.

55. This Decision considers Student's social skills (Issue 3(b)), communication skills (Issue 3(c)), and social interaction opportunities (Issue 3(f)) together, because the evidence was persuasive that her social skills and social interaction were partially dependent on her ability to communicate.

56. Student's teachers, service providers, and behaviorists all concurred at hearing that Student's social skills, and her ability to initiate communication with others were slow to develop from the time she was in elementary school and through her first year of middle school. She did not initiate play or communication with her peers at school, except incidentally. She gravitated to adults. She had only one or two "friends" in class with limited communication between them. She spent the majority of her time at school alone, or in small group instruction where she required prompting to engage in social interaction. When Student started middle school in fall 2016, Student was in a classroom without behavior interventionists who in elementary school staffed the S.U.C.S.E.S.S. program. She occasionally engaged with a peer, but more often reacted to adults when they redirected her behaviors. The evidence was persuasive that Student had significant needs in the area of social skills from the time she began middle school, and that she made minimal progress in her social interactions at school.

57. Student had an iPad at school which Long Beach Unified made available to assist Student in communication. However, she seldom used it on a regular basis. Mother observed Student and school staff during the end of fifth grade, and in sixth grade, sitting in class with the iPad in front of her, without engaging by using the device. None of Long Beach Unified's witnesses persuasively testified that they were using the device regularly to assist Student with her communication skills. Ms. Florendo noted in her 2017 triennial speech assessment that Student did not consistently use the Proloque2Go application on her iPad. She concluded Student needed direct instruction on how to communicate more effectively. Student's February 2017 IEP included a pragmatics goal that focused on the skill of greeting another person and asking a question verbally or with a communication device. It also included a goal for social play, where Student would engage in structured play activities with others (adults and peers), for at least 70 percent of the time in a three-minute time frame across two consecutive

weeks. Long Beach Unified staff were responsible for that goal. Although the IEP team offered those goals, they were never implemented because Mother did not consent to the IEP.

58. At the IEP team meetings held to develop the January 2018 IEP, the IEP team reported Student required modeling or visual and verbal prompting to greet staff and peers, take turns during an activity, and gain attention. The IEP team did not note whether she met her 2017 annual goal in pragmatics. Similarly, the January 2018 IEP did not mention the social skills goal, whether Student met the goal or whether she made progress. The January 2018 IEP did not include a social skills goal. However, the pragmatics goal addressed social interaction with school staff and peers, including use of her alternative and augmentative communication device. The IEP team agreed that new goals in independent social communication would be discussed at an amendment IEP team meeting after data was collected regarding spontaneous initiating of wants and needs. However, the IEP team did not recommend a specific social skills program. In summary, the evidence proved that, despite her low cognitive abilities and low functioning in verbal communication, Student had a significant need in developing her skills in social communication and initiation of peer and adult interactions. Long Beach Unified had no program in place for her from May 2016 through May 16, 2018, to address those continuing needs.

59. Ms. Hollar and Ms. Kutis generally concurred as to Student's deficits in pragmatics. Ms. Kutis reported that Student made some progress toward her communication goals. However, Dr. Hollar was more persuasive that Student, whose communication deficits were historically significant, needed more intensive speech therapy and assistive technology to encourage her communication skills. Dr. Hollar recommended a token reward system for communication engagement; use of a tally sheet during educational tasks to increase communication skills across all settings;

placement in situations at school where Student was communicating with peers at least 12 times a day, through role development of common classroom activities; and teaching Student simple gestures to direct others in the classroom until she could use words. Dr. Hollar also recommended several applications for the iPad that would promote development of Student's communication skills. Ms. Kutis was not familiar with most of the applications Ms. Hollar recommended, which supported Ms. Hollar's recommendation for training in the use of those applications. Finally, Dr. Hollar recommended enrollment in a social language and play intervention program, such as Relationship Development Intervention; or Floortime (available through Regional Centers and private clinics); or PLAY program, to train caregivers in the development of pragmatic language skills and appropriate social play interactions.

60. Student met her burden of persuasion as to Issues 3(b), 3(c) and 3(f). Ms. Hollar's opinions that communication and social skills were essential to Student's ability to function in society as she grew older were persuasive. Social skills were an important aspect of Student's educational program, particularly given her documented low cognitive abilities. The evidence was convincing that Long Beach Unified denied Student a FAPE by failing to provide Student with a specific social skills and communication program at school, such that she could successfully access her educational program, in light of her unique needs.

ISSUE 3(D): SAFETY AWARENESS PROGRAM/SERVICES

61. Student did not meet her burden on Issue 3(d). Student offered no persuasive evidence that Parents ever requested or that Student required a safety awareness program or services to access her education such that Long Beach Unified denied her a FAPE by failing to offer one.

62. Dr. Taubman's opinions on this issue were not convincing. Dr. Taubman opined that, as Student grew older, her deficits in social skills and language and her

persistent engagement in “awareness-precluding stereotypic behavior,” meant her vulnerability and safety were becoming an area of increasing concern. His opinion was not based on any reported or observed specific behaviors, or any data or information he gathered from his observations and assessment that indicated Student actually faced safety risks at school. It appeared to be more speculative of what the future might hold for Student.

63. Mother testified that Student understood the meaning of red and green traffic lights and knew that a red light meant she must stop. She could not cross the street by herself or approach strangers. However, there was no evidence that there had ever been an incident where Student’s behavior put her at risk at school. No one testified that during fourth, fifth or sixth grades, she ever eloped from her classroom or the school campus, impacting her access to her education. Ms. Wolfe, Ms. Pickens, and Ms. Lin all testified Student was compliant at school and followed directions. When Mother observed Student in her classroom, Student sat quietly at the back of the classroom, without any evidence of elopement or unsafe behaviors.

64. Student offered no evidence as to what type of safety awareness program Student required or any opinions on what such a program should look like. Dr. Taubman’s generalized opinion about Student’s future needs in safety awareness was not enough to establish that Long Beach Unified denied Student a FAPE, depriving her of educational benefit appropriate for her circumstances, because Student required a specific service or program that addressed safety awareness, beyond what she received during the course of the school day.

ISSUE 3(E): SPEECH AND LANGUAGE

65. Student contends in Issue 3(e) that Long Beach Unified denied her a FAPE by failing to offer appropriate speech and language services. Student met her burden of persuasion.

The January 2016 IEP, which was Student's last agreed upon IEP until April 2018, provided Student with two 30-minute sessions of group speech therapy weekly during the regular school year, and one 30-minute session during the 2016 extended school year. The service was delivered at Holmes and continued at Stanford until April 2018, when Parent signed the January 2018 IEP.

66. Student had three speech goals from her 2016 IEP, two in semantics and one in syntax. At the 2017 IEP meeting, Long Beach Unified staff reported Student met one of her semantics goals, made 10 percent progress toward the second semantics goal, and 20 percent progress toward the syntax goal. The 2017 IEP included an offer of speech therapy services twice weekly for 30-minute group sessions, with goals in articulation, semantics, and pragmatics. That IEP was not implemented because Parents did not consent. The IEP team continued to work on Student's 2016 IEP goals.

67. At the January 2018 IEP meetings, Ms. Kutis reported Student met or exceeded the 2016 IEP goals in semantics and syntax. She provided 30 minutes twice weekly of individual therapy in the speech therapy clinic, and occasionally worked with Student in the classroom, even though Student's 2016 IEP called for group therapy. She agreed with Ms. Hollar that Student had deficits in articulation. She came to the meetings with proposed new goals, which were consistent with Ms. Hollar's recommendations.

68. Ms. Hollar's testimony was persuasive, however, that Student had historic and ongoing significant needs in the area of speech and language and that her lack of language impacted her access to her educational program and progress. She was critical of Student's earlier speech and language goals. She opined the goals as written would not help Student initiate and engage in conversation, because she was prompt dependent. Student performed during testing extremely below average, at a 12-16-month level, when using all components of non-verbal patterns. She performed very low

when participating in the one-word picture vocabulary test. Given Student's deficits in articulation and pragmatics, Ms. Hollar opined she needed intensive intervention to develop her communication skills. She recommended several new goals. She also recommended speech therapy at school four times a week, 15 minutes twice a day, both in the classroom and outside of the classroom. In her opinion, Student could tolerate an increased amount of speech therapy and needed it to increase her language skills. She recommended parental training twice a month for 30 minutes. She also recommended specific applications to support language development, and a one-to-one aide to support speech and language development in the educational setting. Her recommendations were credible and supported by the evidence that proved that Student made minimal progress in the area of speech from May 2016 until Ms. Hollar assessed her.

69. In general, Ms. Hollar's opinions were more persuasive as to Student's needs in the area of speech and language. Ms. Hollar's assessment results showed Student had significant deficits in language development, with which Ms. Kutis did not disagree. Ms. Hollar was critical of Student's speech goals, opining they were too prompt dependent to encourage growth. Student was largely non-communicative in the classroom. In Ms. Hollar's opinion, during fifth and sixth grade, Student did not show significant progress in language development, and her goals did not address all of her language needs. She had the ability to process language, but she needed to learn how to use it. She was also critical of Student's lack of use of her communication device, and the fact that staff did not actively engage Student in using the device. Ms. Florendo's testimony was consistent with Ms. Hollar's conclusions in this regard, because she reported Student had the communication device in 2017, but did not use it frequently and needed training to use the device. On the other hand, although she worked with Student, Ms. Kutis did not assess Student during the 2017 or 2018 school year. She

worked with her in the speech therapy clinic for one hour a week, and occasionally during class time. However, she worked on goals from the 2016 IEP, which Student met. Ms. Kutis concurred with Ms. Hollar's assessment results, although she disagreed that Ms. Hollar's classroom observations reflected Student's patterns throughout the day. Nevertheless, she agreed with Ms. Hollar's proposed goals, which she opined were consistent with the goals she recommended to the January 2018 IEP team.

70. The evidence was convincing based upon Ms. Florendo's Ms. Kutis's and Ms. Hollar's testimony, that Student's speech and language was historically a significant area of need, and that two thirty-minute sessions of speech therapy each week, whether in a group or individual setting, or a hybrid of the two, was insufficient to meet those needs to enable her to make appropriate progress in light of her unique circumstances. Given Student's notable lack of progress in the area of speech and language dating back to at least fourth grade, Student proved that Long Beach Unified denied Student a FAPE by failing to provide sufficient speech and language services from May 16, 2016, until May 16, 2018.

ISSUE 4: INCOMPLETE RECORDS AND PRIOR WRITTEN NOTICE

71. Student contends Long Beach Unified procedurally denied Student a FAPE by failing to i) complete IEP documents for Student, and ii) failing to provide written notice before it terminated transportation services. Student argues that Long Beach Unified provided all IEP drafts from 2017 and 2018 to Parents as incomplete documents, and as a result the incomplete documents made it impossible for Parents to fully participate or ascertain what Long Beach Unified was offering as FAPE. Long Beach Unified contends all relevant IEP's signed by Parents were complete. It also contends the final draft IEP provided to Parents in May 2017 was complete and would be finalized after Parents signed it. The January 2018 IEP was provided in final draft form to Student and her attorneys, and a final complete copy was provided to Parents' attorney after

Parents signed it. Long Beach Unified also contends Parents were fully informed in writing and at IEP meetings regarding the reasons why Student would not receive transportation if they participated in the School of Choice program.

4(A) Failure To Complete IEP Documents

72. Student did not prove that Long Beach Unified procedurally violated the IDEA by failing to ever provide Parents with complete IEP documents, as Student argued. Although the evidence established that some of the IEP drafts provided to Parents in 2017 and 2018 were incomplete or had errors, that alone did not establish a procedural violation that impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process or deprived Student of educational benefit.

73. Parents attended the IEP meetings from February 2017 through April 2018, and in 2018 were represented by multiple attorneys at the IEP team meetings held to develop the January 2018 IEP. The IEP team provided Parents with a draft IEP at each meeting that contained information pre-populated by administrative staff and those IEP team members working with Student. Mother had the opportunity to and did ask multiple questions about the content of the IEP's at each meeting. She was assisted by a Spanish interpreter, and, in some cases, the school counselor provided explanations in Spanish.

74. Those drafts included some mistakes and omissions. For example, the January 2017 IEP draft, on the information page, noted Student's placement at Stanford, while she was still attending Holmes. This resulted in some confusion at hearing. However, Long Beach Unified staff credibly testified that this anomaly was caused by administrative staff pre-populating the IEP draft with Parents' School of Choice for middle school. No one, including Parents, disagreed at the 2017 IEP team meetings or at hearing that Student was attending, and would continue to attend, Holmes through

2017 extended school year. The same is true for transportation as a related service in the January 2017 IEP. The January 2017 IEP draft did not include transportation through 2017 extended school year, which the IEP team intended to include as a related service until Student matriculated to middle school. Its omission from the IEP services page, failing to identify that the school district would provide transportation through 2017 extended school year, was a procedural violation. However, the IEP team members clarified for Mother at IEP team meetings that Student would continue to receive transportation through that time. Mother knew when she refused to sign the 2017 IEP that Student would not receive transportation in middle school. She did not consent to the 2017 IEP so Student could continue receiving transportation as the status quo, and after asking specific questions about transportation to her school of choice. The evidence established that Student continued to receive round trip home to school transportation as the status quo, through the time of hearing. Thus, the procedural violation resulting from the incomplete 2017 IEP did not significantly impede Parents' opportunity to meaningfully participate in the decision-making process, impede Student's right to a FAPE, or deprive her of educational benefits.

75. Long Beach Unified procedurally violated the IDEA when Ms. Kutis and other staff changed the IEP draft after the April 14, 2018 IEP team meeting, without input from Parents or their attorneys. While Ms. Kutis modified the IEP speech goals, and other staff corrected start and end dates for previous goals, and changed the amount of time Student would receive specialized academic instruction, Long Beach Unified sent those changes to Parents' attorney for review. Long Beach Unified did not make those corrections at an IEP meeting. However, the procedural violation did not significantly impede Parents ability to participate, because they were represented by counsel during review of the final draft, they received the corrections, and had the opportunity to comment on them, or ask for another IEP meeting to discuss the

changes, if they chose to do so. Instead, Parents signed the IEP, noting their objections to the removal of occupational therapy and transportation. Transportation services remained status quo, through the time of hearing from Student's 2016 IEP. Therefore, the procedural violation caused by changing the IEP draft after the April 2018 IEP meeting, regarding start and end dates of goals, speech goals and frequency of therapy, or the frequency of specialized academic instruction, did not deprive Student of educational benefits, or impede her right to a FAPE.

76. In summary, Student did not show through persuasive evidence that Parents' ability to participate in IEP meetings was significantly impeded, that Student was deprived of any educational benefit, or that her right to a FAPE was impeded in any way due to Parents' receipt of draft or incomplete IEP documents during IEP meetings. Student did not prevail on Issue 4(a).

4(B) Prior Written Notice – Transportation

77. Student contends Long Beach Unified procedurally violated the IDEA by terminating Student's transportation services without providing Parents prior written notice of its intended action. By failing to send prior written notice, Student argues the procedural violation denied Student a FAPE. Long Beach Unified contends that Parents received written notice regarding the transportation policies of the School of Choice Program, which served as the requisite notice.

78. Prior written notice must be given when the school district proposes or refuses to initiate a change in the identification, assessment, or educational placement of a child with special needs or the provision of a FAPE. (20 USC §1415(b)(3) & (4); §1415(c)(1), §1414(b)(1); 34 CFR § 300.503; Educ. Code §§ 56329 and 56506(a).)

79. The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopen Sch.*

Dist. (3rd Cir. 2010) 606 F.3d 59, 70.) Prior written notice must be sent “a reasonable time” before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement or provision of FAPE to the child. (34 C.F.R. § 300.503(a)(1); Ed. Code, § 56500.4, subd. (a).) This is to ensure that “parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect.” (*Letter to Chandler*, 59 IDELR 110 (OSEP April 26, 2012).)

80. A prior written notice must include (1) a description of the action proposed or refused by the agency; (2) an explanation for the action; (3) a description of each evaluation procedure, assessment, record, or report which is the basis of the action; (4) a statement that the parents of an individual with exceptional needs have protection under the procedural safeguards, and the means by which a copy of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance; (6) a description of the other options the IEP considered and the reasons why those options were rejected; and (7) a description of other factors relevant to the proposal or refusal of the agency. (20 U.S.C. 1415(b)(3) and (c)(1); 34 C.F.R. § 300.503(a) and (b); Ed. Code, § 56500.4, subd. (a) and (b); see also Ed. Code, § 56500.5 [requiring “reasonable written prior notice” that a student “will be graduating from high school with a regular high school diploma . . .”].) The notice is required even if the change is being proposed by the parent. (*Letter to Lieberman*, 52 IDELR 18 (OSEP 2008).)

81. When a violation of such procedures does not actually impair parental knowledge or impede participation in educational decisions, the violation is not a substantive harm under the IDEA. (*C.H. v. Cape Henlopen Sch. Dist.*, *supra*, 606 F.3d at p. 70.)

82. The purpose of prior written notice as a procedural protection was to ensure Parents had sufficient notice of Long Beach Unified’s decision to withdraw transportation as a related service in the January 2017 and January 2018 IEP’s, because

Mother opted to participate in the School of Choice program when Student enrolled in middle school. Long Beach Unified provided all parents of sixth grade students preparing to matriculate into middle school, including Mother, with written information regarding its School of Choice Program. It provided its policy that Long Beach Unified did not provide transportation to a school of choice if a school with an appropriate program closer to Student's residence existed. Although Mother did not recall at hearing that she received the document, she completed the application for School of Choice and listed three school choices.

83. Testimony from school administrators established that Long Beach Unified policy was that it did not offer transportation, even to special education students with an IEP that provided for transportation as a related service, to any student who enrolled in a school of choice, rather than the nearest school to a child's residence with the appropriate program.

84. The IEP team discussed Mother's decision to participate in the School of Choice program at the February 9, 2017 IEP team meeting. Team members informed Mother that Long Beach Unified would not provide Student with the related service of transportation if she went to a School of Choice campus. At the March 2017 meeting, Mother asked for clarification about the transportation in the School of Choice program, and the IEP team confirmed that Long Beach Unified would not offer transportation if Student attended a School of Choice.

85. Long Beach Unified did not, however, send Parents procedurally compliant prior written notice of its decision to withdraw the transportation service from Student's IEP at any time after Mother declined to sign the 2017 IEP. When a child has an IEP, and when an IEP team refuses to offer or withdraws a related service requested by a parent, then the school district must provide the parents with procedurally compliant prior written notice. Long Beach Unified's argument that its memoranda, notices, and

explanations to Parents regarding the School of Choice transportation policy constituted prior written notice was not persuasive. Those memoranda were directed to all students and did not address Student's unique needs and why Long Beach Unified determined she no longer needed transportation as a related service to access her education. Those general notifications did not comply with technical notice requirements for prior written notice.

86. However, the procedural violation did not actually or significantly impede parental participation during the 2017 IEP team meetings. Mother received her parental rights, attended the meetings, asked questions about her rights and transportation, received clarification, gave input, and declined to sign the IEP so she could invoke the status quo to continue to receive transportation. Similarly, Student did not prove that the procedural violation impeded her right to a FAPE or deprived her of educational benefit. Long Beach Unified continued to provide Student with transportation through the 2017 extended school year, and in the 2017-2018 school year, under the status quo of the 2016 IEP, until the time of hearing. Neither Parent nor Student suffered any actual harm from the procedural violation in 2017.

87. At the January 2018 IEP team meetings, multiple attorneys accompanied Parents at those meetings. The attorneys actively participated on behalf of, and in conjunction with, Parents. The IEP offer included continued placement at Stanford, as Mother's school of choice, with no transportation. Although Long Beach Unified did not send prior written notice to Parents in 2018 regarding its decision not to offer transportation to Stanford because of the School of Choice policy, Student did not prove that the procedural violation impeded Parents' participation in the formulation of the January 2018 IEP. Mother was fully aware that Student would not receive transportation, and she so noted on the IEP when she signed it to enable implementation, but wrote that the IEP did not offer a FAPE. Student offered no

evidence that Parents' ability to participate meaningfully in the IEP process in 2018 was impeded in any way because of Long Beach Unified's failure to provide prior written notice. Similarly, Student continued to receive transportation under the status quo. She did not prove that Long Beach Unified's procedural violation in 2018 impeded her right to a FAPE or deprived her of educational benefit. Student did not prevail on Issue 4(b).

REMEDIES

1. Student prevailed on Issues 3(b), 3(c), 3(e) and 3(f). As a remedy, Student requests an award of compensatory speech therapy, a social skills program, and a communication program, as recommended by Susan Hollar, and reimbursement for private speech therapy services. Ms. Hollar's recommendations were credible and appropriate and even if Student had prevailed on Issue 1, the remedies awarded here would have been no different. Dr. Taubman's recommendations were less applicable, because they were directed at Student's placement and behavior services, and Student did not prevail on those claims.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup Sch. Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup Sch. Dist.*, *supra*, 31 F.3d at p. 1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should

have supplied in the first place." (*Ibid.*)

3. Student proved Parents paid \$310 for private speech therapy at California State University at Long Beach during spring and fall 2017, and they are entitled to that reimbursement amount. Student's request in her closing brief for 240 hours of compensatory education was not supported by the evidence.

4. Ms. Hollar recommended speech therapy at school four times a week for two 15-minute sessions daily, which was an increase of one hour a week from Ms. Kutis's recommendations at the 2018 IEP meetings. Ms. Hollar also recommended direct parent training, social language and play intervention, including floor time activities and specific applications, such as Hamaguchi's Phrase Two, Toontastic, and Springo for auditory processing of one and two-step commands. She recommended a one-to-one aide to support speech and language development in the educational setting. She opined at hearing that Student would benefit from 100 hours of compensatory speech and language services by a speech pathologist focusing on new goals that addressed social engagement and pragmatics. She also opined Student could easily manage compensatory speech therapy sessions, one hour a day in length, three times a week.

5. With the exception of the one-to-one aide to support speech and language in the educational setting, Ms. Hollar's recommendations were credible, and reasonable in light of Student's significant and historic delays in speech, communication, and social skills. Ms. Hollar did not elaborate on her recommendation for a one-to-one aide or address Dr. Taubman's concerns of promoting independence, such that a one-to-one aide to support Student's speech and language was an appropriate remedy. At hearing, no one from Long Beach Unified credibly disputed Ms. Hollar's recommendations for an increase in speech therapy services to two hours a week at school or offered any alternatives to the number of compensatory speech therapy hours she proposed at hearing.

6. Based on the evidence, Student is entitled to 100 hours of publicly funded compensatory speech and language services provided by a certified non-public agency of Parents' choice. The non-public agency shall meet Long Beach Unified's guidelines, if any, for non-public agencies. Long Beach Unified shall provide a copy of the applicable guidelines to Parents within 10 business days of the date of this Decision. These hours shall include services that focus on development of communication, speech therapy, social skills training, and parent training in the use of applications for assistive communication devices used by Student in the classroom. Student shall use the block of hours at a frequency recommended by the non-public agency provider; however, she must use the entire block of hours no later than December 31, 2020. Long Beach Unified shall reimburse Parents, based on proof of mileage and attendance, at the then prevailing Federal rate, for one round trip for each compensatory session Student attends.

7. Long Beach Unified shall convene an IEP meeting within fifteen school days of this Decision and shall increase the time in Student's annual IEP for speech therapy services during the school day to four times weekly for two 15-minute sessions daily, using push-in or pull-out models, as determined by the speech therapist. This frequency and duration shall be stay put through Student's next triennial IEP offer, or unless Student's IEP team makes a different offer of services in this area of need and Parents consent.

8. The IEP team shall develop goals in the area of speech and language, as recommended by Ms. Hollar. Long Beach Unified shall fund up to four hours of Ms. Hollar's time, at her usual and customary rate for preparing for, traveling to and from, and attending the IEP team meeting held for this purpose and shall incorporate her

input in the development of goals directed at speech and language, communication, and social skills.

9. Within 30 school days of the date of this Decision, Long Beach Unified shall provide Student's related services providers at her school of attendance, and Parents, with up to two hours of training in the use of applications for Student's assistive communication device, including those recommended by Ms. Hollar, if available to Long Beach Unified. Long Beach Unified shall ensure through supervision by Student's special education case manager, that Student's teachers and related service providers encourage Student's use of the assistive communication device throughout the school day.

ORDER

1. The parties' joint motion to toll the statute of limitations is denied.
2. Within 30 days of this Order, Long Beach Unified shall reimburse Parents \$315 for private speech therapy services provided by California State University Long Beach, without the necessity for further documentation.
3. Long Beach Unified shall fund 100 hours of compensatory speech and language services provided by a certified non-public agency of Parents' choice. The non-public agency shall meet Long Beach Unified's guidelines, if any, for non-public agencies. Long Beach Unified shall provide a copy of the applicable guidelines to Parents within 10 business days of the date of this Decision. These hours shall include services that focus on development of communication, speech therapy, social skills training, and parent training in the use of applications for assistive communication devices used by Student in the classroom. Student shall use the block of hours at a frequency recommended by the non-public agency provider; however, she must use the entire block of hours no later than December 31, 2020. Long Beach Unified shall reimburse Parents, based on proof of mileage and attendance, at the then prevailing

Federal rate, for one round trip for each compensatory session Student attends.

4. Long Beach Unified shall convene an IEP meeting within fifteen school days of this Decision and shall increase the time in Student's annual IEP for speech therapy services during the school day to four times weekly for two 15-minute sessions daily, using push-in or pull-out models, as determined by the speech therapist. This frequency and duration shall be stay put through Student's next triennial IEP offer, or unless Student's IEP team makes a different offer of services in this area of need and Parents consent.

5. The IEP team shall develop goals in the area of speech and language, as recommended by Ms. Hollar. Long Beach Unified shall fund up to four hours of Ms. Hollar's time, at her usual and customary rate, for preparing for, traveling to and from, and attending the IEP team meeting held for this purpose and shall incorporate her input in the development of goals directed at speech and language, communication, and social skills.

6. Within 30 school days of the date of this Decision, Long Beach Unified shall provide Student's related services providers at her school of attendance, and Parents, with up to two hours of training in the use of applications for Student's assistive communication device, including those recommended by Ms. Hollar, if available to Long Beach Unified, and shall ensure through supervision by Student's special education case manager, that Student's teachers and related service providers encourage Student's use of the assistive communication device throughout the school day unless or until her IEP team determines she no longer requires the device.

7. Student is entitled to no other remedies.

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 Issues 3(b), 3(c), 3(e) and 3(f). Long Beach Unified prevailed on Issues 2, 3(a), 3(d), and 4. Neither party prevailed on Issue 1.

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: February 22, 2019

/s/

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings