

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN MATEO-FOSTER CITY SCHOOL  
DISTRICT,

OAH Case No. 2015040885

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SAN MATEO-FOSTER CITY SCHOOL  
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2015030258

DECISION

On March 4, 2015, San Mateo-Foster City School District filed a request for a due process hearing with the Office of Administrative Hearings, naming Parents on behalf of Student. On April 16, 2015, Student filed a request for due process hearing naming San Mateo-Foster City. On May 13, 2015, OAH granted San Mateo-Foster City's motion to consolidate and designated Student's case as the lead case governing the decision timeline. On June 3, 2015, OAH granted Student's motion to amend his complaint. On June 29, 2015, OAH granted San Mateo-Foster City's request to continue the hearing.

Administrative Law Judge Theresa Ravandi heard this matter in Foster City, California, on August 24, 25, and 26, 2015.

Father appeared on behalf of Student and attended each day of hearing. Student was not present.

Melanie D. Seymour, Attorney at Law, represented San Mateo-Foster City. Attorney Alejandra Leon observed the first day of hearing. John Bartfield, San Mateo-Foster City's Director of Special Education attended each day of hearing.

At the conclusion of the hearing, the matter was continued at the parties' request to September 14, 2015, to allow time to file written closing briefs. The record closed with the parties' timely submission of closing briefs and the matter was submitted for decision.

## ISSUES<sup>1</sup>

### STUDENT'S ISSUES

1. Did San Mateo-Foster City deny Student a free appropriate public

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<sup>1</sup> Student's issues have been reorganized and renumbered for clarity. Student attempted to raise issues at hearing and in his closing brief that he did not identify in his amended complaint, specifically: whether his placement at Horrall Elementary School constituted the least restrictive environment; whether Parents were denied the opportunity to observe other placement options; whether he was afforded sufficient mainstreaming time; whether the district predetermined his placement; the appropriateness of his goals; the appropriateness of the initial assessment and the occupational therapy assessment; whether he required social skills services; and whether he was provided prior written notice. A party who requests a due process hearing may not raise issues at the hearing that were not raised in his complaint, unless the opposing

education during the 2014-2015 school year from November 1, 2014, through the extended school year by failing to:

- (a) reschedule individualized education program team meetings upon Parents' request;
- (b) consider Parents' input regarding proposed amendments to IEP's in the areas of behavior support and social skills;
- (c) consider external evaluations;
- (d) incorporate external evaluations into Student's IEP;
- (e) have San Mateo-Foster City members of Student's IEP team contact independent evaluators;
- (f) notify Parents prior to an IEP team meeting that a change in Student's placement would be recommended;
- (g) grant Parents' request to observe and record Student during class sessions;
- (h) permit Parents access to Student's records and evaluation notes;
- (i) offer a program designed to meet Student's unique behavioral needs by not offering individual applied behavior analysis (ABA) services;
- (j) offer a program designed to meet Student's unique speech and language

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party agrees. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) San Mateo-Foster City did not agree to add additional issues. Accordingly, this Decision is limited to those issues in Student's amended complaint as clarified during the August 7, 2015 prehearing conference, and specified in the Order Following Prehearing Conference. Student has the right to file a separate due process complaint alleging issues separate from those adjudicated herein. (20 U.S.C. § 1415(o); 34 C.F.R. § 300.513(c); Ed. Code, § 56509.)

- needs by not offering individual speech and language services; and
- (k) offer extended school year services for the 2014-2015 school year?

#### SAN MATEO-FOSTER CITY'S ISSUE

1. Is San Mateo-Foster City's January 8, 2015 behavioral assessment of Student legally compliant?

#### SUMMARY OF DECISION

This Decision finds that the notes prepared by San Mateo-Foster City's behavior assessor during the course of her behavior assessments of Student, and the teacher input forms completed in preparation for these assessments, constitute educational records; that Parents were entitled to copies of these records; and that San Mateo-Foster City's failure to timely provide copies of these records significantly impeded Parents' right to participate in the IEP development process. This Decision also finds that San Mateo-Foster City's January 2015 behavior assessment of Student met all procedural and substantive requirements such that Student is not entitled to an independent educational evaluation at public expense.<sup>2</sup>

Student did not establish that San Mateo-Foster City failed to reschedule an individualized education program team meeting upon Parents' request or failed to consider Parents' input and private evaluation reports in developing his IEP. Student did not meet his burden of proving that San Mateo-Foster City was legally required to: (1) contact independent evaluators; (2) notify Parents in advance of an IEP team meeting that it would recommend a placement change; (3) allow Parents to observe and

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<sup>2</sup> An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.) The terms are used interchangeably herein.

videotape Student in class for a full school day; or (4) provide Parents copies of assessment reports prior to the 60-day timeline for convening an IEP team meeting to review the results. Further, Student did not establish that he required individual applied behavior analysis services, individual speech and language services, or extended school year services in order to receive a FAPE.

## FACTUAL FINDINGS

### JURISDICTION

1. At the time of hearing, Student was four and one-half years old. At all relevant times, he resided with Parents within the boundaries of San Mateo-Foster City and qualified for special education under the categories of autism and speech or language impairment. Student was attending preschool at San Mateo-Foster City's George Hall Elementary School at the time of hearing.

2. Student is the son of two loving parents who have gone to great lengths to understand his diagnoses and treatment needs. Parents noticed that Student began to lose some of his emerging language skills after his second birthday. In September 2013, Parents enrolled him in preschool at the United Methodist Church Cooperative in Burlingame. By February 2014, the director of United Methodist recommended that Student be professionally evaluated for appropriate diagnosis and treatment because of his communication deficits and progressively disruptive behaviors beyond that expected for a typical two-year-old.

### PRIVATE DIAGNOSES<sup>3</sup>

3. In May 2014, pediatric neuropsychologist Dr. Lisa Sporri with the Golden

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<sup>3</sup> None of Student's private assessors or providers testified at hearing.

Gate Regional Center, and Dr. Jeffrey Bruno, a psychologist with Child Assessment and Family Solutions, each independently assessed and diagnosed Student with autism spectrum disorder. Student was of average intelligence but presented with language delays, impaired social interaction, minimal interest in peers, and was unable to follow class routines.

4. In July 2014, speech and language pathologist Carolyn Brady of Mills-Peninsula Health Services diagnosed Student with a mixed language disorder secondary to autism, based on his delayed expressive and receptive skills and disordered pragmatic skills. Ms. Brady recommended group and individual speech therapy services. Mills-Peninsula speech pathologist Nisha Engineer provided speech therapy to Student from August to November 2014, and again worked with Student beginning in April 2015.

#### SAN MATEO-FOSTER CITY'S INITIAL MULTIDISCIPLINARY ASSESSMENT OF STUDENT

5. In August 2014, Parents completed an enrollment packet with San Mateo-Foster City and informed the District of Student's autism diagnosis; his isolation; his difficulties expressing himself and understanding directions; his poor behaviors and attention deficits; and his lack of adaptive skills including toileting regression. Parents provided copies of Student's private assessments and asked San Mateo-Foster City to contact the private assessors and service providers and to incorporate their recommendations as part of its comprehensive assessment of Student. Parents signed a release of information authorizing San Mateo-Foster City to contact Mills-Peninsula, Student's pediatrician, and United Methodist. Parents asked San Mateo-Foster City to specifically assess Student's need for ABA therapy, speech services, and occupational therapy.

6. On September 15, 2014, Parents signed an initial assessment plan for San Mateo-Foster City to assess Student in the areas of health, intellectual development,

language and communication, social and emotional functioning, and adaptive behavior, and to conduct an informal assessment of developmental delay. In October 2014, Father provided school psychologist Sarah Swenson with contact information for Steven Forth, clinical director of Gateway Learning Group, Inc. At that time, Mr. Forth was completing a functional behavior assessment of Student and preparing an assessment report and behavior intervention plan. Also in October 2014, Anna Marie Rivero, an occupational therapist with Mills Peninsula, assessed Student and began to provide services to address his motor and sensory deficits.

7. Pursuant to the initial assessment plan, Ms. Swenson completed a psychoeducational assessment of Student; a special education teacher conducted an informal play-based assessment and skills observation; and speech pathologist Kirsten Park assessed Student's language needs. San Mateo-Foster City's November 6, 2014 multidisciplinary report specifically referenced and incorporated the private assessment reports of Dr. Sporri, Dr. Bruno, Ms. Brady, and Ms. Rivero. Consistent with the results of the private assessors, Student demonstrated variable ability to maintain attention to the testing process; required frequent prompting and redirection; and inconsistently responded to incentives and sensory breaks.

8. San Mateo-Foster City's assessment team considered Parents' concerns including Student's isolation from peers, inability to follow directions, elopement, speech impairment, delayed self-care, sleep and toileting difficulties, and tantrums which prevented him from participating in his preschool program. Student's teacher also provided information on Student's functioning. In his preschool class at United Methodist, Student could not sustain attention to a non-preferred activity for more than one minute; did not interact with peers or adults; had verbal communication deficits; and demonstrated the following behaviors: hiding, dropping to the floor, difficulty with transitions and following directions, throwing items, and running around the room.

9. San Mateo-Foster City assessed Student over two sessions in October 2014 and also observed him at United Methodist. During the first assessment session, Student responded to basic questions, and communicated in one to five word phrases. He played with the assessors and participated in standardized testing with the use of first-then language (i.e. first we listen, then we choose a toy) and a reinforcement item. It was difficult to engage Student during the second session. He threw items, but retrieved them when directed. He frequently hid under the table, but when ignored, he came out independently after a few minutes. In terms of his language skills, Student followed one-step directions and identified basic colors and body parts, but he could not consistently answer simple questions. Student used age-level vocabulary and spoke in sentences of up to seven words. His mean length of utterance was slightly higher than average for his age, but he did not consistently use language to express his wants and needs and intermittently babbled unintelligibly. Student struggled with pragmatic language skills, which included the use of behaviors and words to interact socially.

10. Mother was present for both of San Mateo-Foster City's October 2014 testing sessions. In a November 4, 2014 e-mail to Ms. Swenson, Father asked to continue the initial IEP team meeting scheduled for November 6, 2014, to allow time for additional testing due to Student's lack of engagement during the second session. Further, Mr. Forth's behavior report was not completed, and Father believed this was critical to understanding Student's functioning and behavior needs. Father also wanted to receive copies of San Mateo-Foster City's assessment report prior to the scheduled IEP team meeting.

11. Ms. Swenson called Father the next day, November 5, 2014, and spoke with him for approximately 45 minutes to address his concerns about testing and data collection. She assured him that San Mateo-Foster City did not require additional testing to determine Student's eligibility for special education and his educational needs.



During this conversation, Father elected to proceed with Student's initial IEP team meeting scheduled for the next day. The morning of the team meeting, November 6, 2014, Father sent Mr. Forth's draft report to Ms. Swenson and requested that she call Mr. Forth to discuss his findings. Mr. Forth recommended 10 hours per week of ABA services in the home, school, and community settings. Ms. Swenson informed Father that she was unable to make this call before the IEP meeting, but the team would consider this report and recommendations.

### NOVEMBER 6, 2014 INITIAL IEP TEAM MEETING

12. On November 6, 2014, San Mateo-Foster City convened Student's initial IEP team meeting to review assessments and determine eligibility. The following members attended: Parents, Program Specialist Dr. Malia Mulherin (Student's case manager), Ms. Swenson, Ms. Park, and the special education teacher who informally assessed Student. At the start of the meeting, Parents received a copy of their procedural safeguards.

13. Parents testified that near the beginning of the IEP team meeting, Father asked to reschedule it to a different day. San Mateo-Foster City denied that Father made such a request. Parents' testimony on this point was not persuasive in light of the circumstances surrounding this meeting. Father frequently corresponded by e-mail with San Mateo-Foster City. The morning of the initial IEP team meeting, he sent an e-mail to Ms. Swenson acknowledging that the team would meet to make a final determination of Student's eligibility and needs and attached Mr. Forth's report for the team's consideration. He did not ask to continue the meeting when Ms. Swenson informed him that she would not be contacting Mr. Forth prior to the meeting. Ms. Swenson persuasively testified that during the IEP team meeting Father raised concerns about the assessment process, but he did not ask to reschedule the meeting. The IEP meeting notes corroborate her testimony. After the IEP team meeting, Parents did not ask for a

further meeting. Rather, the next morning Father sent an e-mail to Dr. Mulherin and Student's IEP team and shared that he found the team members to be friendly and accessible and was pleased with San Mateo-Foster City's plan for Student. Father also expressed that he hoped to finalize Student's IEP shortly and that he saw no need for further IEP team meetings.

14. Parents were active participants at the IEP team meeting and provided their input about Student's need for behavior supports by sharing a recent letter from Student's private occupational therapist that recommended ABA services. The team reviewed this letter. Further, San Mateo-Foster City considered Parents' concerns for Student's safety due to his elopement in the community and their input about his needs in the area of social skills which they first shared in the August 2014 intake packet. The team considered and shared Parents' concerns with Student's lack of peer interactions. The November 2014 IEP specifically noted Parents' concerns with Student's inability to successfully participate in United Methodist's preschool program. San Mateo-Foster City team members reviewed and considered all private reports submitted by Parents.

15. San Mateo-Foster City's assessment team provided Parents with a copy of its report and reviewed its findings. Student presented with communication and social interaction deficits and behavior challenges that adversely impacted his ability to maintain attention, transition from activities, and follow directions and class routines. The IEP team determined that Student was eligible for special education pursuant to the categories of autism and speech or language impairment, and that his behavior impeded his learning. San Mateo-Foster City recommended the use of embedded classroom behavior supports including a visual schedule, timer, and prompting cards to address his behaviors. Student had needs in the following areas: behavior, including transitions and paying attention; social skills; and expressive and pragmatic language.

16. The team developed goals for each area of need. Given his baseline of

requiring moderate to maximum support to transition from preferred activities, one behavior goal required Student to transition from preferred activities without protest and with minimal supports, with 80 percent accuracy. A second behavior goal called for Student to transition from one class activity to another using a visual schedule with minimal support and 80 percent accuracy. Given Student's baseline of requiring maximum prompting to participate in non-preferred activities for one minute or less, Student's attention goal called for him to attend to teacher-directed activities for up to 10 minutes, with no more than two prompts in 80 percent of opportunities. Student's social skills goal called for him to take turns with peers with a minimum of five exchanges of objects during structured play, with 80 percent accuracy.

17. In the area of communication, Student was able to respond to "wh" questions with 60 percent accuracy. His expressive language goal called for him to respond to "who," "what," "where," and "what am I doing" questions regarding himself, his environment, or pictures, with three to five word phrases and 80 percent accuracy. Given Student's baseline of just beginning to ask for help and his failure to use words to interact in class, his pragmatic language goal called for him to independently use a minimum of three word phrases to communicate a variety of pragmatic functions (request action/object, request help, protest, greet, comment, draw attention, and initiate interaction) in class and in speech sessions with adults and peers in 80 percent of opportunities.

18. Dr. Mulherin's knowledge of Student's needs and his educational program was clear throughout her testimony. Dr. Mulherin helped design and develop San Mateo-Foster City's preschool autism programs which incorporate ABA-based

behavioral and instructional practices throughout the day.<sup>4</sup> In her capacity as program specialist since July 2014, Dr. Mulherin continued to supervise these specialized preschool programs. Applied behavior analysis is a broad term which includes strategies for decreasing negative behaviors as well as instructional strategies. ABA therapy is the process of applying the principals of behavior to systematically shape behavior to effectuate positive change. The evidence established that children with autism are often anxious about what will happen next. To address the unique needs of students with autism, San Mateo-Foster City's preschool autism programs use visual schedules which graphically display the next activity; first-then systems to help a student tolerate a less desired activity knowing that a preferred activity will follow; visual cue cards to prompt appropriate behavior or communication; and individual and group behavior reinforcement systems with effective motivators. Its programs include naturalistic teaching strategies and integrated incidental instruction, which means that the teacher instructs in the moment and promotes skills based on what is occurring.

19. San Mateo-Foster City offered Student a placement in one of its specialized autism programs at Horrall Elementary School. The placement consisted of a preschool special day class with 240 minutes per day of group specialized academic instruction. Robin Flecha taught the offered class which was comprised of seven students with a ratio of one adult for every two to three students.<sup>5</sup> Her class

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<sup>4</sup> Dr. Mulherin was a school psychologist with San Mateo-Foster City for seven years, and for three of those years she served as the lead school psychologist for the preschool intake team. Dr. Mulherin has been a licensed educational psychologist since 2011, and holds a master's and doctorate degree in educational psychology.

<sup>5</sup> Ms. Flecha did not testify at hearing.

incorporated strong routines and clear transitions, individual visual schedules, and individualized positive behavior supports based on ABA principles. Based on San Mateo-Foster City's initial assessment results, this preschool special day class program with embedded ABA supports addressed Student's behavior needs and was reasonably calculated to provide him with educational benefit.

20. San Mateo-Foster City also offered small group speech and language services for 30 minutes twice per week. Student's primary communication need was in the area of pragmatic language and social interaction. It was undisputed that he required weekly speech therapy. Parents had provided Ms. Swenson with an October 7, 2014 report from Ms. Engineer, Student's private speech provider, which recommended that Student receive individual speech services because his behaviors prevented him from participating in a group setting. Given Parents' primary concern that Student did not interact with peers, and because his primary language need was pragmatic or social language, individual speech services would not effectively target his unique language needs. Student required peer models and opportunities to practice with peers which could not occur in a one-to-one setting with a speech pathologist. Based on what the team knew of Student's behavior and communication needs, the offer of a small, specialized classroom with embedded ABA supports, along with 30 minutes twice weekly small group speech therapy, addressed Student's needs and was reasonably calculated to provide him with educational benefit.

21. The IEP team reviewed eligibility criteria for extended school year services. Based on its assessment, San Mateo-Foster City reasonably determined that: (1) Student was not likely to demonstrate significant regression in skills during school breaks; and (2) the educational benefit he derived during the regular school year would not be significantly jeopardized if he did not receive extended programming. San Mateo-Foster City did not offer extended school year services, but agreed to collect data on any

regression and recoupment difficulties following school breaks, and to meet again, if needed, to address whether Student required extended school year services.

22. Because of Parents' expressed concerns about Student's sensory needs and their request for individual ABA services based on Mr. Forth's report, San Mateo-Foster City offered to conduct an occupational therapy and behavior assessment. Parents signed an assessment plan at the November 6, 2014 IEP team meeting authorizing San Mateo-Foster City's occupational therapist to assess Student's motor development and sensory processing, and for its autism program specialist to conduct an ABA behavior assessment.

23. Parents did not immediately consent to the November 6, 2014 IEP offer. Following the IEP team meeting, San Mateo-Foster City remained receptive to information from Student's private providers. For instance, Ms. Park reached out to Ms. Engineer to discuss Student's speech therapy and needs. On November 10, 2014, Father forwarded Mr. Forth's final behavior report and recommended intervention plan to Ms. Swenson and Dr. Mulherin. Mr. Forth had identified three target behaviors: elopement, non-compliance, and aggression, and determined that Student would benefit from weekly ABA therapy. Similar to those proposed by the IEP team, Mr. Forth also developed goals in the areas of attention and compliance; language, including increasing Student's mean length of utterance from 1.5 to 3 words, and answering "when," "where," and "who" questions; and social interaction including turn taking.<sup>6</sup> Consistent with San Mateo-Foster City's offer of a special day class program with embedded ABA supports, Mr. Forth recommended the following behavioral strategies: novel reinforcers; a visual schedule; clear beginning and end time for activities and a timer to help transitions; visual token system; use of first-then statements; and planned

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<sup>6</sup> Mr. Forth proposed 26 goals across multiple areas.

ignoring of challenging behaviors.

24. On November 14, 2014, Mother observed Ms. Flecha's class. Also on that date, Parents consented to the November 6, 2014 IEP with the additional requests that Student's IEP team reconsider his need for extended school year services at the end of the school year, and that the team meet in two months to review progress. Student began attending Ms. Flecha's class on November 20, 2014.

#### FOLLOW-UP ASSESSMENTS: OCCUPATIONAL THERAPY AND BEHAVIOR

25. Parent's consent to the November 6, 2014 assessment plan triggered a legal timeline for San Mateo-Foster City to complete its occupational therapy and behavior assessments, provide Parents with a copy of the assessment reports, and convene an IEP team meeting within 60 days, not counting days of school vacation in excess of 5 days. After the November 2014 IEP team meeting, Father continued to send frequent e-mails to San Mateo-Foster City providing his input and updates, and Dr. Mulherin timely responded. She forwarded his reports and information to key district personnel including Student's teachers and assessors, and invited Father to continue to send any further information for the team's consideration.

26. Pursuant to the November 2014 assessment plan, occupational therapist Lori Ann Carreon assessed Student's motor and sensory needs and timely completed a report with her findings and recommendations. Student demonstrated developmentally appropriate fine motor and visual motor skills, and good body awareness without bumping into peers or objects or falling. He could follow simple directions, transition without additional prompts, and often made his needs known.

27. In December 2014 and January 2015, Kari Sachs, a national board certified behavior analyst and a program specialist in autism with San Mateo-Foster City, conducted a behavior assessment of Student. In addition to her master's degree in special education, she earned a certificate of advanced graduate studies in autism and

severe disabilities, a graduate certificate in behavior intervention in autism, and she had completed coursework for the California Autism Spectrum Disorders Authorization. Ms. Sachs has worked with students with autism for over 12 years. She was a special education teacher in two different states, worked as an autism coach in New York for five years, and taught a graduate level special education course in behavior management. Ms. Sachs accepted her current position in 2012. She designed, developed, and continues to supervise San Mateo-Foster City's district-wide behavior intervention and autism program known as Behavior Analysis, Social and Educational Services or "BASES" within the department of special education. Ms. Sachs designed San Mateo-Foster City's autism program based on her experience working in different ABA classrooms and studying the service delivery models and structure of private ABA programs. She also assisted in creating San Mateo-Foster City's own in-house direct individual behavior intervention services program for those students who required more support than that provided by the embedded classroom model. Ms. Sachs was well qualified to conduct Student's behavior assessment.

28. At hearing, Ms. Sachs differentiated the behavior assessment she conducted with Student from a functional behavior assessment such as that conducted by Mr. Forth. Generally, if a student displayed significant negative behaviors, then Ms. Sachs would conduct a functional behavior assessment to determine the function of the negative behavior or why it was occurring; its antecedent or what triggered the behavior; and the consequence or what response maintained the behavior. Such a functional behavior assessment would result in the development of a behavior intervention plan to teach socially appropriate replacement behaviors that served the same function. Student had not engaged in any significant behaviors in Ms. Flecha's class that adversely impacted his education, so a functional behavior assessment was not warranted. Based on Parents' request for individual ABA therapy, Ms. Sachs



conducted the behavior assessment to determine whether Student required individual or supplemental behavior interventions in addition to those embedded within his preschool classroom program. There was no dispute that Ms. Sachs' behavior assessment constituted an educational assessment under the Individuals with Disabilities Education Act.

29. In preparation for her behavior assessment of Student, Ms. Sachs conducted a comprehensive review of Student's educational file including his initial assessment and the November 2014 IEP. She also read Mr. Forth's initial and final functional behavior assessment reports, which analyzed more challenging behaviors that Student did not display in Ms. Flecha's class. Since she had read and considered Mr. Forth's assessment reports and his proposed behavior intervention plan, Ms. Sachs reasonably determined it was not necessary to contact Mr. Forth directly.

30. Ms. Sachs had conducted approximately 60 school-based behavior assessments over her career. There are no standardized testing measures for this type of behavior assessment. Rather, based on her education, experience, and training, Ms. Sachs determined that the Barriers to Learning Assessment from Dr. M.L. Sundberg's Verbal Behavior Milestones Assessment and Placement Program measure was the best overall tool to analyze school behavior needs. The Verbal Behavior Milestones Assessment is a curriculum-based assessment used to guide observations and determine current skill levels based on research from the field of applied behavior analysis. The Barriers to Learning assessment is a criterion-referenced language and social skills assessment tool and skill tracking system. The evidence showed that the Barriers to Learning tool is a technically sound instrument designed to identify behaviors that may interfere with instruction and is designed for students with autism and other developmental disabilities. This tool recognizes 24 possible barriers to learning including behavior problems, impaired social skills, and inability to generalize skills. A student is

rated on each barrier and can earn a score of "0" meaning the barrier did not present a problem and that skills were developing in balance; a score of "1" meaning an occasional problem; a score of "2" showing a moderate problem; a score of "3" revealing a persistent problem; or the highest score of "4" indicating the barrier presented a severe problem for the student. A student's overall score is calculated by adding the individual scores on each barrier, and therefore ranges from a "0" reflecting no problems with any barriers, to a score of 96 showing a severe problem (score of "4") on all 24 barriers.

31. Ms. Sachs received training in administering and scoring the Verbal Behavior Milestones and Barriers to Learning assessments directly from its author Dr. Sundberg and also during ongoing professional development workshops. Ms. Sachs established that these tools are widely used and accepted in the field of behavior assessment. Student's private ABA provider Mr. Forth also used the Verbal Behavior Milestones tool during his behavior assessment of Student. Ms. Sachs had used these assessments approximately 60 times, was familiar with the publisher's guidebook, and followed all protocols with the Barriers to Learning tool in analyzing Student's behavior needs and skills. She spent a total of 12 to 15 hours conducting her assessment and preparing her report. As determined below, Ms. Sachs' behavior assessment met all procedural and substantive requirements.

32. Ms. Sachs persuasively established that the key to a behavior assessment is direct observation of the student in his school environment and collection of data from parents, teachers, and service providers. Ms. Sachs conducted four observations of Student engaged in different activities including play time, circle time, small group work, and snack time. Each observation lasted from 30 to 60 minutes, during which she recorded Student's behaviors and functional skills and their impact on his learning. During her observations, Ms. Sachs collected assessment data using narrative recording

and frequency recording of any interfering behaviors, and antecedent-behavior-consequence data. She recorded her observation data in written notes. She did not share her notes with anyone and used them, in part, as a memory aid for the purpose of completing her assessment report. Ms. Sachs personally maintained these recorded observations which formed one basis for her assessment findings. She did not include her personal data sheets with her report. San Mateo-Foster City did not provide Student a copy of Ms. Sachs' assessment notes nor introduce them into evidence at hearing. At hearing, Ms. Sachs readily recalled her observations of Student. She thoughtfully and thoroughly answered questions on both direct and cross examination as to Student's presentation and needs based on her assessment.

33. Ms. Sachs developed and used an ABA Assessment-Family Input Form as part of her behavior assessment protocol. Mother completed the parent form which called for information regarding Student's behavior, communication, social and emotional skills at home, his strengths, and any concerns. Mother identified Student as having the following challenging behaviors: toileting issues, difficulty transitioning from activities, running away, social isolation, throwing toys, refusing directions, and becoming overly emotional.

34. Ms. Sachs spoke with Ms. Flecha regarding Student's skills and behaviors in class. Consistent with her practice, Ms. Sachs also asked Ms. Flecha to complete a teacher input form she developed based on the Verbal Behavior Milestones assessment. This form asked about any challenging behaviors Student displayed in class, including any repetitive or obsessive-compulsive behaviors, and about his social skills including eye contact, and any sensory defensiveness. Ms. Flecha completed and returned this form to Ms. Sachs. Ms. Sachs also provided Ms. Flecha with Dr. Sundberg's Behavioral Language Assessment Form which also sought information regarding behavior, communication, and social and pre-academic skills. There was no evidence that Ms.

Flecha completed the Language Assessment form. At hearing, Ms. Sachs could not recall if Ms. Flecha returned the Language Assessment form, and her January 8, 2015 behavior assessment report did not reference this form. It was Ms. Sachs' practice to collect completed teacher input forms and incorporate them into her assessment report. These forms were not maintained in Student's educational file. Ms. Sachs established that she included all relevant information from Ms. Flecha's teacher input form in her final assessment report, often using quotation marks denoting lengthy excerpts. Ms. Flecha's completed form was not attached to the assessment report. San Mateo-Foster City did not provide a copy of the completed teacher input form to Student nor introduce it into evidence at hearing.

35. Based on the multiple measures she used to collect behavior data on Student, including her own class observations, record review including Student's private evaluations, and analysis of Parent and teacher information, Ms. Sachs completed the Barriers to Learning Scoring Form. Ms. Flecha's input, verbal and written, was consistent with Ms. Sachs' direct classroom observations. Moreover, Mother's reports of Student's difficulty with peer interaction and with transitions aligned with teacher reports and Ms. Sachs' observations. Ms. Sachs determined that Student had needs in the areas of conversational skills, social skills, and transition. On 15 of the 24 barriers to learning, Student showed no problems and his skills in those areas were developing in balance. Student showed slight elevations on 8 of the barriers which were identified as occasional problem areas. Student received his highest score on the barrier of impaired social skills which was ranked as a moderate problem. This result was consistent with Parents' reports of Student's impaired social functioning as well as the findings of his initial assessment. Ms. Sachs noted that while Student talked to peers and helped them, he did not consistently initiate peer interactions. Further, while he initiated and engaged in conversation with adults, he was not able to maintain these conversations without adult

assistance.

36. Ms. Sachs rated Student as having an occasional problem in the area of behavior problems. Student's behavior had improved greatly from the time of his initial assessment when he was observed to engage in tantrums including verbal protesting, running away, and throwing and grabbing items. Student had some tantrum behaviors the first week of class, but these decreased in frequency and duration with the use of the following strategies: repetition of directions, verbal prompts, strong routines with clear transitions, and the use of an individual visual schedule. At school, Student did not present with significant behavior challenges and was easily redirected. For example, Ms. Sachs observed Student clean up his toys in class without protest with the use of classroom ABA supports. Initially, Student demonstrated challenging behavior when Mother came to pick him up such as lying on the floor and crying. However, this behavior was extinguished with the ABA-based strategy of a social story that prompted Student as to what he was expected to do when school ended, step-by-step, and that promised a preferred item, known as a behavioral contingency, if he followed the expected steps. Student occasionally demonstrated hyperactive behavior and failure to attend such as calling out in class, but he was motivated to participate in class and benefited from first-then language and behavior contingencies to help him learn to wait and to comply with class expectations.

37. Ms. Sachs also concluded that Student had occasional problems with generalizing his behavior and communication skills. He needed time to develop rapport with adults and become comfortable with his routine before he could transfer learned skills to a new setting. While the barrier of being dependent on reinforcers also presented an occasional problem for Student, he progressed to a less frequent reinforcement schedule and was able to maintain motivation with intermittent social rewards as opposed to tangible items. Given that 8 barriers presented occasional

problems for Student and 1 barrier presented a moderate problem, Student's overall score on the Barriers to Learning was a 10 on a scale of 0 to 96. Student's results showed he was able to access his educational program; that the barriers identified were not adversely impacting his learning; and that the level of behavior support in class was meeting his needs and allowing him to acquire skills.

38. Ms. Sachs recommended the following ABA-based class behavior interventions: visual daily schedule; alternate preferred and non-preferred activities; increase rates of reinforcement when teaching new skills; use positive-based behavioral contingencies such as first-then language to motivate appropriate behaviors; create structured opportunities to practice making requests and develop social, play, and conversational skills with peers; and allow for movement throughout the day. Mr. Forth recommended many of these same strategies in his assessment report, and Ms. Flecha used these interventions in class. Student presented no evidence that the assessment was not accurate or that the assessor was not qualified to complete the assessment. Rather, Student's main concern about the behavior assessment was that it failed to recommend individual ABA services.

39. Ms. Sachs prepared a report with her findings and recommendations and attached her Barriers to Learning Scoring Form. She persuasively concluded in her report and testimony that Student should continue to receive supports in a small class setting, targeted instruction for social interactions during naturally-occurring situations, and a classroom management strategy based on ABA principles. Given Student's progress and the absence of significant behaviors that impeded his learning, he did not require individual ABA services. The evidence showed that individual ABA therapy is teacher-directed; consists of random demands unrelated to the environment; and is appropriate for students who cannot learn in a small group setting. Ms. Sachs persuasively determined that it would be detrimental to use a more restrictive instructional strategy

such as individual ABA therapy since Student demonstrated the ability to learn and make progress on his goals in the classroom setting. The structure, small class size, and embedded ABA programming of his special day class addressed Student's behavior needs and provided him the support he needed to access his program.

#### JANUARY 8, 2015 IEP TEAM MEETING

40. San Mateo-Foster City was required to complete its occupational therapy and behavior assessments and convene an IEP team meeting no later than January 21, 2015.<sup>7</sup> On December 15, 2014, San Mateo-Foster City provided Parents with a Notice of Meeting for January 8, 2015, stating that in addition to the special education teacher and administrator, the occupational therapist and program director for autism would also attend. On December 17, 2014, Mother signed the notice indicating she would be in attendance. San Mateo timely convened an IEP team meeting on January 8, 2015, to review Student's assessments.

41. Mother provided input to the IEP team the night before the meeting by sending a text message to Ms. Flecha listing Mother's concerns about Student's behaviors. She discussed this list at the IEP team meeting. Mother's main goal was for Student to succeed in a regular education kindergarten classroom by fall 2016. To achieve this, she told the IEP team that Student needed help to overcome behavior challenges including difficulty following directions, staying focused, sitting still, transitioning, and dealing with frustration; and that he needed to develop his motor, sensory, and social skills.

42. Mother's main concern was that she had never seen Student interact with

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<sup>7</sup> Horrall was not in session from December 22, 2014, through January 2, 2015, due to winter break.

peers in the community or with classmates at United Methodist where, more often than not, she observed him face down on the floor in class. For the first two weeks at Horrall, Mother spent approximately 10 minutes with Student at school when she dropped him off and picked him up, but she did not observe him during class hours. During these times, Student did not interact with his peers. Student would throw himself on the floor when Mother came to pick him up, although Ms. Flecha's ABA-based strategies were effective in getting him to walk to the car. On a near daily basis, Ms. Flecha provided Parents with written updates on Student's day. These updates showed that Student was interacting with his peers and successfully participating in group and play activities at school. Although Mother did not believe these class reports because of her observations and home experiences, Student did not introduce any contradictory evidence of his classroom functioning at Horrall.

43. At the IEP team meeting, Ms. Flecha discussed her observations and reported on Student's levels of performance in the areas of pre-academics, communication, motor skills, behavior, social skills, and self-help as documented in her January 6, 2015 preschool transition report. Her written report was attached to the January 8, 2015 IEP which Mother received at the meeting. Student was able to sit through a 15-20 minute circle time and 10-15 minute small group activities and complete assigned tasks. He used language to make requests, ask questions, and comment on his surroundings, and was able to follow one-step and two-step directions. Student was increasingly social and engaging with adults, but needed assistance to initiate peer interactions. Even so, he independently greeted peers, liked to help them, and was beginning to use social language such as saying "excuse me" and asking to share toys. Student showed some behavior issues in class such as noncompliance, but this lessened once he learned the class routine and expectations. Parents' concern with toileting regression, first expressed in their August 2014 intake packet, was not observed



at school where Student independently used the toilet and washed his hands. Student made marked progress towards his speech and language goals, often exceeding his mean length of utterance goal by using more than three word phrases to communicate a variety of pragmatic functions, and he consistently responded to "who," "what," and "what am I doing" questions although he needed assistance with "where" questions.

44. The morning of the January 8, 2015 IEP team meeting, Ms. Sachs e-mailed a copy of her draft behavior assessment report to Father, and provided Mother a copy during the meeting. During the IEP meeting, Ms. Sachs reviewed her findings and recommendation that Student did not require additional behavior intervention services beyond that provided within the classroom. Mother had the opportunity to ask questions about this assessment. Ms. Carreon provided Mother a copy of her occupational therapy report and presented her findings that Student did not require school-based occupational therapy. The team considered Mother's concerns about Student's sensory processing issues. At school, Student responded well to the sensory room and classroom sensory supports, and was able to follow the class routine, actively participate, and benefit from his program. Additionally, Student successfully participated in mainstream circle time and small group activities of short duration in the general education preschool class.

45. Based on Student's progress, San Mateo-Foster City recommended that Student transition to a special day class at George Hall Elementary that still used ABA strategies but offered more group support, as opposed to individual support. George Hall provided more opportunities for Student to interact with peers with higher levels of communication and social skills. Student was ready for a classroom with greater expectations for independence. Access to peers with more developed social and language skills would provide Student appropriate models and practice time to address his social skills deficits.

46. Lori Hughes taught the offered preschool special day class at George Hall. Ms. Hughes, who testified at hearing, has been a preschool special education teacher for 20 years and has always had at least one student with autism in her classes. She has received and provided ongoing professional development training in the areas of autism, applied behavior analysis, and behavior interventions. In contrast to Ms. Flecha's classroom, Ms. Hughes focused on group directions with less individual prompting for her class of 11 students who were expected to show more independence by participating in longer structured activities with fewer prompts. Even so, her teaching style and classroom incorporated ABA strategies. Ms. Hughes used a visual class schedule showing students what came next; a class recess schedule letting them know what activities were available; first-then cards to reinforce compliance; token economies where students earned their own preferred motivator; visual cue cards of comments to peers to prompt verbal exchanges; and behavior cue cards to remind of class expectations.

47. Student still had needs in the areas of behavior and speech but his class functioning had improved since his initial IEP team meeting on November 6, 2014. Ms. Flecha's report, speech therapist Henry Loh's update, and Ms. Sachs' behavior assessment all showed that Student was progressing towards his goals with his classroom behavior supports and small group speech services. There was no evidence that Student required individual ABA or individual speech services to access his education. San Mateo-Foster City offered specialized academic instruction in a preschool special day class at George Hall, 30 minutes of weekly mainstreaming in a small group with adult support, and continued small group speech and language services twice weekly for 30 minute sessions.

48. Mother agreed that Student would benefit from a placement with peers with more developed communication skills. Even so, she was surprised by the

recommendation to move Student to a different school as he had only been attending Horrall for two months. Mother believed that San Mateo-Foster City must have inappropriately placed Student initially.<sup>8</sup> However, the evidence showed that Student's behavior needs were greater when he first started at Horrall. As time went on, Student responded to the services provided, and his need for a more structured classroom lessened. Mother consented to the IEP and agreed that after a transition period, Student would begin attending George Hall on January 26, 2015.

49. Mother believed that she was not afforded an opportunity to participate in the January 8, 2015 IEP team meeting, and decided she would not participate in any future IEP team meetings. However, Mother acknowledged that she voiced her concerns to the team. The evidence demonstrated that Mother participated in the IEP team meeting by sharing her input about Student's behaviors and social interaction needs, and the team considered and responded to her concerns.

#### INITIAL REQUEST FOR INDEPENDENT EVALUATIONS

50. In a January 9, 2015 e-mail to Dr. Mulherin, Father rescinded consent to the January 8, 2015 IEP and requested independent educational evaluations in the areas of occupational therapy and behavior. Parents disagreed with San Mateo-Foster City's findings that Student did not require individual ABA or occupational therapy. Father accused San Mateo-Foster City of preventing Parents from participating in the IEP team meeting process by failing to provide Mother copies of the assessment reports prior to the January 8, 2015 IEP team meeting; failing to provide copies of assessment notes with the assessment reports; and failing to provide advance notice of the recommendation to

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<sup>8</sup> The appropriateness of Student's placement at Horrall was not at issue in this hearing.

change Student's placement.

51. San Mateo-Foster City honored Parents' decision to rescind consent and offered to schedule another IEP team meeting with Father to review the assessment reports with him. Father agreed to participate telephonically in an IEP team meeting scheduled for January 26, 2015. He informed San Mateo-Foster City that if it did not offer ABA services at the next IEP team meeting, he would request an independent behavior evaluation. Based on this comment, San Mateo-Foster City reasonably considered Father's request for an independent behavior evaluation to be on hold, pending the outcome of the January 26, 2015 IEP team meeting.

#### JANUARY 26, 2015 IEP TEAM MEETING

52. San Mateo-Foster City reconvened Student's IEP team on January 26, 2015, to once again review its assessments, address Parents' concerns, and determine Student's placement and service needs. Dr. Mulherin, Ms. Flecha, Ms. Sachs, Ms. Carreon, speech therapist Mr. Loh, and Father attended and participated in the meeting. Father informed the IEP team members that he agreed with the recommended placement change but disagreed with the assessments, and wanted individual ABA services and occupational therapy in place for Student before any placement change. After discussing Ms. Carreon's assessment and asking questions, Father withdrew his request for an independent occupational therapy evaluation.

53. The team considered Father's input regarding Student's behavior and lack of social skills. At home, Student still struggled with toileting and elopement, ran into things, fell off chairs, had excessive amounts of energy, and never interacted with peers. Student did not have any of these issues at school. Ms. Sachs established that it is common for students to present with more challenging behaviors at home as that setting is typically less structured and without class routines and daily schedules being followed by a group of peers. Ms. Flecha summarized her written report of Student's

progress in class. As she reported at the January 8, 2015 IEP team meeting, Student displayed age-appropriate attentional skills, was able to sit through and participate in circle time, and responded well to the structured classroom and its embedded ABA supports. At school, Student remained with his class, stayed in line when walking to the park, and waited with the group. Ms. Sachs reviewed her assessment and findings that the classroom behavior-based strategies were meeting Student's needs. Student was able to learn in a small group format; his behavior and reinforcement needs were met by classroom staff and programming; and Student did not require supplementary school-based behavior intervention services. Ms. Sachs explained that all of San Mateo-Foster City's preschool programs integrated ABA-based strategies within the classroom, and that Student was able to attain and retain skills in the natural class setting. Student was accessing his program without a more restrictive service such as individual ABA therapy. Ms. Sachs offered to speak with Student's home ABA provider about these matters.

54. Social interaction remained a prime concern of Parents. In response, San Mateo-Foster City continued to recommend a change in placement to the special day class at George Hall with higher functioning peers to allow Student the opportunity to further develop his social skills. At the January 26, 2015 IEP team meeting, Father did not consent to this change in placement and renewed his request for an independent behavior evaluation. On January 29, 2015, in a follow-up e-mail to Ms. Flecha, Father reported Parents' continuing experience that Student remained unable to effectively communicate or respond to basic questions and that his anti-social and dangerous behaviors continued at home. Father reiterated that Parents' ultimate goal was for Student to be fully mainstreamed and successful in a general education classroom.

#### SAN MATEO-FOSTER CITY'S RESPONSE TO PARENTS' REQUEST FOR AN INDEPENDENT EVALUATION

55. On February 6, 2015, San Mateo-Foster City's special education director

John Bartfield sent Parents a prior written notice denying their request for an independent evaluation and informing them that San Mateo-Foster City would file for a due process hearing to defend its assessment. Within two weeks, San Mateo-Foster City's counsel spoke with Father about Parents' concerns. Following this discussion, San Mateo-Foster City offered to re-assess Student's behavior needs; Father agreed, although he did not retract his request for an independent evaluation. Near the end of February, Mr. Bartfield spoke with Father about the independent evaluation request to better understand his concerns. Father's main concerns about the behavior assessment were that Ms. Sachs did not contact Mr. Forth; she did not allow Parents input into the assessment process; and she did not inform Parents when she would be assessing Student. Further, Parents firmly believed that Student required individual ABA services similar to what Mr. Forth had recommended and provided to Student at home. After this conversation, San Mateo-Foster City filed its request for a due process hearing on March 4, 2015.

#### PLACEMENT AT GEORGE HALL

56. On February 25, 2015, Father consented to an IEP amendment authorizing Student's placement at George Hall with 30 minutes of weekly mainstreaming. Father agreed that Student needed to be with students of similar ability. Student was out of the country from February 8, 2015, through March 13, 2015, so his first day at George Hall was on March 16, 2015.

57. Mother, accompanied by Dr. Mulherin, observed Student in Ms. Hughes' class a few days after he started at George Hall in March 2015. At hearing, Mother and San Mateo-Foster City witnesses had different impressions of this observation. During her 30 minute observation, Mother recalled Student fell to the ground approximately 12 times, and remained on the ground for a total of 20 minutes. Ms. Hughes and Dr. Mulherin acknowledged that falling to the floor was a common behavior as Student

acclimated to his new class. This was his way of escaping demands and seeking attention. However, they did not agree with Mother that he fell to the floor as frequently as she stated, or stayed there as long as she stated. Ms. Hughes had taken data on this behavior and her data showed a steady decrease in the behavior in response to class interventions. At hearing, Ms. Hughes estimated that Student fell to the floor approximately 25 times his first day of class, but did not remain there for more than a few minutes total. A few days later, Mother observed Student for 15-20 minutes of circle time and then free play, a time when Student generally would not demonstrate escape or attention seeking behavior. Dr. Mulherin and Ms. Hughes are accustomed to collecting behavior data and their testimony was more persuasive that Student fell to the ground only a few times during Mother's observation and did not remain there for longer than a few minutes total during the full observation.

58. While Parent was understandably concerned to see Student fall to the floor in class, the evidence established that Student needed a period of time to acclimate to a new situation and to trust new adults. With planned ignoring, an ABA strategy also recommended by Student's private ABA therapist Mr. Forth, Student frequently got up from the floor on his own to rejoin class. As he adjusted to his new individual and class schedules, this behavior further decreased. Student was in Ms. Hughes' class for only two weeks and then went on spring break for three weeks from March 30, 2015, until April 20, 2015.

59. Father continued to provide San Mateo-Foster City with frequent updates on Student. For instance, on March 25, 2015, Father informed Ms. Hughes and Dr. Mulherin of Student's continuing behavior issues since his return from abroad, including slamming doors, non-compliance, falling to the ground, throwing things, toileting regression, overall reluctance to talk, and inability to speak in a full sentence. In an April 10, 2015 e-mail, Father requested the opportunity to observe and video record Student

for an entire school day because of his disbelief that Student did not demonstrate these same behavioral challenges at school. Father also requested an IEP team meeting so he could renew his request for individual speech and ABA therapy and extended school year services, and review Student's progress on his goals.

60. Dr. Mulherin responded to Father's April 10, 2015 e-mail that same day and provided him a copy of San Mateo-Foster City's class observation policy which limited visits to one hour. She offered to set up a class visit consistent with this policy. On April 13, 2015, Father declined her offer for a one hour visit as he did not feel this would allow sufficient time to observe and record Student's class behavior. San Mateo-Foster City's counsel encouraged Father to reconsider and observe, after which time he could request an additional observation period. On April 27, 2015, Father renewed his request to schedule full-day class observations and to videotape Student in class. Dr. Mulherin replied the next day and reminded Father of the visitation policy and offered to set up more than one observation time. She also informed Father that San Mateo-Foster City did not permit videotaping of the preschool special day class. Dr. Mulherin reserved an observation time slot on April 30, 2015, but Father cancelled this observation.

61. During this same time period, on April 17, 2015, Parent requested in writing a copy of Ms. Sachs' behavior assessment reports,<sup>9</sup> her assessment notes, and any other records related to her assessment. On April 20, 2015, San Mateo-Foster City's counsel provided Father another copy of the January 2015 behavior assessment report but did not forward any observation notes or the teacher input form.

62. Following its February 2015 offer to reassess Student's behavior needs,

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<sup>9</sup> Father mistakenly believed that Ms. Sachs wrote a December 2014 and a January 2015 behavior assessment report.



San Mateo-Foster City prepared an April 10, 2015 assessment plan authorizing an ABA reevaluation by the autism program specialist. On April 21, 2015, Parent consented to the behavior reevaluation. Ms. Sachs again provided Parents with an input form to report their concerns and priorities which would guide her assessment. She also requested that Father complete a release of information so she could contact Mr. Forth of Gateway. Father provided a signed release on April 30, 2015, the day it was requested.

#### MAY 11, 2015 IEP TEAM MEETING

63. In response to Parent's April 10, 2015 request for an IEP team meeting, San Mateo-Foster City and Parent agreed to meet on May 11, 2015. In an April 30, 2015 e-mail to Father, Ms. Hughes confirmed that the purpose of this IEP team meeting would be to review Student's progress towards goals, address Parent concerns about speech services and extended school year, and to share with the family the visual supports that were working with Student in class. Because Ms. Sachs had not completed her reevaluation of Student's behavior needs, Parents' request for ABA services would be discussed at a later date.

64. On the morning of the May 2015 IEP team meeting, Father provided San Mateo-Foster City with an agenda he prepared that included the following items: individual ABA; extended school year services; speech therapy; and Student's deficits in the areas of safety, self-care, and social interaction. Father also provided a synopsis of Student's unsuccessful attempt to participate in a community-based music class in April 2015, during which time he disrupted the class, was unable to follow directions, and did not interact with peers or adults. At the May 2015 IEP team meeting, Father asked Ms. Sachs to consider this agenda and synopsis for her reassessment in lieu of completing the ABA assessment parent input form.

65. The following individuals attended the May 11, 2015 IEP team meeting:

Father, Ms. Hughes, Dr. Mulherin, Ms. Sachs, Student's speech therapist Cori Wang, and general education teacher Shala Moayed. The team reviewed Student's progress. Student had settled into his new class routine within the first two weeks. Teacher praise as well as tangible reinforcers motivated him. Student used an individualized token economy in which he earned smiley face tokens for following class expectations, and exchanged these tokens for a preferred reinforcer. Initially, Student was reinforced for every token he earned. Very quickly, Ms. Hughes was able to thin his reinforcement schedule, as Student remained motivated to work towards earning four tokens in exchange for one reward. Student used an individual visual schedule to help prepare for transitions.

66. Ms. Hughes presented her behavior data which showed that the frequency and duration of Student's falling to the floor had decreased in response to the class supports. A review of data collected from April 20, 2015, through May 6, 2015, showed that the highest frequency of this behavior was eight times in a day with the total average time on the floor being five minutes in a day. Ms. Hughes used a variety of behavioral techniques and strategies which helped Student to successfully participate in class. For instance, because Student was motivated by teacher attention, Ms. Hughes used planned ignoring of noncompliant behavior and caught Student being good when he followed his schedule. After twice demonstrating the use of visual yes/no prompt cards, Student stopped throwing unwanted items and voiced his preferences instead. With the help of visual cue cards, Student learned to identify a peer by name, appropriately get his attention, and ask him to play a particular game. After just a few demonstrations, Student was able to ask peers to play without visual prompts. During play, Student took turns and shared toys. In view of Student's progress, Ms. Hughes offered to develop new social skills goals and send these to Father for his review. The classroom supports continued to meet Student's behavior and communication needs as

well as social skills deficits as demonstrated by his progress.

67. Student was cooperative during circle time in Ms. Moayedí's general education class. Father asked about Student's interactions with typical peers, but Ms. Moayedí could not report on this because circle time was not a time for socialization. Therefore, Ms. Hughes recommended that Student's mainstreaming time increase to twice per week, to allow a period of free time for social skills practice. Father testified that the team did not seek his input on this proposal, but his testimony was not persuasive. Ms. Hughes recommended increased mainstreaming in direct response to Father's concerns regarding Student's social interactions. Further, this recommendation was directly aligned with Parents' often expressed goal of having Student succeed in a general education classroom. The evidence demonstrated that Father participated in the discussion pertaining to this recommendation. He expressed interest in the recommendation, asked about videotaping Student in the general education class, and did not voice any concern with the proposal to increase mainstreaming time.

68. San Mateo-Foster City considered Parents' concerns about Student's difficulties in participating in the community music class. District members of Student's IEP team were not surprised that Student struggled in the music class, which was a new environment with an unfamiliar teacher and 11 new students. Student learned quickly but needed time to develop trust with new adults. The music teacher was not experienced teaching students with special needs, and there was no evidence she was aware of Student's needs; familiar with effective behavior strategies; or utilized any behavior supports to assist him. In contrast, Ms. Hughes prepared Student for new settings by practicing routines with the use of visual and behavior supports. That Student struggled his first time attending a new community-based class did not prove his needs had changed or that he now required individual ABA services. Rather, the team discussed ideas to help Parents use the class behavior supports at home and in the

community. Ms. Hughes had previously provided Parents a token economy and behavior cards to help reduce Student's challenging home behaviors. In response to Father's concerns that Student did not talk about past events, Ms. Hughes offered to provide class photographs to encourage conversations about school and suggested ways he could support Student's communication.

69. At the May 2015 IEP team meeting, Father acknowledged that Student's language skills had improved. He believed Student had met his speech goals and wanted to develop more challenging goals. At hearing, Ms. Wang established that Student was progressing on his speech goals with her twice weekly small group sessions.<sup>10</sup> In addition, Ms. Hughes' class was language-based, and Ms. Hughes worked with Student on his language goals all day. Student was very verbal in class and speech sessions and used three to eight word utterances. Within his first month at George Hall, Student met his pragmatic language goal in terms of making requests. Because Student struggled to generalize his skills, Ms. Wang's push-in small group sessions were particularly important to ensure that Student's pragmatic skills developed in his natural class environment. Shortly after the team meeting, Father acknowledged in an e-mail to Student's private speech therapist Ms. Engineer that Student was using a minimum of seven to nine-word phrases at home.

70. The evidence showed that Student knew many words and demonstrated language skills but needed to learn how to communicate with others, particularly his

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<sup>10</sup> Ms. Wang is a licensed speech and language pathologist employed by Alpha Vista Services, Inc. which contracts with San Mateo-Foster City. She has provided speech services to students at George Hall since 2012. Ms. Wang has a certificate of clinical competence from the American Speech-Language-Hearing-Association, and holds a master's degree in education with a concentration in speech-language pathology.

peers. Therefore, one-to-one speech services would not address his need for peer models and interactive peer practice sessions. Ms. Wang persuasively explained that based on Student's progress towards his goals, he was receiving appropriate speech services. She was impressed with Student's progress given the short amount of time she had worked with him. In response to Father's request for updated speech goals developed in collaboration with Student's private therapist, Ms. Wang offered to contact Ms. Engineer, create a new goal, and send it home for approval. Ms. Wang emailed Ms. Engineer the day after the IEP team meeting to begin discussions.

71. Father also requested that Ms. Sachs contact Mr. Forth of Gateway as part of her behavior reassessment. Prior to the May 2015 IEP team meeting, Ms. Sachs had contacted Gateway and learned from their regional coordinator that Mr. Forth did not have any updated information as he last worked with Student in December 2014. Mr. Forth himself subsequently informed Father in a May 31, 2015 e-mail that he was not sure he could be of assistance as he had not observed Student at his San Mateo-Foster City school placements.

72. The team addressed Father's agenda items of safety concerns and self-care issues, which they were not seeing at school; Student's social issues; and his improvement with individual and class supports. The team discussed Parents' concerns with Student's behavior, speech, and social interaction, and considered and responded to Student's recent failed attempt to participate in a community music class. That Ms. Moayedi was excused from the team meeting after approximately 10 minutes refuted Father's testimony and recollection that the majority of the 90 minute meeting was comprised of a dialog between Ms. Hughes and Ms. Moayedi about mainstreaming. The only item on Parents' agenda that was not covered was extended school year services as there was not sufficient time. Therefore, the team members tentatively agreed to re-convene on June 8, 2015, to discuss extended school year services, as well as the

behavior reevaluation.

73. At the May 11, 2015 IEP team meeting, San Mateo-Foster City offered to increase Student's mainstreaming time from 30 minutes once a week to twice weekly. Father did not consent to this amendment. The night of the May 11, 2015 IEP team meeting, Father requested a further telephonic IEP team meeting as soon as possible. However, he then informed Ms. Hughes that he did not want to meet until the end of June 2015, after the scheduled due process hearing. San Mateo-Foster City's counsel and Dr. Mulherin each e-mailed Father several times in an attempt to encourage him to participate in an IEP team meeting prior to the start of the extended school year to discuss not only summer school, but also the behavior reassessment.

#### BEHAVIOR REASSESSMENT JUNE 2015<sup>11</sup>

74. On June 2, 2015, Ms. Sachs e-mailed a copy of her draft behavior reassessment report to Father and offered to schedule an IEP team meeting to discuss the results. As of the time of hearing, Parents had declined to participate in an IEP team meeting to review this second behavior assessment, and San Mateo-Foster City had not convened a team meeting for this purpose.<sup>12</sup> Ms. Sachs again utilized the Barriers to Learning tool to guide her observations, considered Parent input, and had Ms. Hughes complete the Language Assessment Form and her own ABA assessment teacher input form. She included Ms. Hughes' information in her assessment report but did not attach copies of the completed teacher input forms. San Mateo-Foster City did not provide

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<sup>11</sup> The appropriateness of this second behavior assessment was not at issue and no findings are made in this regard.

<sup>12</sup> Whether San Mateo-Foster City failed to timely convene an IEP team meeting to discuss the results of its behavior reassessment was not at issue in this hearing.

Parents with Ms. Hughes' input forms nor introduce these at hearing. Ms. Sachs observed Student in class three separate times, collected data on Student's behavior, functional skills, and impact on learning, and recorded her observations in the form of narrative, frequency, and antecedent-behavior-consequence data in written notes. She personally maintained these notes, did not share them with anyone, and used them partly as a memory aid to complete her report. San Mateo-Foster City did not provide Parents with Ms. Sachs' written data notes nor introduce these at hearing.

75. Student's reassessment results were consistent with his first behavior assessment. Student showed slight elevations on 9 of the 24 barriers to learning and received an overall score of 12. The barriers of negative behaviors, failure to generalize, and reinforcement dependent were now ranked as moderate problems for Student, but his social skills improved such that this barrier was downgraded from a moderate to an occasional problem. Overall, the evidence showed that after a slight increase in negative behaviors upon transition to Ms. Hughes' class, Student's negative behaviors decreased and his social skills increased. Ms. Sachs credibly concluded that Student continued to learn in the small group and natural class setting and make progress on his goals with embedded ABA class supports such that he did not require the more restrictive strategy of individual ABA therapy.

76. Based on Student's challenging home behaviors, the recommendations of his private ABA provider, his past struggle at United Methodist, his recent failed attempt to participate in a community music class, and Mother's observations of Student on the ground at school, Parents pursued individual ABA services for Student. Following her initial 30 minute observation at George Hall in March 2015, Mother also observed Student at two class parties later in the year and again during a circle time the start of the 2015-2016 school year. During each observation, Student threw himself to the floor, demonstrating no improvement from Mother's vantage point. However, Ms. Hughes

persuasively established that the presence of a parent is frequently an antecedent to challenging behavior. Moreover, during the class parties, Student's routines were disrupted which contributed to escape and attention seeking behaviors. Further, Mother's 2015-2016 class observation happened at the start of the school year, a time of transition when challenging behaviors were more likely to resurface. Even so, the behavior data continued to show decreased duration and frequency of Student's time on the floor, as a result of planned ignoring, visual strategies, and Student's own motivation to engage. Student responded favorably to his class programming and received educational benefit.

#### JUNE 15, 2015 IEP TEAM MEETING

77. Father continued to decline to participate in an IEP team meeting prior to the due process hearing. On June 4, 2015, Dr. Mulherin informed Father that the team would meet on June 15, 2015, prior to the start of the extended school year on June 24, 2015, to discuss if Student needed extended school year services. She encouraged him to attend or to propose an alternate date. Father received a notice of meeting for the June 2015 IEP team meeting. In a June 5, 2015 e-mail to Dr. Mulherin and copied to Mr. Bartfield and San Mateo-Foster City's counsel, Father requested that the IEP team not meet without the Parents. Father did not agree to meet and did not provide alternative dates. He advised San Mateo-Foster City that he believed it had already determined that Student was not eligible for extended school year services, and that he would enroll Student privately for the summer and request reimbursement at hearing.<sup>13</sup>

78. On June 15, 2015, San Mateo-Foster City convened Student's IEP team

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<sup>13</sup> There was no evidence that Student participated in a private summer school program.



meeting to discuss his eligibility for extended school year services. Dr. Mulherin, Ms. Sachs, Ms. Moayed, Ms. Hughes, and Ms. Wang attended.<sup>14</sup> Parents declined to participate and were not willing to continue with the IEP team meeting process until the conclusion of this due process hearing. To determine Student's need for extended school year, the San Mateo-Foster City members of the IEP team examined various data points to see whether Student made progress on his goals following breaks in instruction and services.

79. The assembled team members reviewed classroom data and data from the speech pathologists, Mr. Loh and Ms. Wang. Student began preschool at Horrall on November 20, 2014. Despite two days off in November for Thanksgiving, and two weeks off for winter break, neither Ms. Flecha nor Mr. Loh noted any regression. Further, Student recovered skills within a reasonable period of time after several extended breaks including a month-long trip out of the country during February and March 2015; the three weeks of spring break from March 30, 2015, until April 20, 2015; and a 10-day absence at the end of May 2015, due to a medical procedure. Upon his return to the country and transfer to George Hall, Student's negative behaviors increased. Given the change in schools, fewer individual supports, and lower staff to student ratio, this was not unexpected. Within a short period of time, his behavior of throwing items was extinguished and his behavior of lying on the floor quickly diminished. Following spring break, Student's behavior of lying on the floor decreased, and he continued to make progress on all of his goals. Following his ten-day absence at the end of May 2015, Student was able to participate in non-preferred tasks after just one day. Student

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<sup>14</sup> Whether San Mateo-Foster City committed a procedural violation by convening this IEP team meeting without Parents was not identified as an issue for hearing and is not addressed in this Decision.

continued to make steady progress on his goals despite these extended breaks. His speech skills improved and Ms. Wang did not notice any regression following extended breaks. Student was retaining his skills session to session despite extended breaks in service delivery. Consequently, San Mateo-Foster City reasonably determined that Student did not require extended school year services.

80. At hearing, Ms. Wang and Ms. Hughes testified about Student's adjustment to school for the 2015-2016 school year, following summer break. While this after-acquired information cannot be used to judge the adequacy of the June 2015 IEP determination that Student did not need extended programming, it does shed light on the reasonableness of this determination. Student adjusted well following summer vacation and continued to progress on his goals at the start of the 2015-2016 school year. He did not show any regression in his communication skills. Rather, Student's ability to answer "wh" questions regarding his environment, a challenging task for him, improved within the first two weeks of school. Ms. Hughes noted maturity in Student since the summer break. Some days, Student did not drop to the floor at all, and on the most challenging days, he engaged in this behavior, at most, twice a day from the start of this school year until the time of hearing. Student's ability to request help improved, and he showed enhanced peer interactions and a reduced need for visual cues.

#### GOAL PROGRESS REPORTS

81. Student's June 23, 2015 goal progress reports on his annual November 2014 goals showed that he met his social skills turn taking goal and made marked progress on all of his other goals. Student demonstrated the ability to transition from recess, a highly preferred activity, without prompts, and he transitioned from play to bathroom with moderate visual cues using his schedule. Student was able to use his visual schedule to transition between activities without adult cues 75 percent of the time, just shy of his goal of 80 percent. He was able to attend to teacher-directed tasks

for up to 7 minutes with minimal visual cues including his smiley face reinforcement chart, while his goal called for 10 minutes of attention. Student met his goal of answering “wh” questions when reading a story or looking at pictures with 80 percent accuracy, but still had difficulty answering these questions regarding his environment. Student met his pragmatic language goal in terms of using a minimum of three word phrases to make requests, greet, comment, draw attention, and initiate interactions with adults, but he required moderate to maximum prompts to verbally protest and to initiate peer interactions.

#### ADDITIONAL REQUEST FOR STUDENT RECORDS

82. On June 23, 2015, Father again requested copies of Ms. Sachs’ behavior assessment notes and records related to both her initial behavior assessment of Student in January 2015 and the reassessment she completed in June 2015. San Mateo-Foster City did not provide Parents with Ms. Sachs’ behavior data as recorded in her assessment notes or any records generated during the behavior assessments, specifically the teacher ABA assessment input forms completed by Ms. Flecha and Ms. Hughes, and Ms. Hughes’ written Language Assessment Form. San Mateo-Foster City did not convene any further IEP team meetings from the time of the June 23, 2015 records request through the time of hearing.

#### LEGAL CONCLUSIONS

##### INTRODUCTION: LEGAL FRAMEWORK<sup>15</sup>

1. This due process hearing was held under the Individuals with Disabilities

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<sup>15</sup> Unless otherwise stated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

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 et seq. (2006);<sup>16</sup> 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 FAPE that emphasizes special education and related services designed to meet their unique needs and to 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 student at no charge to the parent, meet state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the student to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to

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<sup>16</sup> All subsequent references to the Code of Federal Regulations are to the 2006 edition.

typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 951 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (e).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; See 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].) In this consolidated matter, the parties bear the burden of proof as to the issue or issues they raised in their respective complaints.

#### STUDENT’S ISSUE 1(A): ALLEGED FAILURE TO RESCHEDULE IEP TEAM MEETING

## UPON PARENT REQUEST

5. Student contends that two days prior to his initial IEP team meeting of November 6, 2014, and again at the start of this meeting, Parents asked to reschedule the IEP meeting to allow additional time to complete testing and obtain full information. Student argues that San Mateo-Foster City refused to reschedule his initial IEP team meeting and this denied him a FAPE. San Mateo-Foster City contends that while Father asked to reschedule this team meeting a few days prior to the meeting date, he then agreed to proceed with the meeting as scheduled and did not renew his request.

### Legal Requirements for Parental Participation

6. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304; *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043 (*Doug C.*) [“Parental participation ... is critical to the organization of the IDEA.”].) In this regard, an educational agency must ensure that one or both of the parents of a child with a disability is present at each IEP team meeting, and is a member of any group that makes decisions on the educational placement of the student. (20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.322(a), 300.501(b) & (c); Ed. Code, §§ 56341.5, subd. (a), 56342.5.) A school district must notify parents of the meeting early enough to ensure that they will have an opportunity to attend, and schedule the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subds. (b), (c).)

7. The IDEA places an affirmative duty on educational agencies to include parents in the IEP process. (*Doug C., supra*, 720 F.3d 1038, 1044.) A school district’s attempt to timely convene an IEP meeting does not trump parental participation or

warrant refusal to reschedule the meeting at parent's request. (*Id.* at p. 1046.)

### Consequences of Procedural Violations

8. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-206.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subds. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*), superseded on other grounds by statute, ["...procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."]; *Doug. C., supra*, 720 F.3d 1038, 1043; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910 (*L.M.*) [rejecting a structural defect approach and finding a procedural violation may be harmless unless it results in a loss of educational opportunity or significantly restricted parental participation].)

9. Student has not demonstrated that he was denied a FAPE by reason of San Mateo-Foster City's failure to reschedule the initial IEP team meeting. Initially, Father had second thoughts about proceeding with the November 6, 2014 team meeting and in a November 4, 2015 e-mail, requested that the meeting be rescheduled. However, after a lengthy conversation with Ms. Swenson on November 5, 2014, he agreed to proceed with the meeting as scheduled. The morning of the meeting, Father provided the IEP team a draft copy of Mr. Forth's behavior assessment for its consideration. This action demonstrates a commitment to go forward with the meeting. Even when

informed that Ms. Swenson would not have time to contact Mr. Forth prior to the IEP team meeting, Father did not request that the meeting be postponed.

10. Student did not prove that Parents asked the team to stop the meeting and reschedule it for a later date. During the November 2014 IEP team meeting, San Mateo-Foster City considered and discussed Father's concerns regarding the comprehensiveness of its multidisciplinary assessment, as well as other Parent concerns. Parents were active participants in the meeting. Following the meeting, Father expressed his approval of San Mateo-Foster City's plans for Student. The circumstances surrounding the convening of the IEP team meeting, as well as Parents' conduct during the meeting and following the meeting, all demonstrate that Father did not renew his request to reschedule. San Mateo-Foster City did not commit a procedural violation when it proceeded with the meeting as scheduled, as Parents agreed to, and did, proceed with the meeting and did not renew their request to reschedule it. As Student did not prove a procedural violation, there was no denial of FAPE on this ground.

#### STUDENT'S ISSUE 1(B): CONSIDERATION OF PARENTAL INPUT REGARDING BEHAVIOR SUPPORT AND SOCIAL SKILLS

11. Student contends that San Mateo-Foster City failed to consider Parent input regarding proposed amendments to IEP's in the area of behavior support and social skills and that this significantly impeded Parent participation in the IEP process. San Mateo-Foster City maintains that at each IEP team meeting, Parents provided input on Student's needs in all areas and the IEP team considered Parents' input in developing Student's program.

#### Meaningful Participation

12. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1485;



*Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*).)

The IEP team shall consider the concerns of the parent for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) and (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) A parent has meaningfully participated in the development of an IEP when he is informed of his child's needs, attends the IEP team meeting, expresses disagreement with the IEP team's conclusions, and requests revisions to the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693 (*N.L.*)). A parent who has an opportunity to discuss a proposed IEP and suggest changes, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann, supra*, 993 F.2d 1031, 1036.)

13. A school district cannot independently develop an IEP, without meaningful parental participation, and then present the IEP to the parent for ratification. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, superseded on other grounds by statute; *Target Range, supra*, 960 F.2d 1479, 1484.) The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891 (*Amanda J.*)). The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School District* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904]. Parental participation in the IEP process is considered "[A]mong the most important procedural safeguards." (*Amanda J., supra*, 267 F.3d 877, 882.)

14. San Mateo-Foster City considered and responded to Parents' concerns regarding Student's behavior and social skills needs at every IEP team meeting and

through regular e-mail correspondence. During the 2014-2015 school year, Parents participated in four of five scheduled IEP team meetings. Student acknowledged in his closing brief that Parents repeatedly voiced their concerns about Student's behaviors and lack of social skills during the IEP meetings. San Mateo-Foster City listened to and responded to these concerns. At the initial IEP team meeting in November 2014, Parents discussed Student's behaviors which prevented him from succeeding at his first preschool placement, his elopement and sensory issues, his need for supports, and his lack of peer socialization. San Mateo-Foster City not only considered Parents' input, but also shared many of these same concerns. The IEP team determined that Student's behavior impeded his learning, and agreed that he had needs in the areas of behavior, social skills, and pragmatic language. In consideration of Parents' input that Student required occupational therapy to address his behavior and sensory issues as well as individual ABA services, San Mateo-Foster City agreed to conduct additional assessments in these areas.

15. Similarly, during the January 8, 2015 IEP team meeting, San Mateo-Foster City considered Mother's input regarding Student's behavior challenges, toileting regression, motor and social skills deficits, and sensory issues. The IEP team responded to Mother's concerns with reports of Student's progress in the school setting. Based on Student's progress and in consideration of Parents' concerns with Student's social skills deficits, San Mateo-Foster City offered placement in a special day class with peers with greater communication skills to address Student's social skills.

16. At the January 26, 2015, and May 11, 2015 IEP team meetings, the IEP team considered Father's input on Student's ongoing behavior struggles, need for individual ABA services, and his social deficits. In response to these concerns, San Mateo-Foster City informed Father that Student was benefitting from the embedded ABA behavior supports and strategies within his classroom; that he had made progress

on all of his goals; and offered to provide sample visual supports for Parents to use at home. During the May 2015 IEP team meeting, San Mateo-Foster City discussed Father's agenda items of Student's safety and self-care issues, and noncompliant and disruptive behaviors at a community music class and considered Father's input. In response to Father's concerns about Student's ability to interact with typical peers, the team offered to increase Student's mainstreaming time in the general education classroom to allow him time to socialize. That San Mateo-Foster City did not agree that Student required individual ABA services to benefit from his education did not mean that it failed to consider Parents' input. Parents meaningfully participated in the decision making process despite the fact that their ultimate requests for individual ABA and speech and language services were not incorporated into Student's IEP's. At every juncture, including times in between team meetings, San Mateo Foster-City considered Parents' input on Student's behavior and social skills needs. Therefore, Student did not establish a procedural violation in this regard.

STUDENT'S ISSUES 1(C),(D), AND (E): CONSIDERATION OF EXTERNAL EVALUATIONS, INCORPORATING THESE EVALUATIONS INTO STUDENT'S IEP, AND CONTACTING THE INDEPENDENT EVALUATORS

17. Student contends that San Mateo-Foster City had a duty not only to consider his private evaluations, but to contact the private evaluators and incorporate their recommendations into his IEP's. Student alleges that San Mateo-Foster City failed to fulfill these obligations, and thereby denied him a FAPE. San Mateo-Foster City maintains that it not only considered Student's private evaluations, it also incorporated many aspects of these reports into its offers of placement and services and also contacted, or attempted to contact, some of the private providers even though it was not legally required to do so.

18. A school district is required to consider the results of a privately procured

assessment when developing and revising an IEP. (Ed. Code, §§ 56341.1, subds. (a) and (d)(3), 56381, subd. (b)(1).) The results of an evaluation obtained by the parent at private expense must be considered by the school district, if the evaluation meets public agency criteria, in any decision made with respect to the provision of FAPE to the child. (20 U.S.C. § 1414(d)(3) & (4); 34 C.F.R. § 300.502(c)(1).) However, the school district is not required to adopt the recommendations of an independent evaluation. (*Ibid.*; Ed. Code, § 56329, subd. (c).)

19. San Mateo-Foster City met its legal obligation to consider Student's private assessment reports. San Mateo-Foster City considered the private assessments conducted by Dr. Sporri, Dr. Bruno, Ms. Brady, and Ms. Rivero and specifically relied on and incorporated these reports by reference into its November 2014 multidisciplinary report. At Student's initial IEP meeting, the team considered Mr. Forth's preliminary behavior assessment report and a letter from Student's private occupational therapist. All five of the goals developed by Student's IEP team were also recommended by Mr. Forth in his final report. As part of her initial behavior assessment, Ms. Sachs read and considered Mr. Forth's final functional behavior assessment report and behavior intervention plan. There were many consistencies between Ms. Sachs' recommended behavior strategies and Mr. Forth's recommendations. San Mateo-Foster City was not legally required to incorporate recommendations from these private evaluations into Student's IEP. Even so, it did just that in many respects.

20. At Father's request, San Mateo-Foster City's speech assessor Ms. Parks and its speech therapist Ms. Wang both contacted Student's private speech provider Ms. Engineer to discuss Student's communication needs. Further, Ms. Sachs contacted Gateway, Student's private ABA provider, in May 2015 as part of her reevaluation, but was informed that Mr. Forth did not have any updated information as he last worked with Student in December 2014. San Mateo-Foster City did not personally contact Mr.

Forth. However, Student did not provide any legal authority for his contention that San Mateo-Foster City was required to contact his private assessors or services providers. There are no regulations defining the word “consider” and no requirement that a district afford any particular weight to a private report. San Mateo-Foster City fulfilled its legal obligation to consider Student’s external evaluations. Student did not prove any procedural violation.

#### STUDENT’S ISSUE 1(F): PRIOR NOTIFICATION OF AN IEP TEAM RECOMMENDATION TO CHANGE PLACEMENT

21. Student contends that San Mateo Foster-City was required to notify Parents prior to the January 8, 2015, and May 11, 2015 IEP team meetings that it would be recommending a change in placement and an increase in mainstreaming time, respectively. Student alleges that failure to provide advance notice denied him a FAPE. San Mateo-Foster City argues that it did not determine in advance of a full discussion with Parent during Student’s IEP team meetings that it was recommending any change in placement, and that there is no legal requirement that it inform Parent of a possible recommendation prior to the team meeting.

#### Predetermination

22. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-858.) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) However, a meeting of school district personnel in advance of an IEP team meeting to prepare for the meeting is permissible, and does not constitute predetermination. (*N.L.*, *supra*, 315

F.3d 688, 693, fn. 3.) School officials may permissibly form opinions prior to IEP meetings. However, if the educational agency goes beyond forming opinions and, instead, becomes "impermissibly and deeply wedded to a single course of action," this amounts to a pre-determination of placement. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, Jan. 17, 2013, No. 1:11-CV-398) 2013 WL 209478, p.7.)

23. The concept of predetermination is closely related to the doctrine of parental participation in IEP team meetings, discussed above with respect to Student's Issue 1(b). There is no legal authority to support Student's contention that San Mateo-Foster City was required to notify him prior to the IEP team meetings of any recommended change in placement. Indeed, any such requirement would be at odds with San Mateo-Foster City's well-established legal obligation not to predetermine the results of IEP team meetings. Only after full IEP team discussions that included Parent, did San Mateo-Foster City recommend a change in placement to a less structured classroom with higher functioning peers at the end of the January 8 and 26, 2015 IEP team meetings, and an increase in Student's mainstreaming time at the end of the May 2015 IEP team meeting. As such, San Mateo-Foster City did not have a recommendation for a change in placement or services to share with Parents prior to the respective IEP team meeting, in conformity with its obligation not to predetermine placement and services.

24. Student raises in his closing brief the issue of prior written notice as a separate procedural violation for the first time. Whether San Mateo-Foster City provided Student legally compliant prior written notice, pursuant to title 20 of the United States Code, section 1415(b)(3) and (c), of its proposals to change Student's placements was not at issue in this hearing nor litigated by the parties, and no findings or determination is made herein. Because San Mateo-Foster was not required to notify Parents prior to the January and May 2015 IEP team meetings of its recommendations to change

Student's placement and increase his mainstreaming time, Student did not prove any procedural violation in this regard.

STUDENT'S ISSUE 1(G): PARENT REQUEST TO OBSERVE AND VIDEO RECORD  
STUDENT IN CLASS

25. Student alleges that San Mateo-Foster City denied Student a FAPE by impermissibly preventing Parent from observing Student in class and video recording his day. San Mateo-Foster City contends that it is not legally required to allow a full day observation or permit Parent to videotape Student in class. San Mateo-Foster City further argues that consistent with its visitation policy, it offered Parent the opportunity to observe Student for a 60 minute visitation, scheduled an observation time, and offered to arrange additional observation sessions if requested.

26. If the district observed the student in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a student, an equivalent opportunity shall apply to an independent educational assessment of the student in his current educational setting, and observation of any proposed educational placement. (Ed. Code, § 56329, subd. (b); *L.M., supra*, 556 F.3d 900, 910-911[district-wide policy limiting a parent's expert to observations of 20 minute increments violated Education Code section 56329, but was harmless error as it did not deprive parents of meaningful participation].) Thus, the parents' right to participate in the IEP process includes the right to have the parents' independent expert observe a district's proposed placement. (*Benjamin G. v. Special Education Hearing Office* (2005) 131 Cal.App.4th 875, 884.)

27. However, neither the IDEA nor its implementing regulations provide parents the right to observe their child in the classroom setting. (*Letter to Mamas* (Office

of Special Education Programs<sup>17</sup> (OSEP) May 26, 2004) 42 IDELR 10.) Under California law, a parent has the right to observe his child in class in accordance with procedures developed by the district's governing board to ensure safety and to prevent undue interference with instruction or harassment of school personnel. (Ed. Code, § 49091.10, subd. (b).)

28. Student provided no legal authority for his contention that Parent had the right to a full day observation period or to videotape Student in his special day class. Therefore, Student did not prove any procedural violation in this regard. San Mateo-Foster City's observation policies did not impair Parents' ability to participate in Student's educational decision making process. Father did not avail himself of the opportunity to observe Student for a 60 minute period and to request additional observation sessions as needed.

#### STUDENT'S ISSUE 1(H): PARENTS' REQUESTS FOR RECORDS AND EVALUATION NOTES

29. Student alleges that San Mateo-Foster City denied Parents access to his educational records by failing to: 1) provide copies of its assessment reports in advance of the IEP team meetings scheduled to review the results; and 2) failing to provide copies of evaluator notes and records gathered as part of its behavior assessments. Student alleges that Parents were unable to fully participate in the decision making process without full and timely assessment information. San Mateo-Foster City contends that it was not required to provide advance copies of assessment reports or to provide

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<sup>17</sup> The Office of Special Education Programs is a division of the United States Department of Education charged with administering the IDEA and developing its regulations.



copies of its evaluator's private notes or related assessment records as these are not educational records.

### Educational Records

30. To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records in relation to their child's special education identification, evaluation, educational placement, and receipt of a FAPE. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) The district must comply with a request to review records without unnecessary delay and before any meeting regarding an IEP, any due process hearing, or resolution session, and in no case more than 45 days after the request has been made. (34 C.F.R. § 300.613 (a).) The right to review records includes the right to receive an explanation or interpretation of information contained therein. (34 C.F.R. § 300.613(b).) Under California law, the parent shall have the right and opportunity to examine all school records of his child and to receive copies within five business days after the request is made by the parent, either orally or in writing. (Ed. Code, §§ 56043, subd. (n), 56501, subd. (b)(3), 56504.)

31. The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611 (b).) In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3; Ed. Code, § 49061, subd. (b) [similarly defines pupil record].) The United States Supreme Court in *Owasso Independent School Dist.No.I-011 v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (*Owasso*), after conducting an analysis of FERPA provisions related to education records, defined the word "maintained" in this context by its ordinary meaning of "preserve" or "retain." Records are maintained when the agency keeps the

records in one place with a single record of access. (*Id.* 534 U.S. 426, 433-434.)

32. In *S.A. v. Tulare County Office of Education* (E.D.Cal. Sept. 24, 2009, No. CV F 08-1215 LJO GSA) 2009 WL 3126322, pp. 5-7, entry of judgment *S.A. v. Tulare County Office of Education* (E.D.Cal. October 6, 2009, No. CV F 08-1215 LJO GSA) 2009 WL 3296653, the federal court for the Eastern District of California found that school district e-mails concerning a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, relying on *Owasso*, held that the e-mails student requested were not educational records as they were not “maintained” by the school district; therefore, the school district was not required to produce them under a request for student records under the IDEA. (*Ibid.*)

33. Education records do not include records “which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.” (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).) Federal regulations further clarify that for a record to be excluded from the definition of an educational record pursuant to the “sole possession of the maker” exclusion, that record must be used only as a personal memory aid. (34 C.F.R. § 99.3(b)(1).) Further, the Family Policy Compliance Office within the United States Department of Education, in finding that a district had violated FERPA, determined that this exception was not intended to exclude detailed notes that record direct observations or evaluations of student behavior. (*Letter to Baker*<sup>18</sup> (Office of Innovation and Improvement, Complaint No. 1251, December 28, 2005 [comprehensive notes of observations and evaluations by a speech therapist, though kept in the sole possession of the maker, were not used solely as a memory aid and therefore were educational records subject to disclosure].) “School officials may not unilaterally remove records from the protections of FERPA through

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<sup>18</sup> This letter constitutes persuasive though not binding authority.

administrative decisions about where certain records are maintained or how they are categorized." (*Ibid.*)

34. Test protocols such as test questions, student answers, evaluator calculation or scoring sheets, and administration instructions, to the extent these are personally identifiable to the student, are educational records that must be provided to parents if requested. (*Newport-Mesa Unified School Dist. v. State of Cal. Dept. of Educ.* (C.D.Cal. 2005) 371 F.Supp.2d 1170 at pp. 1175, 1179 [providing parents copies of their children's test protocols constitutes a permissible "fair use" pursuant to federal copyright law]; *Letter to Price* (OSEP Oct. 13, 2010) 57 IDELR 50 [test protocols with a student's personally identifiable information are education records and if copyright law conflicts with IDEA's requirement to provide educational records, districts should seek ways to facilitate inspection including contacting the copyright holder].) Parents have the right to inspect instructional materials and assessments including teacher's manuals. (Ed. Code, § 49091.10, subd. (a).)

#### Provision of Assessment Reports

35. Upon completion of an assessment, the district shall provide parents with a copy of the "the evaluation report and the documentation of determination of eligibility." (20 U.S.C. § 1414(b)(4)(B); 34 C.F.R. § 300.306(a)(2)Ed. Code, § 56329, subd. (a)(3).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

36. This issue involves the production of two separate types of documents: the assessment reports, and the documents generated during Ms. Sachs' behavior assessments. With respect to the assessment reports, Student did not demonstrate that San Mateo-Foster City deprived him of a FAPE by failing to provide Parents advance

copies of the assessment reports. Student provided no legal authority that Parents were entitled to receive assessment reports prior to the 60-day date that the IEP team meetings were convened, or should have been convened, to review the assessment results.

37. As legally required, San Mateo-Foster City provided Parents a copy of Student's initial multidisciplinary assessment report at his initial IEP team meeting which was timely convened on November 6, 2014, within 60 days of having received Parent consent to assess. Even though there is no legal requirement to do so, Ms. Sachs provided Father a copy of her January 2015 behavior assessment the morning of January 8, 2015, just prior to the start of the IEP team meeting. Mother received the behavior assessment and occupational therapy assessment reports at the January 8, 2015 IEP team meeting which was timely convened within 60 days of receiving Parent consent to conduct these additional assessments. Father, therefore, had a copy of both of these assessment reports well in advance of the rescheduled IEP team meeting on January 26, 2015. Pursuant to the April 21, 2015 signed assessment plan, Ms. Sachs completed a behavior reassessment of Student and timely provided Father a copy her draft report within 60 days on June 2, 2015. Parents received all of the assessment reports in a timely manner. Student did not meet his burden of proof that San Mateo-Foster City was required to provide copies of its assessment reports prior to the IEP team meetings held within 60 days of Parents' consent to assess. As of the time of hearing, San Mateo-Foster City had not scheduled an IEP team meeting to review the results of Ms. Sachs' second assessment. There was no violation regarding the provision of assessment reports.

38. The analysis is different regarding the documents which were generated during the behavior assessments of Student. In response to Parent's April 17, and June 23, 2015 record requests, San Mateo-Foster City did not provide Student with a copy of

Ms. Sachs' assessment notes or related records she gathered in preparation for her behavior assessment reports. Its contention that these are not educational records but rather personal notes and records in Ms. Sachs' sole possession, for her own personal use, and used solely as a memory aid was not persuasive. Ms. Sachs' notes and the teacher input forms, even though personally maintained, were not used solely as a memory aide in this case.

39. Ms. Sachs conducted two behavior assessments of Student consisting of her expert observation, documentation, analysis of behavior data she personally collected, and analysis of data recorded by Student's teachers. Observation is critical to any behavior assessment. Ms. Sachs' notes recorded her observations of Student's behavior, functional skills, and any impact on learning and included narrative and frequency recording of behavioral data she collected during her assessment of Student. She used her notes to complete the Barriers to Learning Scoring Form. As such, these assessment notes are analogous to test protocols and constitute an educational record. Similarly, the completed teacher input forms stood in the place of testing protocols and are analogous to behavior rating scales. These two records, Ms. Sachs' notes and the written teacher input reports formed, in large part, the basis for her behavior assessments of Student. Under the circumstances of this case, these documents constitute educational records. Therefore, San Mateo-Foster City's failure to provide Parents with copies of these records violated their procedural rights. Parents were the only IEP team members without this information which formed the basis for Ms. Sachs' behavior assessments, findings, and recommendations. Though San Mateo-Foster City had not scheduled an IEP team meeting to review its second behavior assessment at the time of hearing, in March 2015, it named Student in a complaint to defend its initial behavior assessment and in April, Student filed his own complaint challenging, in part, San Mateo-Foster City's determination that Student did not require individual ABA

services. Parents proceeded to hearing on these consolidated matters in August 2015 without the opportunity to review these notes and related assessment records. This violation significantly impeded Parents' ability to participate in the decision making process and thereby denied Student a FAPE.

40. As discussed in full below, even though the assessor notes and teacher input forms were not produced, the credibility of the underlying January 2015 behavior assessment was not compromised given the consistency between the multiple data points including information provided by Student's teacher, speech therapist Mr. Loh, his private ABA provider Mr. Forth, and IEP team members including Parents. Moreover, contemporaneous extrinsic written evidence of Student's functioning in the form of Ms. Flecha's preschool transition report and her daily progress notes further support the overall reliability of Ms. Sachs' January 2015 behavior assessment. In addition, Ms. Sachs' clear recollection at hearing of her personal observations, sound knowledge of Student's behavior functioning and needs as reported by his teacher and Parents and as documented in his records, and her unwavering testimony on direct and cross examination dispelled any question of the validity of her assessment raised by the missing records. As San Mateo-Foster City proved that its January 2015 behavior assessment was legally compliant, this Decision does not award Student an independent behavior assessment. However, San Mateo-Foster City must provide copies of the assessor notes and teacher input forms to Parents to the extent these documents are personally identifiable to Student and convene an IEP team meeting to explain and interpret these records.

#### STUDENT'S ISSUE 1(I): STUDENT'S NEED FOR INDIVIDUAL ABA SERVICES

41. Student contends that because of his behavior needs, he required

individual ABA services to receive a FAPE.<sup>19</sup> San Mateo-Foster City argues that its specialized preschool program with embedded ABA-based class supports and strategies met Student's behavior needs, and he received educational benefit as shown by his progress towards all of his goals.

#### Related Services

42. Related services include supportive services such as behavior support and speech and language therapy as may be required to assist a student with a disability to benefit from special education. (20 U.S.C. §1401(26)(A); 34 C.F.R. § 300.34(a).) State law adopts this definition of related services. (Ed. Code, § 56363, subd. (a) & (b).) An educational agency satisfies the FAPE standard by providing adequate related services such that the student can take advantage of educational opportunities and achieve the goals of his IEP. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.)

43. When a child's behavior impedes his learning or that of others, the IEP team must consider strategies, including positive behavioral interventions and supports, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behaviors that impede a child's learning denies the child a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68 (*San Diego*).)

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<sup>19</sup> Student's closing brief references a discussion Father had with Mr. Forth regarding recommendations for individual ABA services. There was no evidence at hearing regarding this conversation so this information was not considered in this Decision.

44. The methodology used to implement an IEP is left to the school district's discretion so long as it meets a student's needs and is reasonably calculated to provide educational benefit. (*Rowley, supra*, 458 U.S. at p. 208; *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992 (*Roland M.*); See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 - 1150 (*Adams*) [there are many programs which effectively assist children with autism]; *T.B. v. Warwick School Committee* (1st Cir. 2004) 361 F.3d 80, 86; *Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32 [the focus is on whether the chosen methodology is reasonably calculated to confer educational benefit, not whether there are other more effective methods].) ABA therapy is just one methodology to address the needs of students with autism and IEP team decisions regarding services must be based on the unique needs of each individual child. (*Dear Colleague Letter*, (OSEP July 6, 2015) 66 IDELR 21.) Parents, no matter how well intentioned, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 207-208.)

#### Educational Benefit

45. There is no one test for measuring the adequacy of educational benefit conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) "[T]he correct standard for measuring educational benefit under the IDEA is . . . whether the child makes progress toward the goals set forth in her IEP." (*San Diego, supra*, 93 F.3d 1458, 1467.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. However, a district may not discharge its duty under the IDEA by providing a program that "produces some minimal academic advancement no matter how trivial [citation]." (*Amanda J., supra*, 267 F.3d 877, 890.)

46. To determine whether a school district offered a student a FAPE, the focus



is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [the IDEA does not provide for an "education . . . designed according to the parents' desires."].)

#### After-Acquired Evidence

47. The Ninth Circuit has held that a district's decisions in writing an IEP cannot be judged exclusively in hindsight, since "an IEP is a snapshot, not a retrospective." (*Adams, supra*, 195 F.3d 1141, 1149.) "In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Id.* at p. 1149, citing *Fuhrmann, supra*, 993 F.2d 1031, 1041 [citing *Roland M., supra*, 910 F.2d 983, 992].)

48. While a district's actions "cannot be judged exclusively in hindsight," (*Adams, supra*, 195 F.3d 1141, 1149), the Ninth Circuit has observed that after-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1006 [later obtained evidence, such as assessments, may supplement the record if the evidence is relevant, non-cumulative, and otherwise admissible].) The Ninth Circuit held that, in reviewing a district's actions, courts may look to evidence not known to the decision makers at the time as "additional data, discovered late in the evaluation process, may provide significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date." (*Ibid.*)

49. Student did not prove that he required individual ABA services in order to receive educational benefit. San Mateo-Foster City designed its preschool special day

class programs in accord with the principles of applied behavior analysis, and the programs utilized ABA-based behavior interventions and strategies. Student made substantial progress in Ms. Flecha's class with the provision of class behavior supports. By the time of the January 8, 2015 IEP team meeting, he was able to sit through and participate in circle time and follow directions. Student did not display any of his previously noted challenging behaviors and made progress on all of his goals proving that the classroom supports were sufficient to meet Student's needs. Ms. Sachs' behavior assessments further showed that Student was capable of learning in the natural class environment with the embedded ABA strategies. Based on Student's progress, San Mateo-Foster City offered Student placement in a classroom with fewer individual supports and with peers who had greater language and social skills with at the January 8, 2015 IEP team meeting.

50. When Student first entered Ms. Hughes' class in March 2015, his negative behaviors, such as falling to the floor and throwing items, increased. Given Student's difficulty with transitions, his challenges generalizing his skills, and the larger class size and increased expectation for independence, an increase in challenging behaviors was not unexpected. Even so, Ms. Hughes' data showed that Student's negative behaviors declined in frequency and duration with the use of class ABA strategies such as a token economy, behavior contingencies, and visual schedules and cue cards. He stopped throwing items and spent less time lying on the floor. Student continued to progress on all of his goals and met his social skills goal early. Student did not meet his burden of proof that he required individual ABA therapy to receive a FAPE. Rather, the more restrictive, one-to-one ABA services would unnecessarily remove Student from the classroom environment and hinder his opportunity for social interaction and growth. San Mateo-Foster City's program was reasonably calculated to provide Student educational benefit and provided Student a FAPE.

## STUDENT'S ISSUE 1(J): STUDENT'S NEED FOR INDIVIDUAL SPEECH AND LANGUAGE SERVICES

51. Student contends that he required individual speech and language services in order to receive a FAPE. San Mateo-Foster City argues that Student's primary language need was in the area of social language such that Student required small group services to meet his unique needs. Further, San Mateo-Foster City contends that Student made progress towards his speech goals and received educational benefit with the provision of small group speech services.

52. Student did not demonstrate that he was deprived of a FAPE on this ground. The small group speech services provided by San Mateo-Foster City were reasonably calculated to provide Student educational benefit. Student's primary communication need was in the area of pragmatics or social language. Specifically, Student struggled with peer interaction as his peers were less able than adults to provide him support and feedback in his conversation attempts. Given his unique need for peer communication models and peer practice sessions, one-to-one speech services with a speech pathologist would not have met his language needs. Rather, San Mateo-Foster City's offer and provision of small group speech and language services effectively targeted Student's unique communication needs.

53. Throughout the 2014-2015 school year, Student made marked progress on both of his speech goals. By the January 8, 2015 IEP team meeting, Student was using social language, often exceeded his mean length of utterance goal by using more than three word phrases to communicate a variety of pragmatic functions, and consistently responded to "who," "what," and "what am I doing" questions. By May 2015, Father noted that Student's communication skills had improved and that he was using a minimum of seven- to nine- word phrases at home. Father requested more challenging goals to reflect Student's progress. Based on Student's progress on his speech goals, the

small group speech sessions were meeting his language needs and providing Student educational benefit. Student did not establish that he required individual speech and language services to receive a FAPE.

#### STUDENT'S ISSUE 1(K): STUDENT'S NEED FOR EXTENDED SCHOOL YEAR SERVICES

54. Student alleges that he required extended programming in order to prevent regression of skills and that without such extended services he would require an extended period of time to recoup his skills such that he would not receive a FAPE. San Mateo-Foster City contends that Student was not eligible for extended school year services as he did not demonstrate any regression, which was not quickly recouped, after extended breaks, and he was able to attain and retain skills with his regular school year programming.

#### Extended School Year Services

55. California Code of Regulations, title 5, section 3043, provides that extended services shall be provided for each individual with exceptional needs who requires special education and related services in excess of the regular academic year. Students to whom extended programming must be offered under section 3043:

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

56. The federal regulations do not specify any factors that must be considered

in determining eligibility for extended programming. The IDEA simply provides that extended school year services shall be provided to a student if the IEP team determines that such services are necessary to provide a FAPE. (34. C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3); *N.B. v. Hellgate Elementary School District*, (9th Cir. 2008) 541 F.3d. 1202, 1210-1212 [no error in applying a regression/recoupment standard; extended services must be provided if necessary to ensure FAPE].)

57. Student made demonstrable and uninterrupted progress towards all of his goals throughout the 2014-2015 regular school term despite numerous breaks in programming, including: two days off in November 2014 for Thanksgiving; two weeks off for winter break; a month-long trip out of country from February 8, 2015, until March 16, 2015; three weeks of spring break from March 30, 2015, through April 17, 2015; and a 10-day medical absence at the end of May 2015. Student showed no regression after these gaps in instruction and services in terms of his language skills. In the area of behavior, Student was quick to rejoin the class program, recoup skills, and positively respond to his visual schedule within a few days. Additionally, Student returned from the summer break with increased language skills, and he showed greater maturity, improved social skills, a continued decline in negative behaviors, and a reduced need for visual cues. This evidence of his adjustment following summer break is properly considered to the extent it sheds light on the reasonableness of the team's determination at the June 15, 2015 IEP meeting that Student did not require extended school year services to receive a FAPE. Student's quick adjustment to his school routine at the start of the 2015-2016 school year supports San Mateo-Foster City's determination that Student did not require extended programming. On this record, Student did not meet his burden of proof that he required extended school year services to receive a FAPE.

## ISSUE 2: SAN MATEO-FOSTER CITY'S JANUARY 2015 BEHAVIOR ASSESSMENT

58. San Mateo-Foster City contends that Ms. Sachs' January 2015 behavior

assessment met all procedural and substantive requirements such that Student is not entitled to an independent evaluation at public expense. Student argues that he is entitled to a public funded independent behavior evaluation because: 1) Ms. Sachs' failure to contact Student's private ABA provider and failure to involve Parents in the assessment process rendered the assessment insufficient; and 2) San Mateo-Foster City unreasonably delayed in filing to defend its assessment.

### Requirements for Reassessments

59. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(i); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56329.) The notice consists of a proposed written assessment plan and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) As discussed above, the assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

60. Assessments must be conducted by individuals who are knowledgeable of the student's disability and competent to perform the assessment, as determined by the school district. (Ed. Code, §§ 56320, subd. (g), 56322.) Tests must be administered by trained and knowledgeable personnel in conformance with the instructions provided by the producers of the tests; used for the purposes for which they are valid and reliable; selected and administered so as to not be discriminatory; and administered in the language and form most likely to yield accurate information on the student's functioning. (20 U.S.C. §1414(b)(3)(A); 34 C.F.R. § 300.304 (c)(1); Ed. Code § 56320, subds. (a) & (b).) An assessment tool must "provide relevant information that directly assists

persons in determining the educational needs of the child.” (34 C.F.R. § 300.304(c)(7).) If the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of the school district. (*Letter to Anonymous* (OSEP Sept. 17, 1993) 20 IDELR 542.) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Rather, the assessor must use a variety of technically sound instruments. (20 U.S.C. § 1414 (b)(2)(B); 34 C.F.R. § 300.304(b)(2).)

61. In California, the assessment process requires the district assessor to prepare a written report that shall include but is not limited to the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; and 4) the relationship of that behavior to the student’s academic and social functioning. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

62. Evaluations broadly encompass “the procedures used ... to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” (34 C.F.R. § 300.15; *Harris v. D.C.* (D.D.C. 2008) 561 F.Supp.2d 63, 67 (*Harris*).) For instance, a functional behavior assessment is an educational evaluation under the IDEA. (*Harris, supra*, 561 F.Supp.2d 63, 67.) A functional behavior assessment that fails to provide sufficient data to reliably determine the function of a student’s serious behaviors does not constitute an appropriate evaluation. (*Cobb County School Dist. v. D.B.* (N.D.Ga. Sept. 28, 2015, No. 1:14-CV-02794-RWS) 2015 WL 5691136; See also *H.D. v. Central Bucks School Dist.* (E.D.Pa. 2012) 902 F.Supp.2d 614, 627 [no right to an independent evaluation where there was nothing in the record to

suggest that the district's functional behavior assessment was flawed.] )

#### Request for Independent Educational Evaluation

63. Under certain conditions a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent evaluation, the student must disagree with an evaluation obtained by the public agency and request a private evaluation. (34 C.F.R. § 300.502(b)(1) & (2).)

64. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) The district may ask for a parent's reasons for disagreeing with an evaluation, but it may not require the statement of any reason by parents, and may not unreasonably delay its response by waiting for such an explanation. (34 C.F.R. § 300.502(b)(4).)

65. Ms. Sachs' January 2015 behavior assessment met all procedural and substantive requirements. At Student's initial November 6, 2014 IEP team meeting, Parents consented to an assessment plan authorizing San Mateo-Foster City's autism program specialist to conduct an ABA assessment with Student. Parents also received a copy of their procedural rights at this meeting. Therefore, Parents received proper notice



of this assessment. Ms. Sachs was well qualified to complete Student's behavior assessment. Not only does she have the requisite licensure, education, and experience, she also designed, developed, and continues to oversee San Mateo-Foster City's behavior intervention program which consists of classrooms with embedded ABA practices, and also supplemental individual behavior intervention services for those students who required extra support. As an autism program specialist with San Mateo-Foster City, Ms. Sachs was tasked with not only developing and overseeing the district-wide behavior intervention system and training and supervising staff on the interventions, but also with developing an assessment protocol for determining the level of behavior intervention required by students with behavior challenges.

66. There are no standardized assessment tools for determining behavior intervention needs. However, based on her experience, Ms. Sachs determined that the Barriers to Learning tool provided the best overall understanding of students' behavior needs in relation to school tasks. Student did not contend otherwise. The Barriers to Learning tool is a technically sound instrument designed to identify behaviors that may interfere with learning for students with autism. Ms. Sachs was trained in the use of this tool, had used it in excess of 50 times, and followed the author's testing protocols during her assessment of Student. Observation is key to any behavior assessment, and Ms. Sachs observed Student four separate times. Further, she collected additional behavior data from various sources including Parent, Student's private ABA provider at Gateway, Student's initial assessment, reports from his prior teacher at United Methodist, and current teacher reports. Ms. Sachs' behavior assessment encompassed a variety of strategies including her own direct observations of Student, record review, teacher and Parent input, and data analysis. With the Barriers to Learning tool guiding her approach, and based on these various data measures, Ms. Sachs then scored Student's Barriers Scoring Form and determined the degree of Student's respective

challenges. Collection of behavior data from multiple sources supported the accuracy of the assessment. Further, the assessment results were consistent with Student's overall profile.

67. The consistency of the underlying reports of Student's classroom behavior and needs from a variety of sources in conjunction with the absence of any contradictory evidence support the validity of San Mateo-Foster City's January 2015 behavior assessment, even in the absence of the underlying assessor notes and teacher input form. Ms. Sachs quoted Ms. Flecha throughout the assessment report and these quotes correspond to Ms. Flecha's written preschool transition report. Given the consistency between the multiple data points including outside records of Student's behavior in settings without ABA-embedded supports; prior assessments; Parent input; Ms. Flecha's preschool report, her verbal updates to the IEP team recorded in the meeting notes, and her daily progress notes; and reports from Student's speech therapist Mr. Loh, the missing assessment notes and teacher input form did not undermine the validity of the assessment in this case. Ms. Sachs' clear recollection, sound knowledge of Student's needs, and ready ability to answer questions posed at hearing, in conjunction with the absence of any contradictory evidence of Student's classroom functioning as observed by Parents, teacher, or service providers, further support the reliability of the January 2015 behavior assessment. There was nothing in the record to suggest that Ms. Sachs' behavior assessment was flawed. San Mateo-Foster City met its burden of proving that its January 2015 behavior assessment met the requirements of the IDEA and its implementing regulations.

68. Once Ms. Sachs scored Student's results according to the publisher guidelines, she completed a report with the results of her findings and recommendations for behavior interventions. Her report met all statutory requirements. It contained detailed descriptions of Student's classroom behaviors; information

provided by Student's teacher; the methodologies used to obtain data regarding Student's behaviors; and the records Ms. Sachs reviewed as part of her assessment. Finally, the report gave recommendations for behavior interventions and discussed supports already in place in the classroom to address Student's behaviors. Ms. Sachs' timely presented her assessment report at the January 8, 2015 IEP team meeting.

69. Student challenged the behavior assessment because he disagreed with the recommendation that Student did not require individual ABA services, and believed that the assessment was not complete as Ms. Sachs failed to involve Parents or Mr. Forth in the assessment process. Specifically, Mother had previously attended two testing sessions during Student's initial assessment, and Parents contended that they should have been present during Ms. Sachs' observation sessions or informed these were occurring. Student provided no legal authority for this contention. Student's claim that the behavior assessment was insufficient because Ms. Sachs failed to obtain information directly from Parents is not accurate. Ms. Sachs provided Parents with an ABA Assessment-Family Input Form asking for information regarding Student's behavior, communication, social and emotional skills at home, as well as his strengths, and Parents' concerns. Mother completed and returned this form, and Ms. Sachs incorporated this information into her assessment. Further, while Parents preferred that Ms. Sachs speak directly with Mr. Forth, they provided no legal authority that this was a required part of the assessment process. Ms. Sachs considered Mr. Forth's reports and his recommendations. San Mateo-Foster City met its burden of proof by showing its assessor was trained and knowledgeable, appropriately used a variety of methodologies including the technically sound, valid, and reliable Barriers to Learning tool, and that its behavior assessment met all legal requirements.

#### Unnecessary Delay

70. Student contends that he is entitled to an independent behavior

evaluation because San Mateo-Foster City unnecessarily delayed in filing its due process complaint to defend its assessment. The term “unnecessary delay” as used in chapter 34 of the Code of Federal Regulations, section 300.502(b)(2), is not defined in the regulations. “It permits . . . a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an independent evaluation.” (*Letter to Anonymous* (OSEP Aug. 13, 2010) 56 IDELR 175.) The determination of “unnecessary delay” is a fact-specific inquiry. (*Pajaro Valley Unified Sch. Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, No. C o6-0380 PVT) 2006 WL 3734289, p. 3 (*Pajaro*); *Taylor v. District of Columbia* (D.D.C. 2011) 770 F.Supp.2d 105, 107-108, 111[four month delay unnecessary]; *M.M. v. Lafayette School Dist.* (N.D.Cal. Aug. 8, 2012, CV 09-4624) 2012 WL 3257662 [waiting 74 days constituted unnecessary delay]; *J.B. v. San Jose Unified School Dist.* (N.D.Cal. May 6, 2013, No. C 12–06358 SI) 2013 WL 1891398, p.4 [seven month delay unnecessary].) In *Pajaro*, the federal district court for the Northern District of California ordered the school district to pay for an independent evaluation where the district, without justification, delayed almost three months to file to defend its assessment. The Northern District Court held, “the District’s unexplained and unnecessary delay in filing for a due process hearing waived its right to contest Student’s request for an independent educational evaluation at public expense, and by itself warrants entry of judgment in favor of Student.” (*Pajaro, supra*, 2006 WL 3734289, p. 3.)

71. Some delay in the provision of an independent evaluation is reasonable if the school district and the parents are engaging in active communications, negotiations, or other attempts to resolve the matter. (*J.P. v. Ripon Unified School Dist.* (E.D. Cal. April 15, 2009, No. 2:07-cv-02084-MCE-DAD) 2009 WL 1034993, p.7-8 [two-month delay during which time district attempted to negotiate an independent evaluation agreement with parent, and district filed for due process less than three weeks after negotiations

came to an impasse, was not unnecessary]; *L.S. v. Abington School Dist.* (E.D. Pa. Sept. 28, 2007, No. 06-5172) 2007 WL 2851268, p.10 [six-week delay in filing for due process not a per se violation given ongoing efforts to resolve the matter].)

72. San Mateo-Foster City did not unnecessarily delay in filing its due process request to defend its assessment. In this regard, it is important to consider the timing as well as the circumstances surrounding Parents' request for an independent behavior evaluation. Although Father initially requested an independent evaluation on January 9, 2015, he subsequently attended a January 26, 2015 "repeat" IEP team meeting, during which Ms. Sachs once again presented her assessment results just as she did at the January 8, 2015 IEP team meeting. In follow-up communications, Father stated that he would renew his request for an independent evaluation if San Mateo-Foster City refused to offer individual ABA therapy at the repeat IEP team meeting. Therefore, Father put his request for an independent behavior evaluation on hold pending the outcome of the January 26, 2015 IEP team meeting.

73. When San Mateo-Foster City again denied Parents' request for individual ABA services at the January 26, 2015 IEP team meeting, Father renewed his request for an independent evaluation during this meeting. On February 6, 2015, 11 days following the January 26, 2015 IEP team meeting, Mr. Bartfield provided a prior written notice outlining why he was declining Parents' request and informed Parents that San Mateo-Foster City would be filing for a due process hearing to defend its behavior assessment. On March 4, 2015, San Mateo Foster City filed for hearing, 37 days after Father's January 26, 2015 request for an independent evaluation. During this time, San Mateo-Foster City's counsel and Mr. Bartfield separately spoke with Parent to further understand and attempt to resolve his request, and offered to conduct a behavior reassessment by its autism specialist. San Mateo-Foster City proved that it did not unreasonably delay in filing for a due process hearing.

74. San Mateo-Foster City's filing to defend its assessment within two months of Student's initial January 9, 2015 request for an independent educational evaluation did not constitute unnecessary delay, in light of its continued efforts to understand and resolve Parents' concerns, including reconvening an IEP team meeting to re-review its behavior assessment. Therefore, San Mateo-Foster City is not obligated to fund an independent behavior assessment because its behavior assessment was legally compliant and because it filed its complaint without undue delay.

## REMEDIES

1. Student prevailed as to Student's Issue 1(h). As a remedy, he requests an independent behavior evaluation and compensatory education. San Mateo-Foster City prevailed as to its sole issue and proved that its behavior assessment met all procedural and substantive requirements, for which it requests an Order that it is not required to fund an independent behavior evaluation.

2. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of Town of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Id.* at p. 1497.)

3. Within 15 days of this Decision, San Mateo-Foster City is ordered to provide Parents with a copy of Ms. Sachs' behavior notes and teacher input forms completed by Ms. Flecha and Ms. Hughes as well as Ms. Hughes' Language Assessment Form generated in the course of the January and June 2015 behavior assessments of Student. In addition, San Mateo-Foster City shall convene an IEP team meeting within 30 days of this Decision to explain or interpret the information contained in the behavior notes and teacher forms.

## ORDER

1. Within 15 days of the date of this Decision, San Mateo-Foster City shall provide Parents with copies of Ms. Sachs' assessment notes and teacher input forms completed by Ms. Flecha and Ms. Hughes, as well as Ms. Hughes' Language Assessment Form generated in the course of the January and June 2015 behavior assessments of Student.

2. Within 30 days of the date of this Decision, San Mateo-Foster City shall convene an IEP team meeting to explain or interpret the information contained in the behavior notes and teacher input forms.

3. San Mateo-Foster City's January 2015 behavior assessment of Student met all legal requirements such that Student is not entitled to an independent educational evaluation at public expense.

4. All other relief sought by Student is denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed as to Student's Issue 1(h). San Mateo-Foster City prevailed as to all other issues.

## RIGHT TO APPEAL

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

DATE: October 22, 2015

/s/

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Theresa Ravandi

Administrative Law Judge

Office of Administrative Hearings