

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN MATEO-FOSTER CITY SCHOOL
DISTRICT.

OAH Case No. 2016100430

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 3, 2016, naming San Mateo-Foster City School District.

Administrative Law Judge Alexa J. Hohensee heard this matter in Foster City, California on November 10, 2016.

Student's Father represented Student. Lenore Silverman, Attorney at Law, represented District. John Bartfield, District's Director of Special Education, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until November 21, 2016. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUE¹

1. Did Student experience bullying such that he was denied a free appropriate public education from April 21, 2016 through the date of filing for due process?

SUMMARY OF DECISION

Student contends that he was denied a FAPE due to bullying by a classmate, and seeks as remedies that the classmate be suspended and removed to a different classroom and school bus, and that Student receive psychological counseling. District denies that any bullying occurred, and contends that the incidents alleged either did not occur, or were accidents typical of preschool and kindergarten and appropriately addressed.

Student did not prove that bullying took place. Of the six incidents at issue, Student failed to establish that four of those incidents occurred. In addition, those four incidents involved the type of minor bumps and scratches to be expected when young children with developing body awareness and social skills interact. The other two incidents were accidents; they occurred when Student climbed on a playground structure beneath another preschooler who was swinging his legs, and when Student was pushed by a classmate who was not looking where he was running. Those incidents did not constitute bullying under federal guidance on the IDEA, as they were not

¹The issue has been rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Student withdrew Issue Two, as set forth in the prehearing conference Order dated November 9, 2016, on the first day of hearing.

characterized by an aggressor using real or perceived power over Student, and were not repeated. Those incidents also failed to meet the State definition of bullying, because the conduct was not severe or pervasive, and was not reasonably predicted to cause a reasonable student fear of harm, substantial detriment, or substantial interference with his educational program.

This Decision denies all of Student's requests for relief.

FACTUAL FINDINGS

1. Student was five years of age and in kindergarten at the time of the hearing. Student has resided with Parents within District's boundaries at all relevant times.

2. Student is on the autism spectrum. He has difficulty with attention, social interaction, and responding to questions or directions. Student has limited verbal ability. Student is eligible for special education and related services under the eligibility category of autism.

2015-2016 SCHOOL YEAR

3. During the 2015-2016 school year, Student attended preschool in a special day class for students with mild to moderate to disabilities taught by Laura Hughes at District's George Hall Elementary School. Student's preschool day lasted from 8:00 a.m. to 12:00 noon. Student rode a school bus to and from school.

4. Ms. Hughes' students had difficulties with language, sensory regulation and transitions, and she used strategies to help them regulate and calm their bodies. In her experience, four-year-olds tend to be active, whether typical or with disabilities, and they sometimes touch, bump and kick each other. The social skills component of the curriculum in Ms. Hughes' class included teaching her students to understand where their bodies were in space, how close to stand next to others, and how to use a "gentle"

touch. Ms. Hughes taught her students social strategies, including: quiet voice, quiet bodies, saying “stop” if a toy was taken away, putting themselves “in a bubble” of personal space and seeking to gain attention in appropriate ways. Ms. Hughes and her adult classroom assistants were trained in these lessons and strategies, and the students received consistent instruction and support.

5. Ms. Hughes was a credentialed and well-qualified special education teacher. She had 20 years of experience teaching students with multiple disabilities, including autism, language impairment, and sensory regulation difficulties. She also had experience teaching neurotypical four-year-olds, and in her opinion, both typically developing preschoolers and preschoolers with disabilities tended to have body awareness issues. At hearing, Ms. Hughes appeared genuinely committed to her students, and displayed good recall concerning the contact between Student and his classmates, including Student A.² Her testimony regarding the events in her classroom and on the playground, and her opinions regarding the interactions of her students and Student’s needs, were credible and convincing.

6. During morning recess on April 21, 2016, Student A was sitting near the top of the bars of the preschool play structure on the playground and swinging his legs. Student climbed in front of Student A, who accidentally kicked Student in the mouth. Ms. Hughes, who was watching Student A from about 10 feet away, saw too late that Student was going to pass in front of Student A, and was unable to stop the contact. She took Student into the classroom, observed that Student’s lip was swollen but not bleeding, and put an ice pack on the swelling. Student seemed stunned at first, but then said he was fine and participated with the class for the remainder of the day. Student A

² For privacy purposes, this Decision will refer to the alleged aggressor as Student A.

tended to be active, and moved back and forth constantly, but Ms. Hughes was certain that Student A did not intend to kick Student. Ms. Hughes spoke to Student A about being more aware of other children on the playground equipment and having “quiet” feet and hands.

7. When Student returned home, he complained of a sore mouth. Mother elicited from Student through a series of questions that Student A had kicked him. Mother looked into Student’s mouth and saw a cut lip. Mother was understandably upset and told Father. Father emailed Ms. Hughes to complain, and requested that Ms. Hughes separate the two children. He also requested that District suspend Student A or move him to another classroom.

8. District did not suspend or move Student A to another classroom, but Ms. Hughes arranged for Student and Student A to attend separate speech therapy sessions. There were no further incidents between Student and Student A in Ms. Hughes’ class.

9. Over the summer, Parents enrolled Student in a YMCA summer camp. The camp was for typically developing children, and Student had no behavior support. Student did not want to participate in the activities, and would lie on the ground or run across the street. Parents were unhappy with Student’s lack of success in the YMCA program.

10. Parents also enrolled Student in a private language/social skills group at the end of summer. In that program, a speech therapist paired Student with another child to work on play and social skills under the therapist’s supervision.

2016-2017 SCHOOL YEAR

11. During the 2016-2017 school year, Student attended Pierre Yoro’s kindergarten class for students with mild to moderate disabilities. In addition to Mr. Yoro, the classroom had two adult assistants and 11 students, including Student and

Student A. Mr. Yoro observed that Student and Student A were both happy students and enjoyed interacting with each other.

12. Mr. Yoro was a credentialed and well-qualified special education teacher, with 16 years of experience teaching kindergarten and first grade, of which 11 were in special education. He had experience working with children with autism, and training on how to address and prevent bullying. During his testimony at hearing, it was obvious that Mr. Yoro enjoyed teaching and liked Student. He displayed good recall of the interactions between Student and Student A, and a good understanding of the interactions of kindergarten students and students with autism in general. Mr. Yoro's testimony regarding the events at issue and his observations of Student were credible and convincing. Mr. Yoro's opinions regarding his investigations of Parents' complaints and Student's well-being at school were accorded substantial weight.

13. Mr. Yoro taught body and social space awareness to his students in a variety of ways. Every morning his students sang "My Space," with lyrics such as "this is my space, not yours, mine, please don't touch." Mr. Yoro used social stories as examples of appropriate behavior, and had icons and visual aids in the classroom to teach his students to keep their hands to themselves and to maintain appropriate space.

14. Student was always happy when he got off the bus at school, and said good morning to people he knew on his way to class. Student liked to be involved in classroom activities, and wanted to be the teacher's assistant during large group activities. If Student was not ready to do an activity, a small break would usually be enough to assist Student with the transition. From August through October 2016, Student's behaviors improved significantly. Student learned to get attention by raising his hand, to wait his turn and to share, with a few reminders as needed. By the time of the hearing, Student was independently asking for breaks when he was not ready for an activity.

15. Student A's behaviors were also addressed by Mr. Yoro and District, and Student A showed dramatic improvement in behaviors as the school year progressed.

16. The school psychologist, Suzy D'Souza, observed Mr. Yoro's classroom at least twice a week, and provided support to Mr. Yoro and the classroom aides in implementing IEP's and addressing students' behavioral challenges and social/emotional concerns. Ms. D'Souza had education and training in behavioral issues of elementary school children with mild to moderate disabilities, and extensive experience in behavioral interventions and positive behavioral strategies. Ms. D'Souza observed that Student had a happy countenance, interacted positively with staff, had positive interactions with peers, and attended to work assigned to him. Student needed redirection and verbal prompts, which was typical of a child with autism. At hearing, Ms. D'Souza described interactions between Student and Student A as "uneventful," and she did not observe any issues between Student and Student A that required her attention. Ms. D'Souza had a professional demeanor at hearing, she was very familiar with both Student and Student A, and her observations and her opinions were credible and convincing.³

17. District transported Student to school and home on a small bus with two to three other students, including Student A. On August 17, 2016, the first day of the school year, Student and Student A sat together on the ride home. Student told Mother

³Ms. D'Souza's interpretation of the law with regard to assessments, and how an assessor should perform assessments, was less persuasive. However, her testimony regarding her observations of Student were consistent with those of other witnesses and compelling. Her opinion that Student was not exhibiting significant maladaptive behaviors in the school environment was given significant weight.

that Student A had kissed him and yelled at him. Mother asked the bus driver to seat Student and Student A apart from each other, which the driver did.⁴

18. On August 24, 2016, Father emailed Mr. Yoro and request that he keep Student and Student A apart in the classroom. Parents also began asking Student every day if Student A had hurt him. Sometimes Student responded "yes," and sometimes he responded "no."

19. On August 30, 2016, Student informed Mr. Yoro that a classmate (not Student A) had bumped him. Student misidentified the student who had been working with him during math, giving him the name of a student that Mr. Yoro believed was in Student's private language/social skills class.

20. Mr. Yoro wrote on the daily notes that went home with Student that Student had informed him that a classmate had bumped him, and that he was pleased that Student had learned to verbalize and report that type of incident to him.

21. After lunch on August 30, 2016, Father emailed District that Student had told him that Student A had hurt him the day before by putting three fingers in Student's mouth. Father demanded that the school complete an accident report regarding the injury, and asked that Student A be suspended.

22. Mr. Yoro promptly investigated Father's complaint by asking Student open ended questions about an injury the day before, and questioning the other adults in the classroom and on the playground. Mr. Yoro determined that the incident had not happened at school, and emailed the results of his investigation to Father that same day. Mr. Yoro reminded Father that Student and Student A were separated in the

⁴Mother subsequently asked the bus driver to seat the Student and Student A together again, but a few days later Father contacted the bus company and arranged for the children to be seated apart from each other on a permanent basis.

classroom, on the playground and going to and from the bus. He explained that the classroom had three adults to supervise the children during the day, and more than three adults to supervise during snack, recess and physical education. Mr. Yoro related how the students in his class were learning about maintaining their own space, and what they should do or say if someone was in their space. He assured Parents that he informed the parents of his students whenever incidents of physical contact involving their children occurred. He also assured Parents that District did not tolerate incidents of harassment and bullying. Mr. Yoro related additional information about the bumping incident referenced in the August 30, 2016 daily log, and that Student had not reported an injury.

23. In August or September 2016, Student's private speech therapist informed Parents that Student was not a good fit for the language/social skills group in which he had been enrolled in since summer because Student screamed and would not cooperate with the other child. At Parents' request, the speech therapist contacted Mr. Yoro, who relayed strategies used in the classroom to successfully direct Student's behavior and socialization. The speech therapist determined that Student did not have sufficient skills for her small group sessions, and told Parents that she could not continue to serve Student.

24. Also in September 2016, Student began screaming at home and hitting Mother, particularly if he did not get his way. Parents attributed Student's behavior to the bad influence of Student A.

25. On September 13, 2016, during the bus ride home, Student A unfastened his seat belt and went to sit with Student. The bus driver heard a yell, pulled the bus over, parked, found Student A seated next to Student, and moved Student A back to his seat. The driver did not see an altercation or any inappropriate conduct. The bus driver told Mother about the incident when Student was dropped off.

26. Mother saw that Student had a light scratch on one finger, a tiny red area on the palm of his hand, and a red circle on his leg. Mother took pictures of the marks. Father emailed the pictures to District that same day and demanded that District complete an incident report. Father asked that District place Student A on another bus or suspend him. Father believed that the scratch and mark on Student's palm could only have happened if Student fended off an attack to his face by a sharp object, and concluded that Student Must have been trying to poke his son in the eye with a stick. Father also believed that the mark on Student's leg was a bite mark.

27. District immediately contacted the bus contractor to initiate an investigation. A bus company representative interviewed the driver, and called Father to relay that the bus driver had seen the children sitting together, but had not witnessed an altercation or seen Student A holding a stick.

28. The bus company provided a written incident report to District on September 15, 2016, consistent with the bus driver's verbal report to Mother.

29. At dismissal of the school day on September 26, 2016, Student A eloped from his aide and ran to the other end of Mr. Yoro's classroom. Mr. Yoro and all of the adult assistants in the classroom witnessed the incident. Student A was focused on fleeing from his aid, and was unaware of the objects between him and the door. While running and looking over his shoulder at the aide, Student A knocked over two chairs. Student was sitting on one of those chairs, and fell when Student A knocked his chair over. Mr. Yoro opined that the collision was merely a result of Student's position between Student A and the door, and not a result of any malicious intent.

30. Student did not hit his head when he fell. Mr. Yoro went to Student and helped him up. Mr. Yoro gave Student a drink of water and assessed him for injuries, but Student appeared to be fine. Mr. Yoro called Mother to tell her what had happened. The school principal, Kristin Ugrin, filled out a first aid note and sent Parents a follow-up

email. Mother thought that Student's cheek looked a bit red when Student got off the bus, and she took a contemporaneous picture of him. However, the picture she took of Student's cheek was entered into evidence, and it did not show any unusual redness.

31. The next morning, September 27, 2016, Father emailed Ms. Ugrin, telling her that Student A had slapped Student twice and pushed Student out of his chair so that he fell onto his face. Father demanded that District complete incident reports, and that District interview Student A about his motives.

32. On September 27, 2016, Ms. Ugrin spoke with Mr. Yoro and the adult assistants in his classroom, none of whom had seen Student A slap Student, or had seen any slap marks on Student's face. They confirmed that Student had not hit his head in the fall from his chair. Ms. Ugrin reported the results of her investigation to Father.

33. That same day, Father requested in writing that District conduct a behavior assessment of Student. Parents were upset that Student had not behaved well at the YMCA camp and had been dropped from his private language/social skills group. Father noted that Parents had seen an increase in Student speaking out, being aggressive, having noncompliant behavior and exhibiting overall anxiety, which they attributed to Student A's "attacks" on Student.

34. On October 3, 2016, Parents filed for due process against District.

POST-COMPLAINT EVENTS

35. On October 5, 2016, Student arrived at school complaining that his mouth hurt, although he could not say why it hurt. Prior to recess, Mr. Yoro typed into the daily log that Student might have a toothache. At no time during the day did Student report to Mr. Yoro that anyone had hurt him. Student was rigid about wanting his homework to be perfect, and was very upset that afternoon when told that he had done his homework incorrectly. Student was crying when he got off the bus, and winced that evening when Mother helped him brush his teeth.

36. The following morning, October 6, 2016, Father asked Student why his tooth had hurt the night before, but Student did not respond. Father asked Student about his tooth again, and Student pointed to his knee. Father asked if Student A had kicked Student in the mouth with his knee, and Student nodded.

37. On October 6, 2016, District emailed Parents a copy of the bus company's written report on the September 13, 2016 incident. The report was consistent with the information the bus driver had given Mother.

38. On October 7, 2016, Father wrote to District demanding an investigation of the alleged October 5, 2016 knee injury to Student's mouth, and stating that Student no longer wanted to attend school because Student A "hit" him. Ms. Ugrin interviewed the adults in Mr. Yoro's classroom, but none of them had seen another student have physical contact with Student on October 5, 2016. Also, no incident report had been filed by the bus company regarding October 5, 2016. Ms. Ugrin reported to Father that she could not confirm that another student had hit Student in the mouth with his knee, and proposed an IEP team meeting to discuss Parents' concerns.

39. On October 12, 2016, the students in Mr. Yoro's class played soccer at a Special Olympics event. Student was standing near the goal when Student A kicked the soccer ball, and the ball hit Student. Student A was not trying to hit Student. Mr. Yoro saw the accident happen, immediately assessed Student, and determined that Student was not injured. Balls hit other students as the children played soccer and no one reported any injuries as a result.

40. Since the soccer ball incident, Student has not had any injuries or incidents with Student A.

REPORTS BY STUDENT REGARDING PAST EVENTS

41. The evidence established that Student was an unreliable reporter. Student could respond to open-ended questions with time and care, but he could not

dependably answer questions about events that had occurred more than a few hours earlier, and could only respond in the present tense. Student tended to answer “yes” to all questions posed by Father related to past events. For example, Student answered “yes” when Father proposed outlandish scenarios, such as whether the President of the United States had visited Student’s school the day before. Father used yes/no questions when questioning Student about past events, and always asked whether Student A had hurt him when Student was upset, despite the likelihood that Student would answer “yes” regardless of whether Student A had interacted with Student, or whether Student was actually injured. Even though the information gleaned from their son was unreliable, Parents characterized anyone who did not agree with their conclusions as treating Student as a liar, both in letters to District and at hearing.

LEGAL ANALYSIS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.;⁶ 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 prepare them for employment and independent living, and (2) to ensure that the rights of children

⁵Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's 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 child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd.(a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE

requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

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

5. An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031 at p. 1041 (*Fuhrmann*).) Whether a student was denied a FAPE is ultimately evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Adams, supra*, 195 F.3d at 1149.)

PRELIMINARY ISSUE – TIME PERIOD AT ISSUE

6. Student seeks to include in his claim acts of alleged bullying that took place after the filing of his due process complaint, but prior to the hearing. However, as set forth above, Student is limited to the issues alleged in his complaint, unless District agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) No such agreement was presented. Accordingly, this Decision will limit its determination to whether Student was denied a FAPE by acts of alleged bullying from April 21, 2016 through the filing of Student's complaint on October 3, 2016.

7. The ALJ may consider evidence of acts or events occurring after the filing of the complaint, particularly as relevant to credibility, persuasiveness of opinions and remedies, but cannot expand the scope of the claim. (See, e.g., Gov. Code, §11513, subd. (c) [ALJ may admit evidence that is relevant to a determination of the matter regardless of any statutory rule which would render the evidence inadmissible over objection in civil actions].) The evidence of post-filing incidents was considered only for purposes of determining the limited issue in this matter.

ISSUE 1 – DENIAL OF A FAPE FROM BULLYING

8. Student contends that District denied him a FAPE because Student A repeatedly bullied him in the classroom, on the playground and on the bus. District

contends that Student was not bullied, and that the District responded promptly and appropriately to instances of alleged inappropriate conduct by Student A.

9. In a 2013 joint letter providing guidance on the IDEA, the U.S. Office of Special Education and Rehabilitative Services and the Office of Special Education Programs described bullying as follows⁷:

Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (*e.g.*, excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors

(DEAR COLLEAGUE LETTER, (OSERS/OSEP AUGUST 20, 2013) 61 IDELR 263; 113 LRP 33753 (DEAR COLLEAGUE 2013).)

10. California has a more expansive definition of bullying than this federal guidance interpreting the IDEA. The California Education Code defines bullying as "any severe or pervasive physical or verbal act or conduct by a pupil or group of pupils ... directed toward one or more pupils" that causes or is "reasonably predicted" to cause a reasonable student to experience one or more of the following:(a) fear of harm to his or her person or property;(b)a substantially detrimental effect on his or her physical or

⁷These offices are a division of the United States Department of Education and charged with administrating the IDEA and developing its regulations.

mental health;(c)a substantial interference with his or her academic performance; or(d)a substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.(Ed. Code, § 48900, subd. (r).) A “reasonable student” is a pupil, including an exceptional needs pupil, who exercises average care, skill, and judgement in conduct for a person of his or her age, and with his or her special needs. (Ed. Code, § 48900, subd. (r)(3).)

11. The bullying of a student with a disability that results in the student not receiving meaningful educational benefit may constitute a denial of a FAPE under the IDEA. (*Dear Colleague 2013*, at p. 2.)This applies whether or not the bullying is related to the student’s disability. (*Ibid.*)Therefore, a determination of whether bullying has denied a student a FAPE requires a two-step analysis:(i) whether the bullying occurred, and (ii) whether the bullying resulted in the student not receiving educational benefit within the meaning of *Rowley*.

Four Alleged Incidents Were Not Established by the Evidence

12. The weight of the evidence did not establish that four of the alleged incidents actually took place. In addition, the alleged conduct in each of those acts was typical of kindergarten students, who often exhibit a poor sense of personal space and body awareness. Even if the incidents had actually occurred, they would not have constituted bullying.

13. The evidence did not establish that the two alleged incidents on the bus, including kissing on August 17, 2016 and an attack on September 26, 2016, occurred, or that Student A was the aggressor. Parents questioned Student in a way that suggested the answers to Student, and as a result, Student’s responses to Parents were not reliable. According to Ms. Hughes, typical five-year-olds are poor reporters even without receptive and expressive language deficits, and Student was known to be a particularly unreliable reporter. Parents’ questions assumed that Student had been hurt by someone

else, and that Student A was the aggressor. At least once, Student gave the name of a child from his language/social skills group to Mr. Yoro instead of correctly naming a classmate when immediately reporting a classroom incident. Student did not name Student A when asked open-ended questions about the alleged incidents by Mr. Yoro. Although Student demonstrated that he could bring injuries to the attention of an adult, he did not identify Student A as the cause of any classroom, playground or bus injuries to Mr. Yoro or the classroom aides. Other than Parents' speculation, Student offered no other credible or corroborative evidence that Student A kissed or attacked Student at any time on the bus.

14. The evidence of marks and scratches on Student's hand after the alleged attack on September 26, 2016, were not indicative that any incident had occurred. In light of the testimony of Ms. Hughes and Mr. Yoro that young children are active and come into physical contact with playground equipment and other children during routine play, such minor blemishes are of the type that active four and five-year-old students can be expected to receive during a school day. Student's own actions could have caused the marks and scratches, without any other child touching him. The circular mark on Student's leg was not clearly a bite mark. Student did not prove that Student A had an opportunity to or did bite Student's leg on the bus. Student was belted into his seat, the bus driver found Student A seated while next to Student, and the driver did not see an altercation. This evidence weighs against a finding that Student A had an opportunity to, or did, bite Student's leg on the bus.

15. The weight of the evidence did not establish that Student A put his fingers in Student's mouth on August 29, 2016, or slapped Student's face on September 26, 2016. The only evidence of these incidents consisted of Parents' speculation based on Student's responses to leading questions, and unpersuasive photographic evidence. Mr. Yoro convincingly testified that he had conducted thorough investigations of both

alleged events by interviewing likely adult witnesses and asking Student open-ended questions. Mr. Yoro was experienced in questioning kindergarten students with language deficits. He successfully elicited language and information from Student, as demonstrated by Parents request that the private speech therapist contact Mr. Yoro for strategies. None of the adults supervising Student in the classroom or on the playground saw the alleged contacts, or evidence of the alleged contacts, and Student did not complain to or bring such incidents to the attention of Mr. Yoro or other adults. Accordingly, Student failed to meet his burden of proving that these alleged school-based incidents occurred.

16. The alleged incident of October 5, 2016, did not fall within the time period at issue, but illustrates the deficiencies in Student's proof throughout the hearing. Despite Student's acknowledged tendency to answer "yes" to any questions about past events, Father questioned Student the following morning on why Student had been crying about his tooth the day before, and speculated and interpreted Student pointing to his knee and nodding to Father's questions as proof that Student A had kneed Student in the mouth. Mr. Yoro informed Parents that Student had complained of a sore tooth upon arrival at school the prior morning and was upset about his homework. Student never named Student A (or anyone) as the cause of his sore tooth. Student and his classmates were supervised by three to five adults throughout the day, and all adults reported that Student had not complained of an injury that day and that no physical contact between Student and Student A had been observed. Such speculation by Parents, in face of contrary evidence and a reasonable and more likely explanation for Student's behavior, adversely affected their credibility as to this alleged incident and others.

17. Even had the alleged incidents on the bus been established, they would have failed to meet the federal bullying test of continuous or repeated conduct, or the

California requirement that bullying be severe or pervasive. Student and Student A were seated apart from each other after the first alleged incident, and except for one time Student A got out of his seat and sat next to Student, Student A could not and did not interact again with Student on the bus.⁸

18. These alleged incidents also lacked aggression and an imbalance of power, and were not reasonably predictive of fear of harm or detriment. The testimony of Ms. Hughes and Mr. Yoro established that interactions such as yelling and inappropriate touching are likely to result between preschoolers and kindergarteners, particularly those with autism, from a lack of understanding of personal space and appropriate rules of social behavior. There was no evidence that such conduct, had it occurred, was an attempt by Student A to exert real or perceived power over Student, or intended to cause Student to have a fear of harm or other detriment.

Two Incidents Established by the Evidence Did Not Constitute Bullying

19. As to the April 21, 2016 injury on the playground equipment and the September 26, 2016 fall from the chair, the evidence failed to show that either act fell within the federal definition of bullying. Neither the kick received on the preschool playground equipment nor the push from the chair involved continuous or repeated conduct over time. Each of these incidents were isolated acts that did not reoccur.

20. Neither the incident on the playground equipment, nor the one involving the pushed chair, was characterized by “aggression used within a relationship where the aggressors had more real or perceived power” than Student. Ms. Hughes testified persuasively that the kick received on the preschool playground equipment was an

⁸The evidence that Student was repeatedly kissed by Student A during the short time Mother asked the bus driver to sit the students together, consisting of Mother’s testimony and Father’s emails, was speculative and unpersuasive.

accident, and of a type not uncommon among active preschool students with autism and an undeveloped understanding of space, body awareness or appropriate behavior. Mr. Yoro testified convincingly that the push from the chair, and the subsequent hit by a soccer ball, were accidents and that Student was not injured or unduly upset by either contact.

21. However, even under the broader State definition, Student did not establish that anyone subjected him to bullying. The two established incidents, the April 21, 2016 injury on the playground equipment and the September 26, 2016 fall from the chair, did not constitute severe or pervasive conduct directed at Student. They were isolated and unforeseeable accidents.

22. The evidence did not establish that the two incidents were “reasonably predicted” to cause a reasonable student, including a special needs student, to experience fear of harm or other substantial detriment. Ms. Hughes and Mr. Yoro were eyewitnesses to the respective incidents, and testified persuasively that both were sudden unfortunate and random accidents without malicious intent. Not only were the incidents not reasonably predicted to cause fear of harm or detriment, they did not actually cause Student fear of harm or have a detrimental effect on Student’s physical or mental health. They did not interfere with Student’s academic performance or his ability to participate or benefit from services, activities, or privileges at school. Student recovered quickly from both contacts. By the persuasive accounts of Ms. Hughes, Mr. Yoro, Ms. Ugrin and Ms. D’Souza, Student continued to enjoy participating in activities at school, both in the classroom and on the playground, after both incidents. Mother’s testimony that Student had become school phobic due to fear of being harmed by Student A was unpersuasive and inconsistent with all other witnesses.

23. Parents were credible in expressing that they were worried about their son being injured while in school in light of Student’s limited ability to report events and

circumstances. Mother explained that she could protect Student from injury when he was with her, and that she worried about every bump and scratch he might receive when he was away from her. However, not all injuries result from bullying. Some peer-to-peer conflict and physical interaction is inevitable in the school environment, particularly in the early grades, while students are learning how to interact appropriately with their peers. (*Davis v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, 651 [119 S.Ct. 1661, 1675].)

24. No change to Student's educational program was necessary for Student to continue to receive meaningful educational benefit. Student made good progress academically and behaviorally while he was in Ms. Hughes's and Mr. Yoro's classrooms at the time the alleged bullying occurred. The District responded promptly and appropriately to accusations of bullying by having experienced administrators conduct interviews of the witnesses, counsel the participants, and contact the parents with the outcome. (See, e.g., *Johannesburg-Lewiston Area Sch. Dist.* (OCR, February 23, 2010) 110 LRP 67492; *Santa Monica-Malibu Unified School District* (OCR June 30, 2010) 55 IDELR 208, 110 LRP 58973.) District took over two weeks to provide Parents with the bus company's written report of the alleged incident on September 17, 2016, but the report did not contain any information that Parents had not already received from the bus driver and bus company representative. Student presented no persuasive evidence that these incidents or their outcomes impacted his participation in his educational program. At all times, Student continued to receive educational benefit as defined in *Rowley* from his educational program.

25. Student failed to meet his burden of establishing by a preponderance of the evidence that Student been the target of bullying from April 21, 2016 through October 3, 2016, or that Student had not received meaningful educational benefit as the result of any bullying. Accordingly, District did not deny Student a FAPE due to bullying.

ORDER

All of Student's requests for remedies are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on the sole issue heard in this case.

RIGHT TO APPEAL THIS DECISION

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

Dated: December 21, 2016

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings