

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

CHULA VISTA ELEMENTARY SCHOOL
DISTRICT.

OAH Case No. 2017030442

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on March 8, 2017, naming Chula Vista Elementary School District. On May 16, 2017, Student filed an amended complaint. On June 26, 2017, OAH continued the matter for good cause.

Administrative Law Judge June R. Lehrman heard this matter in Chula Vista, California, on October 31-November 3, 2017.

Paul Hefley and Corrin Johnson, Attorneys at Law, represented Student. Student's Mother and Father attended all hearing days.

Pamela Townsend and Amy Rogers, Attorneys at Law, represented District. District Director of Special Education Sharon Casey attended all hearing days.

At the parties' request, OAH continued the matter to November 20, 2017 for the parties to file written closing arguments. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

1. Did District's failure to assess Student in the area of behavior and/or failure to develop a behavior support plan to address Student's self-stimulatory behavior, deny her a free appropriate public education because the failures:
 - a. Impeded Student's right to a FAPE;
 - b. Caused Student a deprivation of educational benefits; and/or
 - c. Significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE?
 2. Did District deny Student a FAPE when it failed to timely assess her for a central auditory processing disorder after Parents requested the assessment?
 3. Did District deny Student a FAPE because:
 - a. Its October 17, 2016 occupational therapy assessment was not appropriately conducted?
-

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. ex rel. J.E.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) At the prehearing conference on October 23, 2017, and confirmed at the commencement of the hearing, Student withdrew without prejudice the following issues raised in her amended complaint: 1) Whether District denied Student a FAPE by predetermining its decision to exit her from special education eligibility at the November 8, 2016 individualized education program team meeting; 2) Whether District denied Parents meaningful participation at the November 8, 2016 IEP team meeting; and 3) Whether District failed to address bullying and teasing of Student such that it denied her a FAPE during the 2016-2017 school year. The parties confirmed the issues at the commencement of the hearing.

b. Its October 28, 2016 psychoeducational assessment was not properly conducted?

SUMMARY OF DECISION

Student prevails on Issues 1 and 3. Student exhibited apparently masturbatory behavior that may have been neurologically-based because of her Tourette syndrome, or may have had a self-stimulatory function that District did not understand. District failed to assess Student's behavior. It conducted occupational therapy and psychoeducational assessments that were flawed by that omission and, in the case of the psychoeducational assessment, by other analytical errors in the areas that were assessed. District assessors chose to ignore, and specifically decided not to address, this behavior. Parents were substantially deprived of the opportunity to participate in the decision-making process regarding the provision of a FAPE as a result of these flawed assessments. Had Student's behavior been properly assessed, the IEP team including Parents would have had information to address Student's behavior. Instead, the lack of assessment led to haphazard interventions without concomitant goals, cursory mention of the behavior in IEP team meetings, discounting of its seriousness, and the eventual proposal to exit Student from special education. The District's failure to properly assess Student in these areas was a procedural violation of the IDEA which denied Student a FAPE, impeded Parents' right to participate in the development of Student's IEP and deprived Student of educational benefit. District is ordered to fund an independent behavioral assessment and occupational therapy assessment. District shall conduct staff training to address the areas in which District committed procedural violations in this case.

Student does not prevail on Issue 2. Student failed to establish that District denied her a FAPE by failing to conduct a central auditory processing disorder assessment by an audiologist. The evidence established that there was no standard

central auditory processing disorder battery of assessments. District's speech language pathologist and school psychologist administered many appropriate assessment batteries that resulted in in-depth investigation of Student's auditory processing. These were sufficient to inform the IEP team as to this area of need. Student failed to meet her burden of proof on Issue 2.

FACTUAL FINDINGS

1. At the time of hearing, Student was nine years old and in the third grade, attending a District school. At all relevant she times resided within District.

2. At all pertinent times, Student was eligible for special education and related services in the categories of other health impairment and speech and language impairment. Student had medical diagnoses of Tourette syndrome, sensory integration disorder, attention deficit hyperactivity disorder, anxiety, asthma, sleep apnea, acid reflux, eczema, pica (involving the eating of paper or dirt), and allergies.

TOURETTE SYNDROME

3. Tourette's is a neurologically-based disorder that can present as repetitive movements that do not appear to have a cause. No District witness or staff had expertise in Tourette's. Some District staff members, including occupational therapist Leslie Cordrey, Special Education Coordinator Nathan Price, school psychologist Theresa Dargis, and school psychologist Kathryn Deane, had passing familiarity with Tourette's either from their schooling or from independent research.

4. Behaviors associated with Tourette's are highly variable and can present in many different ways, as uncontrollable motor or verbal movements. The tics associated with Tourette's are involuntary. Tourette's is not necessarily emotionally driven and thus is not necessarily addressed through counselling, although it can be co-morbid with low

self-esteem and anxiety, which therapy can address. Within the school setting, the syndrome can be a significant impediment in social settings and interactions.

5. Mother expressed her opinions as to which of Student's behaviors were tics, but she admitted that she was not an expert, and her opinions were not supported by expert medical testimony. One example of a behavior Mother interpreted as a tic was Student's licking each page of a book as she read it. In Mother's opinion, Student exhibited tics every hour of every day. The tics were movement-based motor tics and verbal vocal tics, and included, in Mother's opinion, the following behaviors: jumping up and down; touching her forehead; licking books; shrugging; pulling on her shirt and whispering the word "f--k" into her shirt; and speaking words that sounded like gibberish.

6. Parents ignored Student's tics at home, because they were under the impression the behaviors were neurological, involuntary, and unresponsive to directions. Parents gave Student breaks and other behavioral interventions for anxiety and attention deficit hyperactivity disorder, but not for tics. In Mother's opinion, one could distinguish tics from other behaviors because tics were repetitive, and Student reliably self-reported if a behavior was a tic or not.

2015-2016 SCHOOL YEAR, FIRST GRADE

7. During the 2015-16 school year while Student was in first grade, Student attended two different District schools, the first of which was Hilltop. Student exhibited certain behavior while at Hilltop that involved rocking back and forth in her desk chair.

8. Pursuant to a settlement agreement of a prior due process proceeding, Student moved to a different school, Rogers, on February 19, 2016. The rocking discontinued for the remainder of the 2015-16 school year.

9. Mr. Price recalled three trainings in the spring of 2016 with four to five staff members including speech pathologists, school nurses and other staff. At one of

those trainings, staff members discussed Student's tics at that time, which presented as spitting and vocalizations. Mr. Price understood that the trainings were required pursuant to the settlement of the prior due process proceeding between Parents and District. Another training topic was the neurological basis of tics. A sign-in sheet for an April 29, 2016, training session stated that the training concerned "Anxiety and Tic Training (Tourette's and ADHD)." Mr. Price, school psychologist Kathryn Deane, and school nurse Maira Sosa attended, among other staff.

10. The principal at Rogers was Erika Taylor. Rogers' staff met at least twice weekly, every Tuesday and Thursday, and sometimes more often, as often as daily. There was no agenda for these meetings. The meetings included all service providers. The meetings involved students who had student study team, and students with Section 504² accommodations, as well as students with individualized education programs. The purpose was to ensure that staff acted in a coordinated fashion as a system, to discuss what they were doing that week for all students. Attendees included school psychologists, teachers, nurses, occupational therapists, speech pathologists, and the principal, vice principal, and other administrators. The attendees bounced ideas back and forth, collaborated and coordinated so the team could all get each other's feedback. The meetings were to discuss interventions, what was working and not working, and develop a game plan so the District team members were all "on the same page."

² A Section 504 plan is an accommodation plan created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a school district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity, including learning.

May 2016 Annual IEP

11. Student's annual IEP was held on May 6 and 25, 2016, at the end of first grade. The behavior Student had exhibited in the past while at Hilltop that involved rocking back and forth in her desk chair was not occurring at Rogers. It was not at issue in the annual IEP.

12. Student was noted to have a history of other behavior concerns including anxiety and emotional regulation since pre-school. At the time of the IEP, observations and interviews did not indicate significant concerns with anxiety or associated behaviors, but Student was noted to benefit from multi-sensory activities throughout the school day.

13. The May 6 and 25, 2016 annual IEP document contained six goals, in the areas of writing, math, articulation, social communication, attention, and self-regulation.

14. Goal 1 was a writing goal. Student's present level stated that she was able to write four simple sentences, has used a graphic organizer, and could use appropriate spacing, capital letters, ending punctuation and the like, with 50 percent accuracy. Goal 1 stated that, by the annual review date of May 2017, after a teacher-led grade-level writing assignment, Student should be able to produce a graphic organizer and create a single paragraph of five sentences, including a topic sentence, three detailed sentences related to the topic, and a conclusion sentence, using graphic organizers and sentence starters, including appropriate spacing, baseline orientation and ending punctuation, with 90 percent accuracy in three consecutive trials. Goal 1 was to be worked on by teaching staff and the occupational therapist.

15. Goal 2 was a math goal. Student's present level in math stated that she could count from 1 to 100 but struggled with recognizing two-digit numbers, could add and subtract up to 20, could add and subtract by 10's, and could compare numbers using math language "greater than, less than." Goal 2 stated that, by the May 2017

annual review date, Student would be able to read and write numbers from 50-120 and model the numbers using visual supports. Goal 2 was to be worked on by teaching staff.

16. Goal 3 in articulation involved producing the "th" phoneme. It was to be worked on by teaching staff and the speech pathologist.

17. Goal 4 was in social communication. Student's present level stated that in group settings, Student demonstrated difficulty understanding when to talk and when to listen during small group activities. Goal 4 stated that by the May 2017 annual review date, Student would develop social understanding skills like sharing, allowing others to share their ideas, taking turns and managing conflict, while working cooperatively with peers in small group settings with verbal and visual prompts. It was to be worked on by teaching staff, the speech pathologist and the school psychologist.

18. Goal 5 was in the area of attention. Student's present level indicated that she requires an average of three-to-four prompts to keep attention during whole group activities in class. Goal 5 stated that by the May 2017 annual review date, Student would be able during group instruction or independent study, to demonstrate attentive behaviors such as following directions, looking toward the speaker, participate in choral responses, and complete tasks, in 30-minute increments with no more than two verbal or visual prompts. It was to be worked on by teaching staff and the school psychologist.

19. Goal 6 was a self-regulation goal. Student's present level stated that she is reminded, prompted and shown visuals to use her coping/calming strategies as needed, and required one-to-five verbal or visual prompts to help encourage her to use her coping strategies. Goal 6 stated that by the May 2017 annual review date, Student should be able to recognize certain emotions and feelings like anxiety or frustration, and practice coping and calming strategies such as deep breathing, during such situations in four out of five trials with one visual prompt per situation. It was to be worked on by the occupational therapist, school psychologist, and teaching staff.

20. The annual IEP acknowledged continued eligibility under the categories of other health impairment and speech and language impairment. District offered placement and services in general education with a full-time "Special Circumstances Instructional Assistant" aide (referred to as a SCIA), for support during transitions, recess, lunch, small group instruction, and to facilitate social skills and coping. District offered 30 minutes a month of occupational therapy in the classroom, 45 minutes a week of group language and speech services, and counselling. Student was also offered accommodations and supports in the general education classroom, consisting of verbal and visual reminders to use anxiety-reducing tools including chewy or squishy items and stress balls; preferred seating near the teacher or to accommodate personal space; a daily visual schedule to include breaks for sensory strategies; access to sensory strategies and fidget toys all day; and consultation by an occupational therapist to the teacher regarding sensory strategies.

21. Parents did not consent to the May 6 and 25, 2016 IEP at that time.

2016-2017 SCHOOL YEAR, SECOND GRADE

22. Student's second grade year commenced prior to the month of August 2016.

August 15, 2016 Continuation of Annual IEP

23. On August 15, 2016, shortly after the school year started, the IEP team reconvened. The purpose of the meeting was to continue Student's annual IEP. The behavior Student had exhibited while at Hilltop that involved rocking back and forth in her desk chair was still not occurring and was still not at issue in the annual IEP.

24. At the August 15, 2016, IEP meeting, Parents requested a special circumstances instructional assistant assessment. Parents also requested a central auditory processing disorder assessment to be completed by an audiologist. Mother

was concerned that Student could not understand multi-step directions when there was background noise. She had done some independent research and suspected that Student had central auditory processing disorder.

25. District proposed that Student's upcoming triennial assessments be conducted early, with a school psychologist determining if auditory processing was a present deficit. Parents agreed, and at that time they withdrew their request for a central auditory processing disorder assessment by an audiologist, pending District's assessments.

26. At the conclusion of the August 15, 2016 IEP team meeting, Parents consented to the annual IEP. At the time of the hearing, the May 6 and 25, 2016 annual IEP remained Student's last agreed upon and implemented IEP.

27. Ms. Fabiana Press was Student's second grade general education teacher. Pursuant to the accommodations in Student's IEP to address Student's sensory needs if she could not focus, Ms. Press sometimes redirected Student, gave her movement breaks, allowed her to take a walk, and offered her fidget toys.

28. Speech pathologist Amanda Lopez conducted group speech therapy services for Student pursuant to the IEP, working on the articulation goal and on social language, such as taking turns, not interrupting, raising her hand, and allowing others to share their feelings.

29. Occupational therapist Lesley Cordrey provided occupational therapy services pursuant to Student's Goal 6, the goal in self-regulation. Ms. Cordrey also consulted with Ms. Press in accordance with the modifications and accommodations in the IEP.

30. On August 29, 2016, District drafted an assessment plan for assessments in the areas of academics, health, intellectual development, language and speech communication development, motor development, social emotional functioning,

adaptive behavior, and need for a special circumstances instructional assistant. On September 5, 2016, Parents consented to the assessment plan.

31. Although Parents had withdrawn their request for a central auditory processing disorder assessment by an audiologist at the August 15, 2016 IEP team meeting, on September 5, 2016, Parents signed the assessment plan and handwrote a request for assessment for central auditory processing disorder by an audiologist.

32. On September 7, 2016, District sent prior written notice declining to conduct a central auditory processing disorder assessment by an audiologist, pending the triennial assessments that were about to begin. District sent the prior written notice by return receipt mail, however the receipt contained no signature and Mother denied receiving the letter.

September 2016 Behavioral Events

33. On September 6, 2016, Student began exhibiting notable behavior in the classroom that is at the center of this case. Student exhibited the behavior in the classroom at least twice on that day. The behavior appeared to teacher Ms. Press to be masturbation. Student sat on the edge of her seat and rocked back and forth as if to stimulate her private areas. Student's legs were spread wide apart, and she rocked in her chair, appearing to be rubbing herself on her seat. Ms. Press made eye contact with Student and felt that Student knew the behavior was not appropriate, because Student looked away awkwardly and stopped, but then resumed. Ms. Press told Student that the behavior was "not okay at school."

34. To Ms. Press, this behavior was notably more concerning than behaviors she had seen before. Somewhat inconsistently with her description of how concerning the behavior appeared to her, she testified that it did not disturb other students or interfere with their learning, and that they were not even aware of it. Ms. Press explained that her second grade class has all sorts of behaviors and movements, including

banging, throwing objects, rocking, running, etc., and that she regularly redirected her students.

35. By email dated September 6, 2016, Parents complained to Principal Taylor and other school staff about the way Ms. Press handled the situation. Parents informed Principal Taylor that Student felt she had been shamed in front of the class. Parents referred to the behavior as “rocking when sitting” and as “stimming.” Parents informed the principal that “stimming can occur when Student was over-stimulated, can make others feel uncomfortable and others may interpret or have a different perspective” on what was occurring. Parents referenced the rocking behavior that had occurred during first grade at Hilltop but had not occurred since Student moved to Rogers. Parents asked questions concerning the use of sensory strategies and the sensory room.

36. Principal Taylor met with school psychologist Ms. Deane when she received Parents’ September 6, 2016 email. After this email, she and school staff generated an informal plan to redirect Student when she engaged in the behavior in such a way that she would not feel ashamed and could focus on her academics. The plan was discussed between Ms. Deane, Student’s special circumstances instructional assistant, Ms. Press, and others.

37. On September 8, 2016, Principal Taylor wrote Parents a responsive email. She stated that the staff, pursuant to her guidance, were going to give Student more breaks, and intervene more. Principal Taylor wrote, “I will personally communicate with our staff regarding how to carefully intervene and re-direct Student. In regards to the sensory room, Student has access to use sensory strategies and can access the sensory room when she needs a break and/or when she earns a reward; she is able to choose additional time in the sensory room past what she requires for sensory input. Student also has access to other sensory strategies/breaks that she currently utilizes. A particular sensory break that has been effective is going for a walk at various times of the day.

Upon observation of stimming behaviors, we have increased breaks in her day for sensory input, in efforts to be proactive and preventative in our approach to providing Student what she needs. I will personally work with the team and staff members to guide them in how to provide Student with careful redirection.”

38. When Principal Taylor wrote this to Parents, she had already discussed the situation with school psychologist Ms. Deane. Principal Taylor did not at this time recommend holding an IEP team meeting, since this was the first time Parents had brought this concern to her attention.

39. On or around September 13, 2016, Ms. Press and Student’s aide alerted Nurse Sosa to more incidents of the rocking behavior. Nurse Sosa came to class to observe. Ms. Press’ specific concerns expressed to Nurse Sosa were that Student was displaying movements that made others in the classroom feel uncomfortable. Ms. Press also expressed to Nurse Sosa that she did not know why the behavior was happening.

40. Nurse Sosa observed Student for approximately 30 minutes. Student was in a chair, seated, and moved forward toward the edge of the chair and rocked backward and forward, then she adjusted herself further forward on the edge of the chair and continued rocking. Nurse Sosa reported to Principal Taylor that the rocking was very intense and vigorous, and that Student did not stop even when redirected.

41. Nurse Sosa called Mother immediately afterward to share the information with Mother so that Mother could share it with Student’s doctors. In addition to rocking when seated on her chair, Nurse Sosa saw facial tics around Student’s face and neck. Nurse Sosa described to Mother additional behaviors of moaning, sticking out her tongue, and making facial expressions. Mother explained to Nurse Sosa that the facial movements were a tic. But Student’s moaning and sticking out her tongue were new behaviors. In Nurse Sosa’s opinion, what she saw in class were involuntary movements. In her opinion, Student was attempting to, but was unable to, control the behavior.

42. On September 16, 2016, Father wrote an email in response to Nurse Sosa's phone call. As in Parent's prior September 6, 2016 email, Father's September 16, 2016 email referred to the behavior reported by Nurse Sosa as "stimming." Mother offered to provide the school with Student's ball chair to "help in class with redirecting [the] stimming."

43. On September 16, 2016, Principal Taylor responded to Father's email, saying District was continuing to increase Student's breaks as needed and would continue to offer her snack and drinks. Ms. Taylor referred to "open communication so we are ensuring Student's needs are met." Ms. Taylor also stated Parents were welcome to bring Student's personal chair to the school.

44. On September 16, 2016, speech pathologist Amanda Lopez observed Student as part of her speech and language assessment. She observed Student rocking on the chair, and observed Ms. Press and the aide attempt to redirect the behavior through interventions, including speaking to Student and providing a squishy toy.

45. To Ms. Lopez's understanding, Student exhibited the rocking behavior when seated in her chair frequently throughout the school day. She believed Ms. Deane and Student's aide were taking data concerning the behavior. Student's aide told Ms. Lopez that she was documenting the behavior. Ms. Lopez thought Ms. Deane and Ms. Press were trying to determine the purpose and the function of the behavior, because the interventions to be used would depend on the function of the behavior.

September and October 2016

46. After September 6, 2016, over the course of a few months until November or December, Ms. Press observed many incidents of this same behavior from Student, about 50 or so incidents. Student wrapped her legs around a chair and rocked her bottom back and forth on her chair. Ms. Press had raised her concern about the behavior with various school staff including Principal Taylor, school psychologist Ms.

Deane, Nurse Sosa, and the occupational therapist Ms. Cordrey. Ms. Press did not mention the behavior directly to Parents because school psychologist Ms. Deane was involved.

47. In October, while the triennial assessments were underway, the subject of Student's behavior was discussed by various staff at various times. At the regular Tuesday and Thursday meetings, when conducting assessments, staff collaborated on assessments, shared information and looked at the child in a collective light. According to Ms. Cordrey "the stimming was different from what we had seen." At first, Ms. Press and Ms. Lopez told Ms. Cordrey that the behavior was capable of being redirected via cues and verbal redirection, but this changed over time and the behavior became less amenable to redirection. Then, staff expanded on the methods they tried. Nothing totally prevented Student's behavior, so Ms. Cordrey and others on the team at that time were looking at what the cause was, be it social, behavioral, or sensory. According to Ms. Cordrey, everyone was working together, trying to see whether the behavior was sensory-seeking or not. Ms. Cordrey's personal impression was that Student's behavior was not a tic, and that Student was able to stop. To Ms. Cordrey, it appeared that the behavior was voluntary, and that it was a behavior that was pleasurable to Student.

48. Ms. Cordrey consulted in the classroom extensively, trying different strategies for Ms. Press to use to intervene. During the time the assessments were being conducted, Ms. Cordrey was experimenting with whether Student needed more movement to address her sensory needs. She gave Student a band to put around the legs of a chair to push her feet against. She implemented various other sensory strategies. Her main concern with Student was body awareness. Strategies included visual cues, a Thera band, fidget toys, movement breaks, walks, preferential seating, different types of chairs and cushions, and "zones of regulation." "Zones of regulation" was a program that showed colors for emotions, such as the blue zone was sad or low.

The program suggested strategies to address the feelings. A visual chart identified the different zones. Speech pathologist Ms. Lopez and school psychologist Theresa Dargis ran a "social thinking" group that used the zones of regulation program. Student was part of the group pursuant to her IEP.

49. In response to Parent's characterization of the behavior as "rocking" or "stimming," Ms. Press and other staff took on that vocabulary as well.

50. Through the September to October time period, during the assessments and leading up to the triennial IEP, Ms. Cordrey experimented with new sensory strategies, such as implementing a movement break every hour. She modified her strategies during this time frame. Ms. Cordrey was in the classroom frequently, at least weekly, to address Student's behavior. The team was trying to determine the function of the behavior in order to address it. The way they tried to determine the cause or function of the behavior was by trial and error interventions, to see what worked. They were trying to determine functionally equivalent replacement behavior. The team was all working very hard to help Student be successful and there were multiple conversations regarding the behavior. The team was working to find the cause so that once they determined the cause, they could determine the solution. Everyone was working together, trying to see whether Student's movements were sensory-seeking or not. Prior to her assessment, Ms. Cordrey knew that stimming was "such a big concern to the entire team." And, it had become the "main concern."

51. Per Ms. Press, staff were "always conferring" with each other. Staff developed different and various strategies to try out, such as a bean bag chair, ball chair, and sensory breaks. After commencing in September, Student's behavior changed. Over time it appeared to Ms. Press to become more obviously actual masturbation, in which Student climaxed after rubbing her bottom on her chair with her legs open. Her face reddened and she appeared to Ms. Press to "finish." When Ms. Press made eye contact,

Student looked away until she was done. If Ms. Press asked Student to move her location, Student did so but then resumed the behavior.

52. Ms. Press's strategies changed as she collaborated with the school psychologist and the occupational therapist, and also in consultation with the speech language pathologist. Ms. Press and staff tried different strategies including rewards for good behaviors, stickers with stars, walks, breaks, putty, sensory tools, and other approaches.

53. In Ms. Press' view as Student's teacher, Student was very articulate and capable of describing her own internal state. Student gave a talk to the entire class about Tourette's and its effects. She was able to tell Ms. Press, if asked, whether her tics were voluntary or involuntary; however Ms. Press never asked Student that question about the rocking behavior. Ms. Press did, however, "wonder" whether this behavior could be associated with Student's Tourette's, but in her view it was unacceptable behavior, whether it was Tourette's-related or not. Ms. Press had, in her teaching experience, a boy who masturbated in class and that was "not ok." Ms. Press informally attempted to understand if stressful situations were triggering Student's behavior; however there did not appear to be a stress antecedent. Student exhibited the behavior when she was relaxed in front of a computer, as well as across settings during writing and math. Ms. Press did not recommend that Student be further assessed regarding this behavior, because the school psychologist Ms. Deane was involved, Ms. Press believed it was Ms. Deane's job to determine if any type of assessment was required.

54. Ms. Deane worked with District's autism support team, to collaborate and consult on different strategies to help Student, although autism was a condition that Student did not exhibit. The autism support team was a behavioral team including a school psychologist and other members with expertise in autism. The autism support team recommended that alternate seating arrangements be tried, such as a rolling chair.

55. Staff told Special Education Coordinator Nathan Price about the behavior. He learned that Student was rubbing her private parts in school repeatedly. At times she was asked to stop and refused. The behavior recurred in class and in speech therapy sessions. Mr. Price discussed with the staff ways to address the concerns. The team was assessing Student for the triennial reevaluation. Mr. Price understood the occupational therapist was looking at Student's sensory needs. The team hypothesis at the time was that the behavior was self-stimulatory in nature. Other interventions that were under discussion were use of a social story and using a special chair. Social stories are scripts used to teach student about the reactions of others, when students have deficits in understanding how they are being perceived.

56. Ms. Lopez observed more rocking behavior on October 25, 2016, when Student was in a group speech therapy session. During the October 25 session, Student engaged in the rocking behavior on and off for five minutes. Ms. Lopez intervened by asking Student to stand up and write a sentence on the board. Ms. Lopez considered the interventions she used to constitute a "movement break." Ms. Lopez did not feel the behavior was impacting Student's ability to engage and learn. Ms. Lopez could still provide speech therapy services to the group. Various interventions Ms. Lopez tried were to get Student up and moving, to have the entire group sit on the floor, and to give Student fidget toys or squishy balls. The fidget toys and squishy balls were the least effective. Standing up, and sitting down on the floor, were the most effective. Ms. Lopez's interventions in Student's behavior were efforts to see what interventions would work.

57. Ms. Lopez, Mr. Price, Ms. Deane, and other District witnesses believed proper intervention depended on the function of the behavior. However, no District staff recommended that a functional behavioral analysis be conducted. A functional behavior assessment investigates the function of a behavior, and collects data regarding the

antecedents preceding it, the behavior itself, and the consequences after it (known as the "ABC's"). The purpose of a functional behavior assessment is to see what a student is trying to accomplish by engaging in the behavior, and, for example, whether the behavior seeks sensory input that can be accomplished a different way. A functional behavior assessment involves observations and data collection to determine the ABC's. The time frame for a functional behavior assessment varies. It can take however long is required to observe the behavior and determine its function. A functional behavior assessment proposes both proactive (preventative) strategies to prevent the behavior from occurring, and reactive strategies to address it when it does occur. A functional behavior assessment is used to address behaviors that significantly impact a student's academic performance or significantly impact other people, where prior interventions have not worked. A functional behavior assessment is not usually the first resort used by District staff to address problem behaviors. According to Mr. Price, there was no reason to conduct a functional behavior assessment unless a student's behaviors were violent, if a student was making progress regardless, or if lesser interventions are working. This behavior was new in the September-October time frame, and when a new behavior emerges the team will try to address it and, if the interventions they try are not working, then proceed to do a functional behavior assessment.

58. Ms. Press and Ms. Cordrey did not themselves take data concerning the behavior. They were under the impression that others did. Ms. Press was told that Student's aide, would be taking data according to instructions from school psychologist Ms. Deane. Ms. Press saw the aide entering data on a tally sheet as to how often she observed Student exhibiting the behavior. Ms. Cordrey, on the other hand, believed that data were taken by Ms. Deane and Ms. Press regarding the behavior. If, in fact, any data were recorded regarding this particular behavior, they were not shared at any IEP team meeting nor presented at hearing.

59. No District staff called for an IEP team meeting to be held to discuss Student's rocking. The team including, Principal Taylor, were working to address it. They discussed amongst themselves what was working and not working.

October 2016 Triennial Assessments

OCCUPATIONAL THERAPY ASSESSMENT

60. Ms. Cordrey did not address or specifically mention the rocking behavior in her triennial occupational therapy assessment. In her testimony at hearing, she presented various explanations for this omission. One, disputed by Ms. Deane, was that the team, and in particular Ms. Deane, specifically directed Ms. Cordrey not to include this behavior in her assessment. Ms. Cordrey also testified that she "did not find it relevant" to her assessment at that time, and that she did not note this behavior in her occupational therapy assessment report, because "we were still establishing what the cause was."

61. Moreover, there was not a test or assessment Ms. Cordrey knew of to determine the cause or function of Student's rocking. According to Ms. Cordrey, there was no way for her to assess what was causing the behavior. Thus, Ms. Cordrey did not recommend any such assessments, because she did not know of any. She did not reach out to experts on Tourette's, such as the Tourette Association, because District was considering it a sensory processing and a self-stimulation issue.

62. Ms. Cordrey's assessment report stated that the presenting concerns in the classroom "involve [Student's] sensory processing in relation to academics and on-task behavior in the classroom." The assessment tools she utilized were a records review; teacher interview/questionnaire; observations of Student; the Sensory Processing Measure-- Main Classroom; the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition, and the Developmental Test of Visual Perception, Third Edition. These were the assessment tools she had available to her. This was the

normal District battery of occupational therapy instruments which was readily available, and with which the District staff was familiar.

63. Through observations of Student's performance, Ms. Cordrey concluded that Student's gross motor skills were functional within her educational environment. Student was able to navigate the playground and school campus independently. She demonstrated good balance. She was able to complete jumping jacks and cross crawls, demonstrating a natural ability to cross midline and had good bilateral coordination. Student's fine motor skills were functional for participation and learning. She could open and close and appropriately use markers and glue sticks. She could properly use scissors to cut straight lines and simple shapes. She could use a desktop computer and iPad with age-appropriate skill. Her visual motor skills were functional for participation and learning. Student could copy all upper and lowercase letters with good legibility, good baseline orientation, and good letter formation. She demonstrated some difficulty with letter formation with lowercase "q" and lowercase "c," however both letters were legible. Overall, her written expression was age-appropriate.

64. The Sensory Processing Measure consisted of rating scale questionnaires. This tool was always used within District occupational therapy assessments. Ms. Cordrey did not exercise judgment regarding which assessment tools were appropriate or not. Ms. Cordrey had Ms. Press fill out the teacher questionnaire. There was a home form for parents, but she did not use it "because at Chula Vista we never did." Ms. Cordrey did not interview Parents.

65. The Sensory Processing Measure was an integrated system of rating scales that covered a wide range of behaviors and characteristics related to sensory processing, social participation, and praxis in elementary school-aged children. Student displayed "definite dysfunction" in the area of "hearing" on the assessment. Ms. Press reported the following behaviors as occurring frequently: showing signs of distress at

loud sounds; speaking too loud; and yelling, screaming, or making unusual sounds to herself. Student exhibited some problems in the area of "touch." Ms. Press reported the following behaviors as occurring frequently: showing signs of distress when hands or face are dirty, and occasionally seeking hot or cold temperatures by touching windows or other surfaces. Student demonstrated definite dysfunction in body awareness, by chewing clothing, pencils, or crayons; almost always hopping or running instead of walking; and almost always stomping or slapping feet on the ground when walking. Student showed some problems in the area of balance and motion, by "occasionally rocking in her chair; frequently wrapping her legs around the legs of her chair; and always slumping, leaning on her desk, or holding up her head while seated at her desk." Student demonstrated some problems in the area of planning by not performing consistently in daily tasks, showing poor organization of materials on or around desk, and frequently having difficulty completing tasks. Student demonstrated some problems with her overall sensory system.

66. The Bruininks-Oseretsky Test of Motor Proficiency, Second Edition, assessed proficiency in fine motor precision, fine motor integration, and manual dexterity. In fine motor precision, Student scored below average and demonstrated the most difficulty with folding paper. In fine motor integration she scored average. On the manual dexterity subtest, Student scored well above average.

67. The Developmental Test of Visual Perception, Third Edition, assessed Student's general visual perceptual skills, determined by an overall score from each of five subtests. Visual perception refers to how the brain interprets and organizes visual information, which is then integrated with motor skills (visual-motor integration). These visual perceptual skills are important for daily school activities including writing, drawing, cutting with scissors, managing clothing fasteners, and participating in puzzles and games. Student did not demonstrate difficulties with her visual perceptual skills. She

scored average or superior in all areas except below average in eye-hand coordination and visual motor integration. During these subtests, she required verbal reminders to take her time, demonstrated difficulty keeping her pencil within small lines when drawing through curved mazes, and had slight deviations from the target lines which lowered her score. However, this did not appear to affect her academically as she produced legible handwriting. She was able to appropriately copy simple to complex shapes, scoring within the average range for the copying subtest. Slight difficulties with her visual motor skills did not appear to affect her academically.

68. Ms. Cordrey concluded that Student benefitted from having access to fidgets at her desk to help with focus and self-regulation during table-top activities. At times, Student appeared to seek proprioceptive input throughout her day, provided during physical education and recess where she was able to jump, run, and climb in the playground area. Student also benefitted from a Thera band wrapped around the legs of her chair. The Thera band allowed Student to swing her legs and receive additional proprioceptive input by kicking the band. Student benefitted from visual supports such as a visual schedule and a visual aid to identify emotions, to assist with transitions, and self-regulation throughout the day.

69. Ms. Cordrey did not conclude with any more specific recommendations for special education eligibility or related services, simply recommending that the IEP team consider the implications, if any, of her report. Ms. Cordrey did not recommend that any further assessments be done. Student's visual perceptual and fine motor skills were functional. For Student's sensory needs, Ms. Cordrey felt she had a good idea of what to do for Student, and she could not think of any other assessments to do.

LANGUAGE AND SPEECH ASSESSMENT

70. Ms. Lopez performed the triennial language and speech assessment. The concerns Ms. Lopez was assessing were in the areas of social language, taking the

perspective of others, how to initiate conversations, and friendship skills. She conducted classroom observations beginning on September 16, 2016. Her final report was dated October 28, 2016.

71. When Ms. Lopez observed Student in class on September 16, 2016, she saw her exhibiting the rocking behavior, back and forth in her seat. She and Ms. Deane discussed what terminology to use to describe this behavior and agreed to call it "stimming." Ms. Lopez recalled that the situation was "touchy," and she was uncomfortable to describe the behavior graphically. Use of the term "stimming" helped Ms. Lopez to understand that Student was doing the behavior because it felt good to her. Ms. Lopez testified that she was not certain if the behavior appeared to be sexually stimulatory.

72. The assessment report therefore stated "Note: discussion of self-stimulatory behaviors observed will be referred to as 'stimming.'" The report did not describe what Student actually did, except to say that Student was observed to kick her feet against her chair and "then engaged in stimming behavior for approximately 7 seconds before the classroom teacher came over to her desk . . . Student then looked towards the aide and began stimming for approximately 5 seconds until the aide looked at Student, at which point she stopped. Overall, Student was observed to follow directions and work independently. Though she engaged in stimming behaviors, she was able to be redirected through standing up, using sensory fidgets (squishy soccer ball) and the presence of the classroom teacher and aide."

73. In addition to observing Student, Ms. Lopez reviewed parent/teacher rating scales; performed an oral-motor mechanism examination; took speech samples; and administered the following standardized testing instruments: Goldman-Fristoe Test of Articulation, Third Edition; Clinical Evaluation of Language Fundamentals, Fifth

Edition; Test of Narrative Language; Social Language Development Test Elementary; and Pragmatic Language Skills Inventory.

74. Clinical Evaluation of Language Fundamentals was a standardized measure designed to identify individuals who lacked the basic foundations of content and form that characterize mature language use. Student performed within the average range in all areas, with the exception of following directions. She demonstrated the most strength in her ability to comprehend spoken sentences of increasing length and complexity, as well as identifying the relationship between similar words. Student demonstrated a relative weakness in her ability to interpret directions of increasing length and complexity. The ability to remember spoken directions supports a student's ability to internalize scripts and rules for behavior. This can impact a student's ability to complete assignments or tasks at school or home. However, based on teacher report, in the classroom setting Student demonstrated the ability to follow multi-step directions. Ms. Lopez's report, based on Ms. Press' impressions, stated that "at times, depending on her mood, [Student] will choose not to follow directions. Given prompting and redirection, she is able to." Overall, Student demonstrated appropriate receptive and expressive language skills for her age.

75. Although Student's results on the Clinical Evaluation of Language Fundamentals indicated below-average scores for following directions, Ms. Lopez observed Student at recess, when there was background noise, following teachers' directions to line up, put toys away, and following two-step directions to do these things in turn, such as "put lunch away then go line up." Student also gave and followed the directions of other students as part of games. Ms. Lopez also observed Student in a classroom setting. Despite the scores on the subtests that indicated struggles with following multi-step directions, Ms. Lopez did not recommend any further testing because of her observations of Student at recess and in class. Ms. Press confirmed to

Ms. Lopez that Student sometimes struggled with following directions. However Ms. Press' opinion was that Student might be choosing not to follow directions. Ms. Lopez believed that struggling with following directions could be impacted by Student's attention deficit hyperactivity disorder and was not necessarily indicative of central auditory processing disorder.

76. During speech therapy sessions with Student, Ms. Lopez had worked with Student on articulation and auditory discrimination, specifically whether Student could hear the difference between the "ph" and "th" sound, where her articulation error was. Student could hear the difference. Ms. Lopez opined that a student with central auditory processing disorder would have difficulty with that discrimination.

77. The Goldman-Fristoe Test of Articulation, Third Edition, was an individually administered standardized assessment used to measure speech sound abilities in the area of articulation in children. It was comprised of two tests: Sounds-in-Words and Sounds-in-Sentences. Student performed equal to or better than 27 percent of peers on Sounds in Words. Student performed better than or equal to 25 percent of age and gender-matched peers on Sounds-in-Sentences.

78. Student performed well on the standardized assessment Test of Narrative Language Development. Narrative language abilities are correlated with positive conversational skills. Her strong performance indicated that her narrative language abilities were average in comparison to her same-aged peers. She demonstrated use of age-appropriate descriptive vocabulary, including adjectives to describe multiple objects and characters in stories. Student did demonstrate some grammatical errors, but overall, Student demonstrated age-appropriate narrative language skills.

79. The Social Language Development Test Elementary examined language-based skills of social interpretation and interaction with friends, by assessing responses to portrayed, peer-to-peer situations. The test assessed the language required to

appropriately infer and express what another person is thinking or feeling within a social context, to make multiple interpretations, take mutual perspectives, and negotiate with and support peers. Student performed within the average range across all four areas of social thinking measured on this assessment. Overall, Student's social thinking skills appeared average for her age.

80. The Pragmatic Language Skills Inventory was a standardized teacher-rating instrument that examined an individual's pragmatic language skills in classroom interaction, social interaction, and personal interaction in comparison to average same-aged students. Based on the Pragmatic Language Skills Inventory and classroom observation, Student was able to help her listener understand, introduce a topic and keep it going, get the meaning from her teacher's lectures, ask for help when needed, recognize when a teacher was cueing a routine, predict consequences for behavior, express a range of feelings, compliment and praise herself and others, and verbally express affection. She demonstrated a relative weakness in taking responsibility when her directions were not understood, and following and deviating from routines appropriately. Overall, compared to same-aged peers, Student demonstrated age-appropriate social skills.

81. In summary, Ms. Lopez concluded that Student presented with average receptive and expressive language skills in the areas of morphology, syntax, semantics, and pragmatics for her age. Student's narrative language abilities were appropriate for her age. Student was able to recall and retell a story that had been read aloud, and answer comprehension questions. Student's performance improved when given picture cues. Her language structure contained some grammatical errors, including difficulty with past tense verbs. Student included important story elements when producing a structured oral narrative, including characters, setting, and a sequence of events. Student was able to convey her wants and needs to others, inquire, and share her

opinion on a variety of topics. Student demonstrated knowledge of how to support a peer, problem solve through social situations, and infer what someone may be thinking.

82. The assessment results indicate that Student did not meet the eligibility criteria for speech or language impairment. She had, as of the time of the assessment in October, met her annual goals from her May 2016 IEP.

83. Ms. Lopez's demeanor on the witness stand was forthcoming, non-defensive, and quietly self-contained. She answered all questions put to her. Her testimony was given great weight overall. However, her uncertainty when asked whether the behavior in question appeared sexually stimulatory conflicted with her other testimony as to her conversation with Ms. Deane in which they agreed to use a neutral terminology ("stimming") so as to downplay the "touchiness" of the subject, and so as to avoid the necessity of being graphic in her description of it.

84. Ms. Lopez was not an audiologist and did not perform a central auditory processing disorder assessment. She was aware that Parents had requested one at an IEP meeting that she attended. Ms. Lopez opined that there was conflicting information in the educator community concerning what a central auditory processing disorder battery should contain. In her realm of speech language pathology, the relevant test was the Clinical Evaluation of Language Fundamentals, and she believed that the batteries she administered from that instrument fell within a central auditory processing disorder battery. However, a central auditory processing disorder assessment would look more specifically at the brain's ability to decipher noises and sounds, take the signals and interpret them. While Ms. Lopez learned about central auditory processing disorder assessments in her training, she did not perform them as they are specific to an audiologist. Ms. Deane confirmed that a central auditory processing disorder assessment is only performed by an audiologist. She also confirmed that according to the American Speech-Language Hearing Association, the speech language professional

organization, there is not a typical battery of tests that an audiologist would perform. Per Ms. Deane, an audiologist would look at background noise, foreground noise, competing noises, and speech versus other noises, to assess how an individual processes speech and other sounds, and how the brain interprets different types of noises and sounds.

85. After her report was issued, on October 25, 2016, Ms. Lopez witnessed more of Student's rocking behavior. She did not amend her report to add this information. She did not feel it was relevant to Student's speech and language development. She did, however, share the information with Ms. Deane.

SPECIAL CIRCUMSTANCES INSTRUCTIONAL ASSISTANT ASSESSMENT

86. School psychologist Theresa Dargis conducted a "Special Circumstances Instructional Assistant" assessment as part of the triennial assessment. The assessment was a behavioral assessment, to determine whether Student required aide assistance. Special Circumstances Instructional Assistant assessments looked at areas of independence, with a goal to instill more independence, and to evaluate what supports were needed throughout the school day. Aides could be provided for students with medical needs, behavioral concerns or academics. Student was already provided with an aide for support during transitions, recess, lunch, small group instruction, and to facilitate social skills and coping, pursuant to her May 2016 annual IEP.

87. The assessment reported Parents' and Ms. Press' ratings of Student in the areas of health and personal care; behavior; instruction; and the least restrictive environment each felt was appropriate for Student.

88. Ms. Dargis had been told by other staff about Student's "stimming behaviors" but she did not herself witness it. She observed Student five times in 20-30 minute blocks on October 17, 18, and 27, 2016. She observed Student using various

accommodations that had been provided to her, including alternate seating, a ball chair, fidget toys, and a band across the legs of a table or chair to bounce her feet upon.

89. The assessment concluded that Student did not require an aide. Ms. Dargis concluded that Student needed only classroom or recess aides, and not full-time support. Ms. Dargis also recommended self-monitoring strategies; positive behavior supports working toward on-task behavior; instruction and modeling; use of a classroom visual schedule; and prompting and teacher support during transitions using verbal, visual or gestural prompting.

PSYCHOEDUCATIONAL ASSESSMENT

90. Ms. Deane conducted the triennial psychoeducational assessment and wrote her report dated October 28, 2016. The report did not mention the behavior of stimming, rocking or masturbating. Ms. Deane acknowledged that in September and October the behavior had been reported to her more than once. She observed it herself on a few occasions in October. At the time of her assessment, she was aware of the behavior. The assessment generically mentioned "sensory-seeking behaviors," tics, Tourette's and atypicality.

91. For her psychoeducational assessment, Ms. Deane reviewed Student's educational records; previous assessments; and Student's medical, health, and developmental history. The purpose of the triennial assessment was to determine processing strengths and weaknesses, as well as eligibility.

92. The Neuropsychological Processing Concerns Checklist for School-Aged Children & Youth, Third Edition, consisted of checklists filled out by Ms. Press, Student's resource support program (special education) teacher, Mother and Father. The checklist asked numerous questions concerning Student's learning of verbal and visual information; memory; knowledge of basic facts; and ability to follow instructions and keep focus, maintain attention, adapt and stay flexible, persevere, solve problems, and

the like. Parents' responses indicated that they had concerns with Student's ability to follow instructions, directions and explanations, and follow multi-step directions; losing track of steps and forgetting where she was mid-task; and trouble summarizing narrative or textual material. Student's teachers either did not share these concerns, or labeled them as less severe than did Parents. However, such concerns, according to Ms. Deane indicated a need to explore Student's auditory processing. Based on these responses, Ms. Deane selected standardized instruments to administer.

93. To assess Student's thinking and reasoning, Ms. Deane administered the Wechsler Intelligence Scale for Children, Fifth Edition. To assess Student's processing and motor development, she administered the Developmental Neuropsychological Assessment, Second Edition, the Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition, and the Comprehensive Test of Phonological Processing, Second Edition. To assess Student's social/emotional functioning and adaptive behavior, she administered the Comprehensive Executive Function Inventory and the Behavior Assessment System for Children, Third Edition.

94. The Wechsler Intelligence Scale for Children is a nationally standardized test designed to assess intellectual ability in children ages 6 through 16 years. It provides a measure of general intellectual functioning, and five index scores: Verbal Comprehension, Visual Spatial, Fluid Reasoning, Working Memory, and Processing Speed. Taken together the assessment generates a full scale intelligence quotient, which estimates an individual's intellectual abilities. On the Wechsler, Student's full scale IQ of 110 fell within the high average range. Her processing speed scores, which measured visual and not auditory processing, were very high. Her visual spatial and fluid reasoning were average.

95. The Wechsler verbal comprehension score of high average would be part of a central auditory processing disorder battery of tests and subtests. The verbal

comprehension index and subtests involved having Student listen, comprehend and answer questions. The verbal comprehension index contained two subtests, one of which assessed auditory comprehension and perception. Her verbal comprehension and working memory scores were high average.

96. Using various subtests in the Developmental Neuropsychological Assessment, Second Edition, Ms. Deane assessed Student's ability to store and retrieve information, and found it to be average. Using other subtests in attention and executive functioning, she measured Student's auditory attention. Student demonstrated average abilities within auditory attention subtests. The auditory attention and auditory attention response subtests in the Developmental Neuropsychological Assessment would be components of a central auditory processing disorder battery.

97. Although Student performed average on auditory attention (i.e. paying attention to auditory stimuli), she exhibited difficulties on the auditory attention response subtests. Student demonstrated relative difficulty within auditory attention response "commission errors" and "inhibitory errors," with scores below expected or borderline.

98. Ms. Deane also administered narrative memory subtests that she opined would be part of a central auditory processing disorder battery. Narrative memory assessed immediate story memory, free and cued recall. This required the ability to listen attentively to prose, to comprehend what was heard, and to organize and retrieve this information, identifying it receptively or using expressive language. The free recall trials required adequate expressive language functioning as well as receptive understanding. Student scored average on these narrative memory subtests.

99. The Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition, measured visual perception, fine motor skills, and eye-hand coordination for paper and pencil tasks in a structured format. Student's scores were average.

100. Ms. Deane used the Comprehensive Test of Phonological Processing, Second Edition, to test Student's sound discrimination and auditory processing skills. She used the Phonologic Awareness Composite component, with subtests, to determine how well Student manipulated phonemes within words. She tested to determine how well Student synthesized a word given the individual phonemes. Student's performance was average. The Rapid Naming Composite component measured Student's ability to retrieve phonological information from long-term memory and to execute a sequence of operations quickly and repeatedly. Retrieval of such phonological information is required when readers attempt to decode unfamiliar words. The Rapid Naming Composite consisted of the Rapid Digit Naming and Rapid Letter Naming subtests. These tasks required Student to name digits and letters rapidly. Overall, Student's ability to perform these tasks was within the average range. Per Ms. Deane the Phonologic Awareness and other composites she administered, are part of the central auditory processing disorder battery.

101. The Comprehensive Executive Function Inventory was a behavioral rating scale completed by a student, and/or the student's parents/guardians and/or teachers. It measured executive functioning strengths and weaknesses. Ms. Press indicated a below average score for Student in organization. The special education teacher indicated a below average score within initiation. Mother indicated concerns with Student's emotional regulation, flexibility, initiation, organization, planning, and working memory. Father indicated concerns with Student's flexibility, initiation, organization, planning, and working memory.

102. The Behavior Assessment System for Children, Third Edition was a system designed to aid in diagnosis and classification of emotional and behavioral disorders. The Behavior Assessment System was divided into Clinical Scales and Adaptive Scales. There was a separate form for parents that Parents completed, and for teachers that Ms.

Press completed. Mother indicated the following areas to be in the clinically significant range: hyperactivity, internalizing problems, anxiety, somatization, atypicality, adaptability and functional communication. Mother indicated at-risk scores with externalizing problems, depression, attention problems, and adaptive skills index. Mother was not interviewed for this assessment or any triennial assessments, however Parents provided written input through questionnaire responses. Father indicated the following areas to be in the clinically significant range: internalizing problems, anxiety, somatization, hyperactivity, and atypicality. Father rated Student to be within the at-risk range for externalizing problems, depression, behavioral symptoms, attention problems, adaptability, activities of daily living, and functional communication. Mrs. Christine Jones, resource teacher, rated Student's behaviors and social/emotional functioning at school. Mrs. Jones indicated the following areas of to be within the clinically significant range: somatization. Mrs. Jones indicated the following areas were at risk: internalizing problems, atypicality, withdrawal, and social skills. Ms. Press rated Student's behaviors and social/emotional functioning at school. Ms. Press indicated the following area to be within the clinically significant range: internalizing problems, specifically within somatization. Ms. Press rated Student to be at risk in the following areas: anxiety, depression, learning problems, atypicality, and social skills.

103. Overall, the raters indicated concerns across both home and school environments in internalizing problems, anxiety, depression, and somatization, as well as atypicality.

104. Despite many at risk and clinically significant scores, Ms. Deane determined that Student's learning was not impacted by emotional or behavioral issues. She concluded Student was no longer eligible for special education. Although Student met the criteria of other health impairment for limited vitality and alertness, it was not to the degree that required special education or related services, in Ms. Deane's opinion.

Other health impairment means having limited strength, vitality, or alertness, that is due to chronic or acute health problems including attention deficit hyperactivity disorder and Tourette's syndrome, that adversely affects a child's educational performance. Although Student demonstrated limited alertness, Ms. Deane concluded that she was not adversely affected in her educational performance. The basis of this conclusion was Student's grade-level performance. According to an academic assessment, Student performed within the average range for all areas of reading writing, mathematics and oral language. Because she was performing at grade level in all academic areas, according to her progress reports, and because she was making progress on her IEP goals, Ms. Deane concluded that she was no longer eligible for special education or related services under the category of other health impairment or any other eligibility category.

105. Ms. Deane felt her assessment was comprehensive and there was no need for further assessments. Student's social/emotional challenges did not in her opinion rise to the level of requiring special education or related services. Other modifications and accommodations other than special education and related services, such as a Section 504 plan, could, in Ms. Deane's view, suffice.

106. At hearing, Ms. Deane presented various, inconsistent explanations for not addressing the "stimming" behavior in her assessment: she could not recall why the behavior was not specifically mentioned in her assessment; she did not observe the behavior during the two formal assessment observations on October 20 and 26, 2016, and therefore she did not mention it, although she had observed it at other times; the behavior was not a concern at the time of the assessment plan or the time of the assessments; the reports she received in the September to October time frame did not concern her; the behavior increased in November, after her assessment, and was not of concern until then.

107. Ms. Deane could not recall whether, or when, she spoke with various team members, including Principal Taylor, concerning the behavior. This conflicted with the credible recollections of the other witnesses (Ms. Press, Ms. Cordrey, and Principal Taylor) that Ms. Deane was the principal decision-maker guiding the team, and was heavily involved in decisions pertaining to it.

108. Ms. Deane could not recall directing occupational therapist Ms. Cordrey not to address the "stimming" in the occupational therapy assessment.

109. Ms. Deane's testimony was vague regarding the taking of data concerning Student's behaviors. She confirmed that Student's aide was collecting data, but could not recall when. Although she acknowledged that she would have directed the taking of the data, she distanced herself from it by saying she could not enforce those directions because other personnel would have been responsible for that. Her testimony had many inconsistencies regarding the frequency and severity of Student's behavior, the decrease or increase, who she directed, what she directed them to do, who was in charge of the decisions about what to assess for, and what to say or not say in the assessments.

110. On the witness stand, Ms. Deane parsed the questions that were put to her so carefully that she appeared evasive. For example when asked whether she recognized an email or event that occurred on a particular date, she responded that she did not recall the "exact date," rather than responding whether she recalled the event or not. When asked how many times certain events had occurred, she responded that she could not recall the "exact number," and repeated that answer even when asked whether the events had occurred more or fewer than 100 times.

October 27, 2016 Progress Reports on May 2016 Annual IEP Goals

111. October 27, 2016, progress reports on Student's IEP goals indicated that Student had already met and exceeded all six of her IEP goals for the year, which had been projected for the next annual review date of May 2017. According to computerized

tests, her reading was on track at grade level. She had jumped an entire grade level in reading from the start of the school year to October. Her progress report on Goal 4 in social communication demonstrated social understanding by allowing others to contribute their thoughts without interruption. Her progress report on Goal 6, prepared by Ms. Cordrey, the self-regulation goal, stated that Student could recognize emotions and use appropriate coping strategies in four out of five trials. She could recognize her emotions, the corresponding "zone," and identify a coping strategy, with the help of a visual prompt, and could return to appropriate emotional regulation three out of four times. Although Student was exhibiting the "stimming" behavior at this time, it was not reported on her October progress reports, which only addressed progress on IEP goals, none of which had identified the behavior in question as an area of need.

October/November 2016 IEP

112. Student's annual IEP team meeting commenced on October 28, 2016, and was continued on November 8, 2016. Parents attended the October meeting with their advocate. Ms. Dargis, Ms. Deane, Student's case carrier and resource specialist Mrs. Jones, Ms. Lopez, Ms. Press, Principal Taylor, and Mr. Price attended. Assessment reports were reviewed. The "stimming" behavior was discussed. Ms. Cordrey and Ms. Press confirmed that Student had been "stimming" during one of Ms. Cordrey's observations. Speech pathologist Ms. Lopez was questioned about her report's mention of the word "stimming" and the behaviors she had observed.

113. The meeting continued on November 8, 2016 with the same participants. The review of the assessments continued. Mother complained that she had never been interviewed by any assessor. The team "discussed [Student's] stimming behaviors, the function, and different strategies she can utilize." The school staff shared that the behavior had been observed throughout the school day and did not appear to follow a consistent pattern. The team discussed that the behavior occurred at any time of day,

when Student was attentive, not attentive, when she was regulated and when she was dysregulated. Parents and teacher Ms. Press reported "severe concerns with displaying odd movements and repetitive movements," which were the rocking and "stimming" behavior.

114. At either or both meetings, the IEP team discussed strategies and interventions to address the behavior, including use of sensory interventions like a ball chair. Various possible replacement behaviors and strategies were discussed. Ms. Cordrey had various ideas about Student's sensory needs. The team suggested use of a "social story" that the psychologist had written.

115. District's conclusion was that Student was making progress, had met her May IEP goals, was performing at grade level, and therefore did not qualify as other health impaired nor under any other category, and was no longer eligible for special education and related services. Parents did not agree and did not consent to the November 8, 2016 IEP proposing to exit Student from special education.

116. During and after the triennial assessments, Special Education Coordinator Nathan Price consulted with the team. Mr. Price's duties included advising and supporting IEP teams, especially where advocates were involved, and answering questions the teams could not necessarily address. He oversaw and reviewed assessments to ensure the assessments were complete. He consulted with the speech pathologists, principals, teachers and school psychologists. Mr. Price was not concerned about the comprehensiveness of the assessments conducted for Student, which were in his opinion "numerous" and "lengthy." Mr. Price consulted with Ms. Cordrey while she conducted the occupational therapy assessment, but he did not recall her findings. At hearing, he stated that if Ms. Cordrey had observed sexualized self-stimulatory behavior, he would have expected her to note that in her report. If she did not personally observe such behavior but it was reported to her by others, he would also have expected her to

address that in her report. Mr. Price did not recommend a functional behavior assessment be conducted for Student, but he would have if he had felt the team needed more information, or if Student had not been making progress on her IEP goals.

117. Mr. Price agreed with District's recommendation to exit Student from special education, because she was making good progress on her IEP goals and District was meeting her needs. Behavior can be addressed without an IEP, for example by Section 504 accommodations and behavior support plans or accommodations. If a student does not require specialized academic instruction and related services, then the student does not qualify for special education.

After the IEP Team Meetings

118. After the October and November 2016 IEP team meetings, District scheduled further meetings and there ensued a series of communications, as follows.

119. District scheduled a meeting for December 6, 2016, to discuss a Section 504 plan. Parents wrote that they did not plan to attend. On November 28, 2016, Principal Taylor responded. Her email stated, "[I]n efforts to provide interventions, regarding the stimming behavior, I am asking how we can align our approach to what you are doing at home for your daughter, and what you would like us to do to address the stimming behavior. We created a social story for [Student] and have introduced functionally equivalent replacement behaviors for [Student] to utilize." The same day, November 28, 2016, Mother responded that Student was not exhibiting that behavior at home. Principal Taylor responded on November 28, 2016, that she understood, but was still soliciting Parents' "suggestions to help us in addressing the behavior at school." Principal Taylor further stated, "We will begin developing a list of ideas, however [we were] looking for your feedback."

120. On November 29, 2016 Parents responded with a list of suggestions including a structured environment, a one-to-one aide and applied behavior analysis therapy, and also suggesting increasing breaks and using the sensory room.

121. On November 30, 2016, Principal Taylor wrote an email stating that “at this time, we are working on implementing the following interventions,” including verbal redirection, gestural redirection, small group instruction on emotional regulation, different seating options, the Thera band, a doughnut seat, movement breaks, sensory breaks, explicit instruction, and instruction through social stories. Ms. Press was redirecting Student when necessary and Ms. Cordrey was discussing Student’s sensory needs.

122. In December 2016, during one of the group speech sessions Ms. Lopez witnessed Student engaging in the rocking behavior throughout her group speech session. Ms. Lopez asked all the students in the group to get up and then sit on the carpet, so as to intervene but not to single Student out.

123. On December 7, 2016, Principal Taylor wrote to Mother stating, “[W]e have seen a significant decrease regarding [Student’s] stimming behavior. Our interventions are working.”

124. In February 2017, at a group speech therapy session, Ms. Lopez witnessed another incident of the behavior. Ms. Lopez asked Student to stand up, but Student refused. Ms. Lopez then redirected her to stand once again. Student did comply with Ms. Lopez’s instructions after Ms. Lopez asked two or three times. Ms. Lopez felt Student was able to control the action. Ms. Lopez also stated that the other students in speech therapy session basically ignored the behavior, and it did not impact Student’s ability to learn, engage, or make friends. In Ms. Lopez’s opinion, the behavior did not impede Student’s learning or the learning of others.

125. District attempted to schedule further meetings to discuss a proposed Section 504 plan on various dates in January through March of 2017. Parents did not attend. On and after February 21, 2017, Parents removed Student from school on medical advice, for the rest of the 2016-2017 school year.

126. Parents filed for this due process hearing on March 8, 2017.

127. An IEP team meeting was held on May 31, 2017, to discuss Parents' request for independent study. Student remained out of school for the remainder of the 2016-2017 school year.

128. At the time of hearing, Student was in the third grade for the 2017-2018 school year. She had returned to school and was attending her neighborhood school within the District, and District continued to implement her May 2016 annual, last agreed upon IEP.

EXPERT TESTIMONY

129. Student's expert witness, Stacy Everson, was the founder of a consultancy firm called Self Esteem Education and Development and Sexuality, or "SEEDS." SEEDS was a not-for-profit corporation with a six-member board of directors and five employees, including educational consultants and operational staff. Ms. Everson founded SEEDS in approximately 1984. Her formal title was "Educational Director." Her education and professional background was as a registered nurse, licensed in California since 1981. She received her Bachelor of Science degree in nursing in 1990. Her resume stated that she was "nationally certified" by an unnamed organization as a Developmental Disabilities Nurse since 1998, and "nationally certified" as a "Family Life Educator" by an organization called the National Council on Family Relations. No information was presented as to what was the meaning of the term "nationally certified."

130. SEEDS assessed clients for "socio-sexual information" and "assist[ed] with social sexual behaviors and interactions in schools and the public." SEEDS also provided

training and consultancy services to agencies that serve individuals with special needs, including Regional Centers, law enforcement, victim's assistance groups, and schools. SEEDS trained these organizations how to question clients regarding sexual abuse, and other topics. SEEDS' focus was on individuals with developmental disabilities and autism.

131. Ms. Everson performed a "social sexual" assessment of Student in preparation for this due process hearing, to see if Student understood the difference between the public and the private sphere, and to assess her understanding of sexuality. For the assessment Ms. Everson did a records review, some independent research on Tourette's, and had up to eight conversations and up to 30 emails with Parents. Ms. Everson met Student three times for 45 minutes each and assessed her in areas of social-emotional functioning, social relationships, and sexuality. The assessment used proprietary non-standardized instruments that SEEDS has developed including flash cards to identify emotions and feelings, visual aids, questions, and anatomically correct dolls to identify appropriate or inappropriate sexual awareness. Student had good social emotional awareness and could talk appropriately about the social situations depicted on the flash cards and other SEEDS instruments. For example, a card showed two people in a staff-client or stranger-stranger situation and asked "do these people know each other?" These instruments informed Ms. Everson if a client understood social roles, for example on a bus, in public, and whether the client had a grasp on social situations. In Ms. Everson's opinion, Student excelled.

132. Student also exhibited age-appropriate awareness of sexuality and sexual behavior. Using clothed and unclothed anatomically-correct dolls, Ms. Everson assessed Student's knowledge of what was private, the difference between boys and girls, and her knowledge of genitalia. Student understood what was private, and she placed appropriate X marks indicating male and female private parts. To assess propriety, Ms. Everson showed pictures of various activities, such as touching etc. in public, and

asked whether or not the behaviors were okay. Student responded to pictures of touching one's own private parts on the bus that this was "not okay unless she has tics," and "if she has tics then that is something that just happens." Student described herself to Ms. Everson as having a "genital tic." In Ms. Everson's opinion, Student was able to tell when something in her own behaviors was a tic or not.

133. Ms. Everson, however, was not an expert in Tourette's. Her opinion that Student's self-description was accurate as to tics was, therefore, given little weight. Ms. Everson had little expertise and almost no experience dealing with people with Tourette's. Her knowledge of Tourette's was "minimal to moderate" and dated back to her history as a nurse practicing in intensive care when she had one client with Tourette's during her nursing career, and an early case at SEEDS including a person with a secondary disability of Tourette's who was accused of sexual abuse. She has also consulted with a doctor at City of Hope who was a Tourette's expert. From this limited experience, she had some familiarity with the symptoms of Tourette's.

134. She opined that motor tics are involuntary neurologically-based muscle twitches that occur throughout the body but mostly in the face. Her research revealed that disinhibition and sexualized behavior, or what looks like sexualized behavior, can be a symptom of Tourette's. Somewhat inconsistently with her opinion that Student's behaviors might be neurological impulses without a "cause," Ms. Everson also opined that it was critical to take data to assess any symptomatology so one could see the precedents, antecedents, functions, and causes of the behavior. To her understanding, people with Tourette's are aware of the effect they are having on others, but they are unable to control it, because their behaviors are neurological tics and not based on emotional unawareness.

135. Ms. Everson was credible on the topic of sexualized behaviors in her primary client base -- persons with autism or developmental disabilities -- but she had a

very limited knowledge base about Tourette's. Ms. Everson did not recommend any particular interventions and did not come to any conclusions regarding whether Student's behavior was primarily caused by her Tourette's or by some other diagnosis. Ms. Everson interviewed no school staff, did not observe Student in school, and did not witness any of the interventions used by school staff, nor did she have an opinion whether these were effective.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁴ et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. §

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴ All subsequent references to the Code of Federal Regulations are to the 2006 version.

1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the

definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School 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.) The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ___ [137 S.Ct. 988] (*Endrew F.*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, at pp. 1000-1001, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student’s IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Id.*, at p. 1001.)

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

(*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on the issues decided.

ISSUES 1 (A)-(C) AND 3 (A)-(B): BEHAVIORAL, OCCUPATIONAL THERAPY, AND PSYCHOEDUCATIONAL ASSESSMENTS

5. Student contends in Issue 1 that District should have and did not conduct a functional behavior assessment to determine the triggers and function of Student's inappropriate masturbation-like behaviors, and that the failure resulted in a denial of FAPE to Student and a denial of parental participation. Student further contends in Issue 3 that District's psychoeducational and occupational therapy assessments failed to assess Student's behavior appropriately. District contends that the assessments it conducted were appropriate and resulted in no deprivation of parental participation or FAPE denial, and that Student is not currently eligible for special education because she does not meet the qualifying conditions for any eligibility category.

Applicable Law

6. If a child's behavior interferes with his or her learning or the learning of others, the IDEA requires that the IEP team, in developing the IEP, "consider the use of positive behavioral interventions and supports, and other strategies, 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).)

7. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify

the special education and related services the student requires. (34 C.F.R. §§ 300.301 (c)(2) and 300.303.)

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

9. A local educational agency must assess a special education student in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. (20 U.S.C. § 1414(b)(2)(A)). The assessments used must be: selected and administered so as not to be discriminatory on a racial or cultural basis; provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; used for purposes for which the assessments are valid and reliable; administered by trained and knowledgeable personnel; and administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b)(3); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

10. A local educational agency shall evaluate a child with a disability before determining that the child is no longer a child with a disability. (20 U.S.C. § 1414 (c)(5).)

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

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

13. Education Code Section 56381, subdivision (a)(2), states, "If the reassessment so indicates, a new individualized education program shall be developed."

14. The IEP shall show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040.)

15. A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006), 464 F.3d 1025, 1031-1033 (*Park*).) In the event of a procedural violation, a denial of FAPE may only be found if that

procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).) A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (See *N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036.)

16. Procedural inadequacies that result in the loss of educational opportunity or seriously infringe on the parents' opportunity to participate in the IEP formulation process result in the denial of a FAPE. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) A procedural error results in the denial of educational opportunity where, absent the error, there is a "strong likelihood" that alternative educational possibilities for the student "would have been better considered." (*M.L. v. Federal Way School Dist.* (9th Cir. 2003) 394 F.3d 634, 657.)

17. To be eligible for special education and related services, a student must have a disability as defined by federal and State law and, because of the disability, require instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A)(ii); Ed. Code, § 56026, subds. (a) & (b).)

18. Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that: (a) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (b) adversely affects a child's educational performance. (Cal. Code Regs., tit. 5, § 3030, (b) (9).)

Analysis

ISSUE 1: FAILURE TO ASSESS BEHAVIOR

19. Student exhibited apparently masturbatory behavior that may have been uncontrollable movements that were neurologically-based, a tic caused by Tourette syndrome. The behavior may have had a self-stimulatory function that District did not understand. Or, there might have been other explanations. Nevertheless, in the midst of the behavior starting in September and lasting until at least December 2016, District did not conduct any formal assessments that were specifically directed to understanding it. Student's needs exhibited during this time warranted an assessment, but District did not perform an assessment that addressed the behavior. Rather, District assessors chose to ignore, and specifically decided not to address, the behavior.

20. District was nevertheless conducting informal, trial-and-error, investigations into the function of the behavior, if it had any function, in attempts to understand and address it. Thus, Ms. Cordrey did not note the behavior in her occupational therapy assessment report, because "we were still establishing what the cause was," and "everyone was working together, trying to see whether it was sensory or not." Nurse Sosa's impression was that the behavior was involuntary. But Ms. Cordrey felt the behavior was not a tic, and that Student could stop. Ms. Press did, however "wonder" whether the behavior could be associated with Student's Tourette's. Mr. Price understood the team's "hypothesis" at the time was that the behaviors were self-stimulatory in nature. The team was trying to determine the function of the behavior in order to address it, by using different interventions, to see what worked. They were trying to determine functionally equivalent replacement behaviors. As late as December 2016, when Principal Taylor wrote to Mother that the team was introducing "functionally equivalent replacement behaviors," this was still guesswork. No assessment to determine the function, or how to replace it, had been conducted.

21. Teasing out a behavior's function, if any, and determining appropriate interventions, is precisely the purpose of conducting the type of behavioral assessment that District failed to do here. Their diligent, but misguided, trial-and-error efforts to address the behavior in the absence of such assessments passed the line between the "first resort" Mr. Price mentioned, i.e. seeing if lesser interventions are working, and crossed over into a dereliction of District's duty to proceed to do an assessment. District's efforts appear to have been informal assessments, but these were not selected and administered so as to yield accurate information, valid and reliable, administered by trained and knowledgeable personnel, administered in accordance with any instructions, or technically sound. Nor were the results of District's experiments brought to an IEP team, nor performed in a manner in which the IEP team might consider them in determining Student's educational program. Thus, District failed to meet its legal obligations regarding the manner in which assessments must be performed, pursuant to which the entire IEP team, including Parents, were entitled to review the assessment results and, as a team, decide the interventions to be tried. Student therefore proved a procedural violation of the IDEA concerning District's failure to assess Student in the area of behavior and/or failure to develop a behavior support plan to address Student's self-stimulatory behavior. The resulting denial of FAPE, and remedies, are discussed below.

ISSUE 3(A): OCCUPATIONAL THERAPY ASSESSMENT

22. The only mention in the occupational therapy assessment report of Student's rocking and "stimming" appears obliquely in a section entitled "balance and motion," in which Ms. Cordrey mentioned Student "occasionally rocking in her chair; frequently wrapping her legs around the legs of her chair." At hearing, Ms. Deane disputed Ms. Cordrey's assertion that Ms. Deane directed her not to address this behavior in the occupational therapy assessment. But, it is irrelevant whether Ms.

Cordrey's omission was of her own accord, or was directed by Ms. Deane. The occupational therapy assessment was incomplete and inappropriate either way, and ultimately it was District's responsibility to assess regardless of which individual was responsible. District's duty was to assess in all areas of suspected disability, including if appropriate, health and development, self-help, and social/emotional status. An eight year-old girl who was apparently masturbating in class clearly fell within these definitions of suspected need.

23. Ms. Cordrey's testimony that she "did not find it [the "stimming"] relevant" to her assessment report at that time was not believable, given the amount of staff attention that was clearly being directed toward ameliorating it. Prior to her assessment, Ms. Cordrey knew that "stimming" was "such a big concern to the entire team." And, it had become the "main concern." Ms. Cordrey was working with the team on strategies frequently, at least weekly. Ms. Press was notably concerned. Ms. Cordrey knew the behavior was different from what she had seen before. Ms. Lopez said the situation was "touchy" and uncomfortable to describe, such that she and Ms. Deane specifically determined a neutral word to use for it. Although Ms. Press testified that other students were not aware or concerned, she told Nurse Sosa at the time that the behavior was making people uncomfortable. Later, in December 2016, Ms. Lopez in speech therapy sessions resorted to telling all the students to get up and sit on the floor. If a child's behavior interferes with his or her learning or the learning of others, the IDEA requires that the IEP team, in developing the IEP, "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." District was clearly concerned with the behavior in the September-to-November 2016 timeframe. The assessors all nevertheless made the decision, not to address the behavior – a decision which is bewildering, given these facts.

24. Ms. Cordrey used the Sensory Processing Measure and other tools that were available to her, that District routinely used. She did not know of any other assessments for this situation and she did not investigate further. This does not absolve District from its obligation to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, with assessments that must be sufficiently comprehensive to identify all of Student's special education and related service needs, whether or not commonly linked to the disability category of the child. If Ms. Cordrey was not the individual who knew how to assess for these behaviors, it was District's obligation to explore other expertise. Student therefore proved a procedural violation of the IDEA concerning the inappropriateness of the occupational therapy assessment. The resulting denial of FAPE, and remedies, are discussed below.

ISSUE 3(B): PSYCHOEDUCATIONAL ASSESSMENT

25. For the same reasons as addressed above with regard to Ms. Cordrey's assertions, Ms. Deane's testimony that the behavior did not rise to the level of concern necessary to warrant an assessment was likewise not believable, and it was not consistent with her other testimony regarding the lengths to which staff went to ameliorate the behavior. Ms. Deane even collaborated with District's STARS autism team to collaborate and consult on different strategies to help Student. Ms. Deane's opinion that Student's learning was not being impacted and that other students were not aware of the behavior was likewise not credible. Behavior that was so concerning to the entire staff ought to have been formally assessed. Yet, Ms. Deane did not even mention it in her assessment report despite having heard the reports of other staff and having herself observed it several times.

26. Furthermore, despite qualifying under the first prong of eligibility under the category of other health impairment, and despite many at-risk and clinically significant scores in Student's behavioral results on the Behavior Assessment System for

Children, Student's learning, according to Ms. Deane, was not being impacted by emotional or behavioral issues. This opinion was not supported by the assessment results and it was not credible. Although Student met the criteria of other health impairment for limited vitality and alertness, it was Ms. Deane's opinion that Student's limited vitality and alertness was not to the degree that Student required special education or related services. Thus, Ms. Deane recommended that Student was no longer eligible for special education. Other health impairment means having limited strength, vitality, or alertness, that is due to chronic or acute health problems including attention deficit hyperactivity disorder and Tourette syndrome, that adversely affects a child's educational performance. The sole basis of Ms. Deane's conclusion that Student was not adversely affected in her educational performance was Student's grade-level performance. Because she was performing at grade level in all academic areas, according to her progress reports in late October 2016, and because she was making progress on her IEP goals, Ms. Deane concluded that Student was no longer eligible under the category of other health impairment.

27. Ms. Deane's analysis was cursory and flawed. If Ms. Deane's reasoning were valid, then the only measure to be looked at is grades, and any student performing at grade level would automatically by this reasoning become ineligible for special education. Indeed, if Ms. Deane's reasoning were correct, there would be no need to conduct assessments in the first place, because grades would be the only relevant factor. A reliance on grades alone amounts to reliance on a single assessment measure, which the law specifically prohibits. Student therefore proved a procedural violation of the IDEA concerning the inappropriateness of the psychoeducational assessment. The resulting denial of FAPE, and remedies, are discussed below.

ISSUES 1(A)-(C) AND 3(A) AND (B): RESULTING DENIAL OF PARENTAL PARTICIPATION AND FAPE

28. In the event of a procedural violation such as a failure to assess, or conducting an inappropriate assessment, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).) Student met her burden of proving by a preponderance of the evidence that District denied her a FAPE and denied Parents their participatory rights, by failing to assess Student's behavior and by conducting inappropriate psychoeducational and occupational assessments.

29. Parents were substantially deprived of the opportunity to participate in the decision-making process regarding the provision of a FAPE as a result of these flawed assessments. Had Student's behavior been properly assessed, the IEP team including Parents would have had information to address it. Instead, the lack of assessment led to haphazard interventions without concomitant goals, cursory mention of the behavior in IEP team meetings, discounting of its seriousness, and the eventual proposal to terminate Student's eligibility for special education and related services.

30. Although Parents attended IEP team meetings with their advocate and asked questions, they lacked relevant information, as did the entire team. In the absence of relevant information, it is not sufficient participation that a parent attended the IEP meetings with an advocate or attorney, expressed opinions and asked questions.

31. It is disingenuous of District witnesses to say that because Student excelled academically and met her IEP goals, that their assessments that failed to address Student's behavior, resulting in a proposal to exit her from special education, were appropriate. The goals were drafted in May. No goals in the May 2016 IEP

addressed this behavior. Goal 4 in social communication and Goal 6 in emotional regulation dictated strategies and interventions that were unsuccessfully used to address it. Moreover, the behavior began in September 2016, months after those goals were drafted and was never formally assessed. The law provides that after assessments address a student's needs comprehensively, the IEP team must consider the assessments in determining the child's educational program, and that a reassessment, shall consider and identify what additional data, if any, is needed to determine the present levels of performance and educational needs of the pupil, and, "if the reassessment so indicates, a new individualized education program shall be developed." Thus the entire purpose of an assessment is to generate new goals when circumstances change, which District did not do here. Student's success and excellence in achieving outdated goals does not absolve District of the duty to generate current goals to address new and different issues that arose after the prior goals were drafted. Remedies are discussed below.

ISSUE 2: CENTRAL AUDITORY PROCESSING DISORDER ASSESSMENT

32. Student contends District was obligated, upon parental request, to conduct a central auditory processing disorder assessment using an audiologist. District contends it appropriately assessed Student in its triennial, including conducting auditory processing assessments that revealed no deficits in that area of need.

33. Legal Conclusions 1 through 4 and 7 through 16 are incorporated here by reference.

34. Student failed to establish that District denied her a FAPE by failing to conduct a central auditory processing disorder assessment by an audiologist. The uncontroverted testimony of Ms. Lopez, as confirmed by Ms. Deane, was that there was no standard central auditory processing disorder battery of assessments. Other professionals besides an audiologist could perform assessments that generated sufficient information for an IEP team to consider. Both Ms. Lopez and Ms. Deane did so

here. There was no evidence that the assessment batteries they administered were insufficient or inappropriate, failed to reveal necessary information, or that the IEP team lacked necessary information. A central auditory processing disorder assessment by an audiologist would have looked more specifically at Student's brain's ability to decipher noises and sounds, take the signals and interpret them. An audiologist would have looked at background noise, foreground noise, competing noises, and speech versus other noises, to assess how Student processed speech and other sounds, and how Student's brain interpreted different types of noises and sounds. However, looking at the batteries that Ms. Lopez and Ms. Deane did administer, it appears that District did an in-depth investigation of Student's auditory processing. The sole basis for Parent's request was their impression that Student had difficulty following directions, which was in fact borne out by the assessments that Ms. Lopez and Ms. Deane conducted. District's assessments were sufficient to inform the IEP team as to this area of need.

35. Student's results on the Clinical Evaluation of Language Fundamentals was average with the exception of following directions. She comprehended spoken sentences of increasing length and complexity. She demonstrated a relative weakness in her ability to interpret directions of increasing length and complexity. According to the Developmental Neuropsychological Assessment subtests in attention and executive functioning administered by Ms. Deane, Student had average ability to pay attention to auditory stimuli, but had some difficulty in responding. Student scored high average on the Wechsler verbal comprehension index and subtests requiring Student to listen, comprehend and answer questions. She scored average on the Digit Span (memory span) subtest within the Wechsler working memory index, which involved Student listening to a recording and indicating whenever she heard certain words or sounds, with increasing difficulty. She scored average on the Developmental Neuropsychological Assessment Narrative Memory subtests that assessed the ability to listen attentively to

prose, to comprehend what she heard, and to organize and retrieve this information. She scored average on the Comprehensive Test of Phonological Processing Rapid Naming and Rapid Letter Naming Composite, made up of subtests that required Student to name digits and letters rapidly. Although Student's results on the Neuropsychological Processing Concerns Checklist indicated below-average following directions, Ms. Lopez observed Student following multi-step directions when there was background noise, giving and following the directions of other students, and in a classroom setting.

36. These assessment results provided sufficient information to inform the IEP team with regard to Student's ability to follow directions, which was the only deficit identified by Parents and which was confirmed by the tests. No evidence was presented that a specific test that only an audiologist could perform would have provided any better guidance or information. (See *Park, supra*, at pp. 1030-32 [Where district's special education consultant performed vision tests and concluded that student's vision was not hindering his education, there was no procedural violation in not assessing for double vision and optic nerve damage despite Parents' suspicion of disability in these areas].) Student failed to meet her burden of proof on Issue 2.

REMEDIES

37. Student requests several remedies, including independent educational evaluations, compensatory education, and District staff training.

38. Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington v. Department of Education* (1985) 471 U.S. 359, 374.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.)

These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

39. Student is entitled to an appropriate remedy for District’s failure in this case to assess Student’s needs in the area of behavior, and for District’s omission of this information from the assessments it did conduct.

40. District is ordered to fund an independent behavioral assessment and an independent occupational therapy assessment. Under the time limits set forth in the Order below, District shall contract with a qualified independent behavioral assessor of Student’s choice and with a qualified independent occupational therapy assessor of Student’s choice, and shall pay the independent assessors directly to perform and prepare assessment reports. District shall pay for the independent assessors to attend IEP team meetings to review their assessment reports.

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

limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment.”

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

43. Pending the assessments and the IEP team meeting contemplated by this Decision, Student shall remain eligible for special education and related services, and her placement shall be as stated her last agreed upon and implemented May 2016 annual IEP.

44. Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Park, supra*, 464 F.3d at p. 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].)

45. Here, District’s staff committed procedural violations including failing to conduct re-assessments of Student in all areas of need when warranted; omitting

relevant information from assessments and reports; failing to assess for and develop new appropriate goals in all areas of need when circumstances warranted; and recommending that Student be exited from special education because she had met outdated goals that had not been properly updated. Accordingly, District training on these important topics is ordered.

46. Parent withdrew Student from school during the time period February 21, 2017, to the end of the 2016-2017 school year. It was not established, however, that this removal was caused by the District's actions or inactions, and Student presented no evidence concerning compensatory education. Therefore no compensatory education will be awarded.

ORDER

1. District shall fund independent educational evaluations in the areas of occupational therapy and behavior. District shall provide Student with agency criteria for conducting the assessments within 15 days of this Decision.

2. Within 30 days of this Decision, Student shall inform the District of Student's choice of occupational therapy and behavioral independent assessors, provided however that the "criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment." District and Student shall cooperate to facilitate the completion of the assessments pursuant to District criteria and payment procedures for independent educational evaluations.

3. After Student provides District with notice that the independent educational evaluations have been completed, District shall convene an IEP team meeting to address Student's special education and related service needs in the areas of behavior and occupational therapy. District shall fund the attendance of the

independent educational evaluation assessors at an IEP, at a rate of payment consistent with existing District policy.

4. Pending the assessments and IEP team meeting contemplated by this Decision, Student shall remain eligible for special education and related services and her placement and services shall remain as stated in her last agreed upon and implemented May 2016 annual IEP.

5. District shall provide no less than three hours of training for all district special education personnel in the topics of: conducting re-assessments of a student in all areas of need when warranted; relevant information to include in assessments and reports; assessing for and developing new appropriate goals in all areas of need when circumstances warrant; not relying on outdated goals; updating goals after appropriate reassessment; and each individual staff member's personal responsibilities in these areas. This training shall not be provided by a District employee or by an employee of the attorneys' office representing the District. Rather, it must be provided by an independent expert in state and federal special education laws, who shall be directed to read this Decision prior to conducting the training and shall tailor the training to the facts presented herein. This training shall be arranged and completed by June 30, 2018.

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 is the prevailing party on Issues 1(a), (b) and (c) and Issues 3(a) and (b). District is the prevailing party on Issue 2.

RIGHT TO APPEALS

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 20, 2017

_____/s/_____
JUNE R. LEHRMAN
Administrative Law Judge
Office of Administrative Hearings