

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT

v.

SAN MARCOS UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2017101012

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 23, 2017, naming San Marcos Unified School District. On November 28, 2017, OAH continued the matter for good cause.

Administrative Law Judge June R. Lehrman heard this matter in San Marcos, California, on February 27, 28, March 1, 5 and 6, 2018.

Nicole Hodge Amey, Attorney at Law, represented Student. Student's Mother attended all hearing days except March 6, 2018. Student's Father attended on February 27, 2018.

Tiffany Santos and Sarah Orloff, Attorneys at Law, represented District. District Executive Director of Special Education Dawn Dully and Program Specialist Amanda Carlson attended all hearing days.

At the parties' request, OAH continued the matter to March 23, 2018, 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 fail to meet its “child find” obligation by failing to discuss eligibility under the category of autism?
2. Did District deny Student a free appropriate public education in the May 30, 2017 individualized education program by predetermining Student’s eligibility?
3. Did District deny Student a FAPE in the May 30, 2017 IEP by failing to offer appropriate IEP related services to meet Student’s unique needs?
4. Did District deny Student a FAPE in the May 30, 2017 IEP by failing to allow Parents full participation and consider Parents’ request to discuss Student’s evaluations, specific needs and eligibility?
5. Did District deny Student a FAPE by failing to complete a Behavior Emergency Report and hold meetings within one day of restraint and seclusion of Student?
6. Did District deny Student a FAPE by failing to assess her in the area of physical therapy?
7. Did District deny Student a FAPE by failing to provide her services in the area of physical therapy?
8. Did District deny Student a FAPE by failing to assess her in the area of assistive technology?
9. Did District deny Student a FAPE by failing to provide her services in the

¹ The parties confirmed the issues at the prehearing conference on February 16, 2018, and at the commencement of the hearing.

area of assistive technology?

SUMMARY OF DECISION

Student did not establish that District failed to meet its "child find" obligation by failing to discuss eligibility under the category of autism. District located and assessed Student, thereby complying with its child-find obligations. Moreover, District discussed eligibility under the category of autism in its assessments and during Student's IEP team meetings. District prevailed on Issue One.

Student did not establish predetermination of eligibility in the May 30, 2017 IEP. There was no evidence of predetermination and substantial evidence to the contrary. District prevailed on Issue Two.

Student met her burden in Issue Three, proving that District denied Student a FAPE in the May 30, 2017 IEP by failing to offer appropriate IEP related services in the area of behavior to meet Student's unique needs. District's assessment and the conversations at the IEP team meetings revealed substantial doubt and uncertainty on the part of District IEP team members concerning the proper way to address Student's behaviors. Despite knowledge of her needs in the area of behavior, District offered Student no related services in that area of behavior, even on a temporary basis until it could gather more data. Student prevailed on Issue Three.

In Issue Four, Student did not establish that District denied Student a FAPE in the May 30, 2017 IEP by failing to allow Parents full participation and by failing to consider Parents' request to discuss Student's evaluations, specific needs and eligibility. There was substantial evidence establishing full participation, although Parents ultimately disagreed with District about Student's eligibility. District prevailed on Issue Four.

In Issue Five, Student did not establish that District restrained or secluded Student. Student therefore failed to establish that District denied Student a FAPE by

failing to complete a Behavior Emergency Report and hold meetings within one day of restraint and seclusion. District prevailed on Issue Five.

In Issues Six through Nine, Student did not establish that assistive technology or physical therapy were areas of need for Student. Student therefore failed to establish that District denied her a FAPE by failing to assess her or provide her with related services in these two areas. District prevailed on Issues Six through Nine.

FACTUAL FINDINGS

BACKGROUND

1. Student was born on June 2, 2014, and was approximately three years and eight months old at the time of hearing. At the time of the May 30, 2017 individualized education program team meeting, she was about to turn three.

Regional Center Assessment

2. On December 23, 2015, when Student was one year and six months old, she was observed and assessed by clinical psychologist Melissa Katz-McArthur, Ph.D. for an Early Intervention Evaluation/Autism Focused Assessment on behalf of the San Diego County Regional Center. The assessment focused on concerns regarding Student's minimal eye contact, self-injury, and inconsistent responses to herself in the mirror. The assessment reported Parents' concerns: Student did not make requests, other than to bring over a box of cereal indicating hunger; she very occasionally pointed, and occasionally used a sign for "more," she sometimes waved; she inconsistently engaged in vocalizations that were sometimes directed at others; her responses were delayed; she did not seem to understand words or directions; she inconsistently responded to her own name; she made minimal eye contact; she made no approach to her family for social interaction, or when upset; she demonstrated an inconsistent social smile; she

showed little interest in toys, a lack of interest in other children; she had a history of behavioral concerns, including lack of awareness of danger, head-banging when upset, sensitivity to textures, songs, lights, and sound; she had tantrums; and she displayed odd body movements and postures, hand- flapping, flat affect, and tactile defensiveness.

3. Dr. Katz-McArthur observed Student as part of her assessment. Student sometimes engaged in vocalizations, sometimes directed at others; she did not imitate sounds or words. She did not seem to use sounds with communicative intent. She did not respond to familiar words, or to her name. She waved "bye" with a prompt. She clapped appropriately, and she pointed on two occasions. She demonstrated fleeting eye contact. She smiled twice, in response to noises. Otherwise, she demonstrated a mostly flat affect. She did not try to show things to others or follow a point. The assessor observed no reciprocal social interactions.

4. Dr. Katz-McArthur opined that Student's delays might be indicative of an autism spectrum disorder. She recommended that Student receive intensive behavioral intervention three days per week.

5. Student qualified as "developmentally delayed" for Regional Center services and had an Individualized Family Service Plan for overall developmental delays. Through her third birthday, Student received a program and services provided by the San Diego Regional Center through the California Early Start Program.² The program

² "Early Start" is another name for the California Early Intervention Services Act (Gov. Code, § 95000 et seq.). An infant or toddler under three years of age is eligible if the child demonstrates a developmental delay. (Cal. Gov. Code, § 95014, subd. (a); 20 U.S.C § 1432, definition (1); see also Cal. Code Regs., tit. 17, § 52020.) The Department of

and services consisted of 36 monthly sessions of applied behavioral analysis at 120 minutes per session; two occupational therapy sessions per week at 60 minutes per session; one session per week of language and speech therapy at 60 minutes per session; one session per week of infant education at 60 minutes per session; and one session per week of family training and counseling at 120 minutes per session.

6. Student in her infant education program provided through Early Start, was working on goals in the area of functional communication, safety, play skills, self-help, joint attention and pre-academic skills, and disruptive behaviors. A May 2016 progress report reported that Student's behaviors were socially and communicatively developmentally younger than her age. She was interested in other adults and children, making eye contact and initiating interaction upon greeting, but did not engage appropriately. She was learning to play with her toys appropriately and have reciprocal exchange. She screamed, cried and eloped when she was denied access to preferred items. She engaged in self-injurious behaviors of throwing her head and body back and falling on to any surface without a sign of caution. She did not follow simple instructions to sit down, stand up or come here. She was beginning to increase her ability to follow basic instructions. She exhibited sensory-seeking behavior. Her communication skills fell under the 8-12 month range. She shouted for attention, babbled single consonant "ba," and said "dada and "mama." Her language was in the range of 12-16 months. In the social-emotional realm, she fell within the 10-14 month range. Her self-help skills in daily living activities such as dressing, feeding and toileting skills fell under the 11-15

Developmental Services delivers Early Start services through regional centers. (Gov. Code, § 95004; Welf. & Inst. Code, § 4620.) Title 17 of the California Code of Regulations, section 52112, prescribes a process for a transition from Early Start to special education services as an eligible child approaches the age of three.

month range. She could engage in reciprocal play, turn-taking, and waiting when highly motivated by the toys available. She could follow another person's lead and engage in simple make-believe activities through imitation. In the area of self-help, she needed hand-over-hand assistance to brush her teeth, wash her hands, dress and undress, and eat with utensils.

7. Behaviorally, she displayed frequent tantrum-like behaviors and was beginning to display aggression towards family members by hitting them. She became very upset quickly when given an instruction that was non-preferred or when denied access to a preferred activity. She attempted to elope, then after eloping engaged in sensory-seeking behavior. Her attention to new tasks was low.

8. The infant education report summarized that her strengths were: she made great eye contact and initiated engagement upon greeting. She could participate in reciprocal exchanges by rolling a ball back and forth and pushing cars back and forth. Her imitation skills were emerging and she was motivated by social praise.

Regional Center Referral to District

9. The Regional Center referred Student to District as part of her transition from Early Start. In January 2017, District School Psychologist Nancy Mendoza met for a school transition meeting with Regional Center. District developed an assessment plan to determine her eligibility for special education and related services when Student turned three years old.

10. Ms. Mendoza reviewed Student's Regional Center program and records. She discounted the relevance of Dr. Katz-McArthur's assessment and the infant educators' progress report, because these were from when Student was younger. Also, despite the fact that both the early assessment and progress report appeared to contain the evaluators' independent observations, Ms. Mendoza discounted them as having

been based primarily on Parent self-reporting. When Ms. Mendoza reviewed the progress report, she focused on Student's areas of strength, which in her opinion were not consistent with autism. Ms. Mendoza also noted that Student had not attended a daycare program or a preschool program yet, and therefore she had no prior consistent experience in an academic group program without family involvement.

11. Ms. Mendoza observed Student at home for approximately 30 minutes. During her observation, Ms. Mendoza observed Student in her room with her brother present. When Student was upset that she could not work her iPad, she threw herself on the ground, screaming and crying, but stopped when Mother fixed the iPad, and thereafter was able to watch the iPad without support. Ms. Mendoza observed that Student demonstrated communicative intent when she threw herself to the ground when her iPad did not work. Student drank from a bottle and when she dropped it, she laughed and made eye contact with Ms. Mendoza. Student attended to Mother when Mother conversed with Ms. Mendoza. Student approached and tugged at Mother but made no verbal requests. She pointed to what she wanted while making eye contact with Mother. Student used one-word utterances after it was imitated (aqui, mommy, paya, now, shows, okay). When her brother interfered with her blanket, Student made eye contact with him, screamed out loud while pointing, and hit him three times with an open hand, but when Mother asked brother to move, Student quickly calmed and smiled. Student used unintelligible jargon with her brother, while giving appropriate eye contact, in two back-and-forth exchanges with him. Student ignored Mother's directions. She imitated her brother, observed him, laughed, and made appropriate eye contact. She used jargon gestures to demonstrate what to do with toys. Student made eye contact with Ms. Mendoza, walked to the door while maintaining eye contact and closed door as she said "bye-bye." Ms. Mendoza observed no repetitive or sensory maladaptive behaviors, no difficulty navigating the physical environment, no sensitivity

to noise or touch, and no self-stimulatory or repetitive ritualistic behavior.

DISTRICT ASSESSMENTS

12. In addition to Ms. Mendoza's records review and observation, a District transdisciplinary team conducted two formal assessment sessions of Student in April and May 2017. The assessors included Ms. Mendoza, Early Childhood Education Specialist Amanda Carlson, occupational therapist Ivy Keim, adapted physical education specialist Kelly Kill, and a speech pathologist. All assessors except the speech pathologist testified at hearing. The assessments resulted in a report dated May 30, 2017.³

13. In the first assessment session, Student refused to enter and Mother had to carry her into the assessment room. Once inside with Mother present, Student demonstrated escalating behaviors that lasted for 25 minutes. She screamed, kicked the door, banged the door, hit the table, shook her milk bottle, spraying an assessor and the floor with milk, threw her milk bottle onto the floor, and attempted to gag herself. Ms. Mendoza attempted to calm Student and asked Mother how to calm Student. Mother replied that the only way to calm Student was to have her brother in the room with her. The assessors determined to allow brother to enter the assessment room. Student calmed when her brother was allowed to enter the assessment room with her. The assessors determined that because Student was unable to be calmed without her brother present, Mother and brother would remain in the room for the rest of the sessions. Prior to her brother's arrival in the first session, Student did not engage with

³ Witnesses including Mother and Ms. Mendoza credibly explained at hearing that at the May 30, 2017 IEP meeting, Mother did not have a Spanish language written copy of the assessment report. Rather, the report was discussed at the IEP meeting and Ms. Mendoza translated certain portions to Mother.

others. After her brother walked into the room, Student was more interested in interacting with the environment.

14. In the second session, although brother was in the assessment room from the beginning of the session, Student required 10 minutes of wait time to engage with toys and environment. She was hesitant to engage with the examiners throughout the session. Student shared toys with her brother on her own terms, and when her brother attempted to share a toy, Student would grab toy and say "mine." Part of the second session was also held in an elementary school's preschool playground. Student required multiple prompts to participate with adult-led tasks in this environment.

15. After brother began attending the assessment sessions, Student did not demonstrate further significant behaviors in the remaining first session or in the next session. However, throughout both sessions while her brother was present, she continued to demonstrate non-compliant and task-refusal behaviors. She required multiple prompts to transition and did so on her own time. She withdrew from interaction with assessors by sitting away or standing in another area of the room, with her head down and not responding to prompts. She eloped from tasks or stated she was "all done."

Ms. Mendoza's Administered Instruments⁴

16. Ms. Mendoza had been a school psychologist for approximately six

⁴ The assessment report is organized by areas of need, i.e. pre-vocational, pre-academic, behavioral etc., thus grouping the impressions of all assessors and assessments together without attribution. This Decision finds it more instructive to parse who thought what about Student, and therefore the summary of the assessment is organized by assessor, in accordance with the testimony taken at hearing.

months when she assessed Student. She had conducted approximately 40 preschool assessments.

17. Ms. Mendoza administered the California Early Start Health and Developmental Questionnaire; reviewed a parent questionnaire and parental input; administered the Autism Spectrum Rating Scale; the Adaptive Behavior Assessment System, Third Edition; the Psychoeducational Profile, Third Edition; and participated in administration of the Behavioral Language Assessment Form.

18. On the parent questionnaire, Mother reported that Student had challenges with textures, could not tolerate touching certain textures, and must be spoon-fed when eating solid foods; primarily drank liquids such as milk and supplements; had difficulty coordinating a spoon, and when she does not like a food, she will spit it out. Student's strengths were her intelligence because she knew her colors, shapes, some letters, and some numbers.

Autism Spectrum Rating Scale

19. The Autism Spectrum Rating Scale reported Mother's observations in areas associated with autism spectrum disorder, including peer socialization, adult socialization, social/emotional reciprocity, stereotypy, behavioral rigidity, sensory sensitivity, and attention/self-regulation. According to Mother's reported results, Student was in the very elevated range when compared to same-age peers on the autism spectrum. Student had significant levels of behavioral characteristics similar to children diagnosed with autism spectrum disorder; elevated results in the 99th percentile in the areas of peer socialization, adult socialization, social emotional reciprocity, atypical language, stereotypy, and behavioral rigidity; sensory sensitivity; self-regulation deficits; social communication deficits; and repetitive behaviors. Mother rated Student's attention/self-regulation skills when compared to same-age peers on

the autism spectrum as very elevated. Student had difficulty communicating either verbally or non-verbally to initiate, engage in, and maintain social contact. Student rarely looked at others when interacting with them; had trouble talking with other children; and had social problems with children of the same age.

20. Ms. Mendoza found Mother's reporting inconsistent with her own observations of Student in the home observation and in the formal assessment sessions. Ms. Mendoza witnessed reciprocal exchanges between Student and her brother and with multiple adults. During the first assessment session, after her brother arrived in the assessment room, Student looked at the examiners who were speaking to her. She shared items back and forth at least four times, and asked for a turn by requesting verbally (e.g. "My turn") at least three times. She played with her brother by initiating/sustaining play, and shared items back and forth. She sustained a social game of ball with four exchanges of catching and throwing a ball with an assessor. She showed interest in a variety of toys and games and allowed others into her play space if she had control of the play. She demonstrated, across both sessions during free play, emerging pretend-play skills. She put noises to trains and fire trucks, put voices (although unintelligible) to toys (penguins, dog), filled cups up with pretend drinks, ate pretend food, played appropriately with a toy kitchen, and talked on a toy cell phone.

Adaptive Behavior Assessment System

21. Mother also completed the Adaptive Behavior Assessment, a measure of skills important for everyday life, such as communication, social and academic skills, home and community functioning, leisure and work activities, self-care and health and safety. Mother reported Student's overall adaptive functioning to be in the extremely low range when compared to same-age peers. Student was strong in functional pre-academics. She was weak in communication. Mother reported low conceptual skills with

extremely low scores on the communication skills subtest. Mother reported extremely low social skills. Mother reported low practical skills with extremely low scores on the self-care, health and safety, and motor subtests. In the area of self-care, Mother reported that Student never drank from a cup, or ate independently with a spoon or fork. Mother's responses to the assessment tool resulted in a global adaptive composite in the extremely low range.

22. Ms. Mendoza found Mother's reports to be inconsistent with her own observations. In her opinion, Student's adaptive behavior was not as low as Mother reported, because, although Student used only a few words, Student was able to communicate her wants and needs. When Ms. Mendoza observed Student, Student showed interest in multiple toys. She played with multiple modalities such as play-doh, a play kitchen, and a Mickey Mouse doll. She gave voices to the Mickey Mouse doll, held up a cellphone and pretended to talk. She engaged in pretend play. She and her brother pretended to make coffee and then they pretended to eat and drink it. They talked in gibberish. In Ms. Mendoza's opinion, these behaviors showed that Student was using imagination in her play. She exhibited both self-awareness and awareness of others that were inconsistent with autism spectrum disorder. Student looked at faces; looked at persons who called her by name; laughed when others laughed; raised and lowered her voice to express emotions; said the names of other people i.e. her brother's and Mother's names; and she said "yes" or "no" in response to questions.

Psychoeducational Profile, Third Edition

23. The Psychoeducational Profile assessed Student's developmental learning potential and maladaptive behaviors related to the autism spectrum. The assessment tool was composed of 10 subtests, six that measure developmental abilities and four that measure maladaptive behaviors. These subtests formed three composites in the

realms of communication, motor skills, and maladaptive behavior. The assessment tool is normed against children with autism, such that mild or moderate scores must be understood as scores that compare the subject with children who are on the autism spectrum, not with typical peers.

24. Student's learning potential, including problem-solving skills, auditory processing, and verbal memory fell in the developmental age of three years, eight months, i.e. above her age range. Of the tasks associated with learning potential, Student could match objects with their pictures, find hidden objects, respond to initiation of play, repeat words and digits, finish three and four piece puzzles quickly, correctly give sounds to toys (e.g. train, fire buck, coffee maker, microwave), use "yes" and "no" appropriately, and learn a new skill with just one demonstration (activating a toy, counting to let penguins go down a tower). She demonstrated some failures in some skills, e.g., in copying shapes and letters, drawing a person, writing her first name, responding to imitation of sounds, repeating three digits, and repeating two sentences composed of three-four words. However, Ms. Mendoza attributed those failures not to skill deficits but to "task avoidance."

25. The characteristic motor behavior scale measured tactile and sensory behaviors, as well as a child's ability to play independently in age-appropriate ways and shift between tasks. Student displayed failing and severe skills before her brother entered the room in shifting from one task to another easily. After her brother entered the room, Student displayed a moderate level of autistic-like behaviors related to motor behaviors. Student displayed appropriate skills examining different textured blocks, manipulating testing materials, looking at test materials and environment, using visual information, and examining textures. She displayed mild skills in using imagination to play with toys, playing in age-appropriate ways by imitating her brother's actions, and exploring the testing environment appropriately. Dependent on the task, she sometimes

avoided the assessors. She inconsistently listened to the examiner and inconsistently completed age-appropriate tasks. Student demonstrated avoidant behaviors that may have impacted her performance on this scale. Ms. Mendoza attributed motor deficits, if any, to "task avoidance."

26. In reporting the results of the Psychoeducational Profile, Ms. Mendoza made many references to task-avoidance. For example, Ms. Mendoza estimated Student's visual-motor imitation skills to be in the two years, five-month range. She attributed Student's below-age performance not to significant deficits in this skill, but to "behaviors of resistance to adult-lead tasks which may have impacted her performance." Student demonstrated failing and severe skills when showing enjoyment of music through singing or movements, that Ms. Mendoza also attributed to "task avoidant behaviors." The report did not explain how or why Ms. Mendoza came to this conclusion, nor did it delve further into what needs Student's "task avoidance" might signify.

27. Ms. Mendoza concluded that Student demonstrated both typical and above-expected cognitive abilities for her age. However, she displayed behaviors that impacted her ability to engage with others and "requires a range of supports to demonstrate her abilities."

28. Ms. Mendoza reported that due to Student's current language ability and her young age, her cognitive scores should be viewed with caution. The assessment results were at best, "a current estimate" of Student's present functioning. Ms. Mendoza cautioned against considering the results as a predictor of future potential. Somewhat inconsistently with that guarded language, however, Ms. Mendoza also concluded that Student's cognitive abilities were not an area of concern. She reported that Student presented with strong cognitive skills to learn.

Ms. Carlson's Pre-Vocational Assessment

29. Amanda Carlson, who currently oversees District preschool programs as a program specialist, served in 2017 as an early childhood education specialist. Her duties included assessments, of which she performed at least 900.

30. Ms. Carlson and the team assessed Student's pre-vocational skills through observation and play. Various assessors took turns playing with Student and observing her skills. Student explored the room by walking around, picking up toys, and interacting with her brother and various examiners. The assessors observed Student making eye contact when interacting with examiners, transition to different areas of the room with verbal prompting only, ask for help when she needed it, and follow single-step directions. Her attention-to-task varied, with a maximum of one minute of sustained attention, while working with an adult. During that minute, she required eight verbal prompts to remain on task, given one-to-one instruction. On another occasion she was able to sit with an examiner for up to three minutes with between one and nine prompts for a single task, while completing tabletop tasks, given one-to-one instruction. Student shifted her attention between adults easily and looked when her name was called from various areas of the room. The observers did not see her follow two-step directions, but she regulated her attention, feelings, and impulses well, with her brother playing alone on the other side of the room. The play-based assessment indicated to Ms. Carlson that Student's pre-academic skills were an area of strength for Student and were nicely developing. Based on her observations during assessment, along with analysis of previous assessments, and the parent rating, Ms. Carlson determined that pre-academics were not an area of concern or need for intervention.

31. Ms. Carlson also observed Student, did a parent interview and administered the Developmental Profile, Third Edition, consisting of a questionnaire completed by Mother that evaluated Student's functioning in the physical, adaptive

behavior, social-emotional, cognitive, and communication realms.

32. Mother reported that Student's adaptive or daily living skill behaviors were in the delayed range. She reported Student was not able to drink from a sippy or open cup, use a fork or spoon for self-feeding, undo fasteners, remove shoes and socks, help put things away, remove pullover clothing, or urinate in the toilet without assistance. Ms. Carlson noted in the assessment report that "It is unclear, based on parent report, if Student has been given the opportunity to master more self-help skills or if her behavior has interfered with mastery."

33. Mother also reported that Student's cognitive skills were average. Student was able to imitate something an adult does, hold things in both hands and bang them together, look for a toy that has been moved out of sight, look in the direction an adult has pointed, point to one body part, use crayons to make marks on a surface, point to something on a page, care for a doll or stuffed animal as if it were a living thing, point to at least 20 items seen in pictures, say size words such as "big/little", sort by color, shape, or size, and count six objects if placed in front of her. She could not give "one more" of something when requested, imitate a circle with a crayon, understand the meaning of "three," or imitate intersecting lines. For many of the skills on this rating form, Mother reported Student to perform "sometimes," as Student often refused to comply with directives or interact with pre-academic tasks at home. Mother reported Student demonstrated knowledge of concepts inconsistently.

34. Mother reported that Student's social-emotional and behavioral skills were delayed. She did not get calmer with human contact when upset, look at an adult who was talking, greet familiar adults by reaching for a hug, entertain herself for 15 minutes without needing constant adult attention, let someone know she needed to use the restroom, play with same-aged children at least once per week, show awareness of emotions of others, explore new places comfortably, prefer to play alongside other

children rather than playing alone, or join group games without help from an adult.

35. Mother rated Student's physical skills as average and not an area of concern. Student could stand, run, and walk with ease, stack at least three items, copy a vertical line, build a bridge using three blocks, and safely buckle herself into a car seat. However, Mother did not rate her to be able to alternate her feet going up stairs, throw or catch a ball, or use scissors.

36. In the area of communication, Mother rated Student's skills were below average. Student babbled and imitated words, waved "bye-bye" in response to adult's words, could name at least 20 items seen in pictures, repeat parts of a nursery rhyme, use at least 50 different words when speaking, and sing a song of 30 words by herself. Mother reported her to "sometimes" clearly understand the word "no", ask for "more", follow instructions of three or more words, and put two words together to make sentences. Student was not able to follow two-step directions, sing at least one verse to a familiar nursery rhyme, respond to nonverbal gestures, look toward a sound when it started, use the names of people she did not see every week, or raise her arms to be picked up.

37. Ms. Carlson's observation of Student's communication during the assessment was notably discrepant from what Mother reported in the home setting. Ms. Carlson observed that Student was able to use several two- or three- word phrases with a correct context (e.g. "This one, that one", "It, Elsa", "No, sit down", "Water, yucky", "I all done", and "Gonna play kitchen"). She sang along to a familiar song, stated her age correctly when given a choice of options, asked for "help," when she needed assistance (on one occasion), followed directions given from across the room, and made eye contact when requesting something.

38. Ms. Carlson was aware that Student had received services from the Regional Center. Ms. Carlson held an "added authorization" in autism and taught over

200 students with autism, in over 16 years of teaching. She did not believe that Student exhibited characteristics of autism during the assessment. Student's eye contact was good; she responded to her name being called; she transitioned from one task to another without assistance; she responded to one-step directions; she attended to others socially and easily; she had no repetitive behaviors; she could use descriptive terms; state what she wanted to do next; and indicate intentions. She sought social engagement without prompting and played reciprocally by handing items back and forth. She had an interest in toys and in reciprocal social interactions. During this assessment session, Student did not have a lot of verbal output. But, she vocalized, and sometimes answered. From this observation, Ms. Carlson opined at hearing that Student had the ability to communicate and did so if she wanted to. Because she occasionally answered some people some of the time, doing so was, in Ms. Carlson's opinion, a "choice." The assessment report did not explain how or why Ms. Carlson came to this conclusion, nor did it delve further into what needs Student's choice might signify.

39. The Behavioral Language Assessment was an observational rating scale of behaviors related to autism spectrum disorder. Ms. Carlson and other team members conducted the assessment and reported the results. The assessment tool was used to find skills to target for intervention. The scales measured performance ranging from one (significant area of support, significantly low performance) to five (typical behaviors for age) in various categories of cooperation, imitation, play, conversational skills, social interaction and other skills. Student performed at a Level One in the area of identifying letters and numbers, indicating she had not acquired a sizable number of labeling and receptive responses, however, Student was speaking with communicative intent, indicating her vocabulary knowledge was clearly increasing (e.g. "I play this one" or "I gonna play kitchen"). The assessment report stated that her "inability to label letters or numbers could be indicative of level of exposure rather than ability to learn static

information or communicate needs and wants.” Student scored a Level Two in ability to match objects to presented samples, indicating an emerging ability to discriminate among visual stimuli. The assessment report again opined that Student's limited social reciprocity and sustained engagement with tasks “appeared to be a choice and not due to distraction or self-involvement, as Student made direct eye contact, listened to instructions, and then moved to a different item of interest (while looking back to see if the examiner was watching).”

40. Throughout both sessions, Student required on average five or more prompts to follow some simple tasks, depending on which examiner was giving them. Even with the additional prompting and wait time, she did not complete tasks or follow directives consistently. Student made eye contact when her name was called, and at times required five prompts to acknowledge the person calling her name. She demonstrated the ability to follow gestures (to look, give high fives) but was not consistently responsive. She generally wanted to engage with others only if her brother first engaged, if it was a preferred task, or at her own time but not to follow a directive. She shifted from adult-led tasks quickly and was not able to be redirected consistently. She sought help independently on two occasions. She was not responsive to prompts to ask for help. Her comfort with assessors was inconsistent and it shifted dependent on the task requested of her. She expressed her needs to others by pointing and giving appropriate eye contact when requesting. She referenced evaluators between tasks, smiled when she was successful with an activity, and said “sorry” on one occasion to an evaluator when she stepped on a toy.

Speech and Language Assessment

41. A speech language pathologist administered the speech and language assessment. Her report included findings from the following tests: Preschool Language

Scale, Fifth Edition, Spanish Edition (PLS-5); Systematic Analysis of Language Transcripts (SALT); and the Clinical Evaluation of Language Functioning Preschool- Second Edition (CELF-2), Pragmatics/Descriptive Pragmatic Profile. The assessor also took, through observation, a sample of Student's conversational language, and screened Student's articulation, oral-motor abilities and voice and fluency.

Preschool Language Scale

42. The Preschool Language Scale is a standardized assessment to determine whether or not a student has an adequate level of language skills for his or her age. The test evaluates a student's auditory comprehension and expressive language abilities.

43. On the Auditory Comprehension subtest, tasks are designed to assess a child's understanding of basic vocabulary, concepts, appropriate play, and grammatical markers. Student demonstrated auditory comprehension at one year, six months, or below average. She did, however, reference people (brother; mother); engage in pretend-play; and understood pronouns "you" and "me."

44. The Expressive Communication subtest is used to determine a child's ability to communicate, name common objects, use concepts, and speak with targeted grammar and sentence structures. Student's expressive abilities on the expressive communication subtest were in the two years, one-month range and were below average. Her expressive language abilities included participating in a play routine with the examiner for at least one minute, using appropriate eye contact, extending toys and pointing to objects to show others; expressing at least five words; using words for a variety of pragmatic functions; using different word combinations; and combining three and four words in spontaneous speech.

45. Student scored below average on the auditory comprehension and expressive communication assessments. However, the assessor noted in her report that

Student's noncompliant behaviors may have impacted her test scores.

Systematic Analysis of Language Transcripts

46. A language sample is a measure that provides information regarding a child's semantic development, expressive grammar, social language, and intelligibility in connected speech. The sample was gathered during the testing sessions through naturalistic play and spontaneous verbalizations. Throughout the evaluation Student expressed herself in English. A total of 50 complete and intelligible utterances were analyzed regarding her semantics, syntax, morphology, and overall language errors. Her mean length of utterance was 1.6 which is below her age level; for her age level she should be between 2.5 to 3.0.

47. Student's vocabulary was limited for her age. She labeled very few toys and pictures. Student demonstrated limited expressive grammar abilities. She expressed a limited number of pronouns. She did not include plurals, basic pronouns, third person singular verbs (e.g. "wants", "helps"), auxiliary verbs (e.g. "is;" "am;" "are"), present progressive verbs (-ing), articles, past tense verbs, or beginning contractions. She asked a single incomplete question to the examiner "Where truck?" Her sampling did not contain a variety of age-appropriate grammar structures. The content for her conversation regarding pictures and play activity was limited. Student could not adequately describe pictures and the play activities. She directed the examiner's attention to what she was doing by calling "Hey!" to the examiner in several instances. She did not initiate or maintain a brief conversation. Student did not role-play during the evaluation.

Clinical Evaluation of Language Functioning Preschool – Second Edition

48. The Descriptive Pragmatics Profile is a checklist that is completed by a parent or familiar adult regarding the child's interactions and social skills. The checklist

examines nonverbal communication skills, conversational routines, and ability to ask for, to give and to respond to information.

49. Mother completed the pragmatic checklist. She reported that Student "sometimes" or "never" used angry, happy, or sad tones of voice, extended her arms to request a hug, pointed to desired objects, raised a finger to indicate "quiet," shook her head "no" for a nonverbal response, waved or said hello/goodbye, looked at the person to whom she was speaking, initiated conversation with family or friends, joined playgroups, games, and conversation with friends or family members, demonstrated turn-taking, communicated verbally or nonverbally when playing with other children, waited until the end of a person's sentence before speaking, said "excuse me," "thank you," "please," "I'm sorry," introduced new conversation topics, stayed quiet when expected, maintained attention while another person spoke, gave or accepted hugs, asked for help from others, stopped a behavior when asked, asked for permission to play with a friend, offered to help others, asked questions when confused, or told the details of an experience or story in the order it has occurred.

50. Student's articulation abilities appeared to be developing appropriately for her age. Student presented no obvious structural oral-motor abnormalities. Her voice pitch, stress and intonation as well as her resonance quality were within expectancies for her age level.

51. The speech language pathologist concluded that Student demonstrated a moderate expressive language delay, and a social communication delay. Her overall language sample did not contain a variety of age appropriate grammar structures. Student had pragmatic difficulties because her interactions and social skills were low when compared to same-aged peers. Student did not initiate conversation with family and peers, did not join playgroups, games, or conversations with familiar persons, was not demonstrating turn-taking, did not communicate either verbally or nonverbally with

friends, and failed to make her needs known. Based upon the assessment results, Student met eligibility criteria in expressive language and pragmatics.

Occupational Therapy Assessment

52. Occupational therapist Ivy Keim assessed Student's fine motor skills. Student could complete fine motor tasks, when attentive. Student had functional upper extremity strength and range of motion to grasp and release objects. She could use preschool materials with adequate control and coordination. Based on Ms. Keim's observations and standardized scores on the Fine Motor subtest of the Bayley Scales of Infant and Toddler Development, Third Edition, Student's fine motor development was consistent with other children her same age and was not an area of concern. She had adequate fine motor skills to access preschool friendly materials.

53. In the area of sensory processing, Ms. Keim's observation did not reveal the sensitivities to visual or auditory input that Mother had reported. Student tolerated sounds, noises and light, and explored a variety of toys and textures. Ms. Keim did not observe self-harm or sensory seeking behaviors. Student engaged in tantrums before her brother came into the room, but this did not appear to Ms. Keim as an issue with her sensory needs or processing. For example, Student's banging on the door did not appear to Ms. Keim to be seeking the sensory input of pressure on her hand.

54. Ms. Keim used Student's brother to aid in the assessment. When Student's brother did an activity, such as playing with blocks, she would comply and do it too. Student's ability to imitate gross and fine motor tasks on command was impacted by the presence of her brother and willingness to participate. Student initially refused adult directives, however with her brother nearby or completing the directive, Student was more inclined to comply. When she did imitate motor activities, she did so with adequate balance, bilateral coordination, and body awareness. Student's sensory

processing in relation to her pre-vocational skills was not an area of concern to Ms. Keim.

55. Ms. Keim was aware that Student received occupational therapy services from a regional center provider, once a week for 120 minutes. The regional center occupational therapist had assessed Student in September 2016 and reported that Student had made progress with fine motor ability and self-care, but engaged in visual stimming, did not like wet or messy tactile play, did not like anything noisy, sought out proprioceptive input by crashing into the couch, bed, or pillows, exhibited behaviors for which she received applied behavioral analysis, had difficulty with transitions and difficulty following adult-directed activity if it is a non-preferred task. Ms. Keim was aware that the regional center occupation therapist was working with Student on self-care skills, activities of daily living, self-feeding in the home setting, dressing, utensils, and the like. Ms. Keim attributed the differences in her observations of Student's skills, as compared to what the regional center occupational therapist was addressing, to differences between the home and school settings.

56. At hearing, Ms. Keim acknowledged that the IEP team had concerns that Student might have difficulty in the classroom without her brother, but she felt that because the concerns were not sensory it was not the occupational therapist's but rather the school psychologist's role to address those needs.

Adapted Physical Education Assessment

57. Adapted physical education teacher Kelley Kill assessed Student over two testing sessions, in an assessment room and on a playground. Adapted physical education is specialized instruction for students who require it in order to access their physical education curriculum. Student's motor skills, range of motion and strength were good. She kicked with definite backward and forward leg swing for each leg, made

forceful sidearm and overhead arm swings, crossed her midline when swinging, stomped -- thereby exhibiting balance on either leg, walked backwards up to four steps, and stood independently from a sitting "W" sit position on the floor. Her gross motor skills were good. Student walked up and sat on stairs and caught a ball. Ms. Kill observed the following deficits: Student crawled and leaped going downstairs instead of walking; she required prompting to perform skills like hopping, jumping and balancing multiple times, however she could perform these skills when prompted. She exhibited defiant behavior and refused to perform at times, which lowered her scores. On the playground, Student tolerated the outdoor environment which was cloudy and cold, and she was not disturbed by environmental noises like cars driving past the school, a school bell ringing, and students walking to and from class. Student could run continuously on uneven surfaces such as: sand, playground, rubber, concrete, and going up and down on the curbs between the surfaces. At times she ran around the playground and would leap off the curbs and jump up onto them while continuously running. Student could go upstairs independently and well, without any unbalanced movements, and down a slide without support.

58. Mother told Ms. Kill that Student had many skills but performing those activities was dependent upon her behavior and desire. Mother was concerned about Student forgetting what she learned. Mother mentioned that Student will always crawl up and down the stairs of their local play structure, and with practice would be able to walk up and down the stairs that day. However, when they would go back to that same play structure, Student would begin again with crawling up and down the stairs, and requiring practice in order to walk up and down the stairs, as if she forgot what she had learned the previous time. Ms. Kill did not observe Student forgetting or re-learning skills she had exhibited.

59. Student successfully navigated the playground independently and with no adult support required in order to appropriately play on the play structure. Student's brother was in attendance during both testing sessions and Ms. Kill used him to engage Student. Student followed and copied his lead, playing, running around, and shoveling sand into a pail. Ms. Kill had no concern about Student's gross motor skills.

60. Ms. Kill administered the Brigance Inventory of Early Development Observation- Third Edition and the Curriculum, Assessment, Resources, and Evaluation- Revised assessment components for gross motor and object control, to score Student on gross motor skills such as running, balance, standing, jumping, hopping, kicking, standing on one foot, etc. The results showcased that Student had age-appropriate skills throughout, with some deficits but no overall delays. Student could stand unsupported, walk unsupported, walk backward three-to-five steps, stoop and return to standing, walk while carrying an object, walk up stairs, run unsupported, step down from a platform or step, climb up a ladder and slide down a slide, jump in place, using feet simultaneously for takeoff and landing. Her object control skills included rolling and pushing a ball, while seated, hurling an object, throwing with an overhand motion, kicking a stationary ball forward, picking an object from the floor, rolling a ball forward from a standing position, and the like.

61. Ms. Kill concluded that Student did not need adapted physical education or specialized instruction. Ms. Kill also did not feel any need to refer Student for a physical therapy assessment, because safety and mobility were not a concern. Student had physical therapy during Early Start, but it was discontinued due to scheduling conflicts. Ms. Kill opined that Student could navigate a classroom and school environments. Ms. Kill was aware of Student's diagnosis of hip dysplasia but did not observe or assess any resulting deficits. Student had a normal gait. Student's running skills were not fully mature, but Ms. Kill did not observe any weakness on one side of

Student's body.

62. Ms. Kill attended the May IEP team meeting at which she went over her assessment and her words were translated to Mother. She did not recommend adaptive physical education.

Assessment's Eligibility Discussion and Conclusions

63. The assessment report examined four categories of eligibility: speech and language impairment, autism, other health impairment and intellectual disability. The assessors concluded Student met the definition of speech and language impaired in the areas of expressive language and pragmatics.

64. In pertinent part, the report stated that Student demonstrated inconsistent skills across environments. Parent observed concerns with behaviors related to the autism spectrum; but in a more structured environment (as found through the two days of testing sessions), Student could demonstrate many typical skills. She struggled with initiating interactions with others but when comfortable and with a preferred task she was able to initiate, maintain, and sustain interaction. She also demonstrated an ability to communicate her needs. She demonstrated a "resistance to controls which may be impacted by her limited exposure to academic environments without the presences of her family." This environmental factor was "unable to be teased out at this time." The report explicitly stated that Student did not meet eligibility criteria for autism because of District's uncertainty how Student might fare in the school environment.

65. At hearing, Ms. Mendoza explained that Student engaged in pretend play, gave voices to Mickey Mouse, held a cellphone up to her ear and pretended to talk, pretended with her brother to make coffee, and pretended to eat and drink over the pretend coffee and talk, although in gibberish. Ms. Mendoza interpreted this behavior to mean that Student lacked the characteristics of autism. In Ms. Mendoza's opinion,

children on the autism spectrum lack the ability to initiate interaction and sustain it, or to use pretend-play and imagination. Student engaged in pretend-play not just with her brother, but with assessors including the occupational therapist. Mother's concerns and observations were considered and taken into account, but differed from the assessors' observations. Ms. Mendoza determined from the inconsistent results that "something was going on" that did not fit the typical autism presentation.

66. The assessment report contained summaries of the assessors' general impressions. In pertinent part, these acknowledged that Student did not perform any task presented without the presence of her brother in the room, displayed significant refusal behaviors that lasted for 25 minutes and only ceased when her brother was included in the assessment, required on average six or more prompts to engage in a structured adult-led task in a one-to-one setting, and even with additional supports did not always attempt or complete tasks. Her learning potential was found not a significant area of concern, although she required six or more prompts to complete each task on this measure, refused to point when asked and instead nodded at correct items, and required activities to be completed on her own time and not when directed. Her prevocational skills were found to be a possible area of concern as she displayed varied resistance to external controls, a shortened attention span when given non-preferred tasks, and reluctance to follow two-step directives. Her pre-academic skills were identified as an area of strength. She demonstrated inconsistent social skills as she rarely initiated interactions with adults in the room, and only sustained interactions with her brother. She presented with mild performance in social reciprocity due to behaviors displayed with her brother throughout the sessions.

67. The summary concerning Student's prevocational skills, which appears to have been authored primarily by Ms. Carlson, stated that it was "likely" that Student's resistive behaviors were being environmentally reinforced in the home environment. It

stated that with consistently applied, structured intervention, the behaviors “may” decrease. It stated that Student’s frustration during the home observation with her iPad not working, expressed by screaming and throwing herself to the floor, may have occurred because Student “was not given an opportunity” in the home environment to “self-soothe or implement a more prosocial way of asking for help.” It also opined that Student “is able to ask for help if she chooses.” It noted Student’s strong cognitive and pre-academic skills, and lack of observed sensory-seeking behaviors on either day of assessment. It concluded that it was “difficult to rule out environmental contributors and learned behaviors when determining a pre-vocational concern for Student at this time as she has not attended a preschool or been observed with typically developing peers.” It concluded that Student’s presentation “may” indicate “behavioral choice versus a deficit,” because her cooperation varied greatly dependent on environmental factors, such as whether her brother was in the room, and which adult gave the directive, and because Student was observed to demonstrate prosocial and cooperative behaviors, including joint attention, reciprocal play, and requesting assistance by asking for help, without significant prompting.

Carlson and Mendoza Hearing Testimony

68. Ms. Mendoza confirmed at hearing that she and the other assessors used Student’s brother throughout the assessments, to calm Student and encourage Student to participate in the assessment. Ms. Mendoza nevertheless opined at hearing that the use of the brother did not increase Student’s scores in the assessment instruments. Her testimony on this topic was not credible, given that it would have not been possible to assess Student at all, had the brother not been present.

69. Ms. Mendoza explained that because the brother did not himself model the skills that were being assessed, he did not increase Student’s scores. This

explanation was not believable, especially in light of the contrary testimony of Ms. Keim and Ms. Kill, who admittedly used Student's brother to aid in their portions of the assessment, and in light of the report's own statement that Student generally wanted to engage with others only if her brother first engaged. Ms. Mendoza's credibility was greatly diminished by this testimony.

70. At other points during her testimony, Ms. Mendoza backtracked, admitting that during the assessment Student did indeed copy what her brother was doing at times, while he was playing.

71. Ms. Mendoza's testimony at hearing appeared much more certain in her conclusions than the contemporaneous assessment report actually indicated. For example, contrary to the nuanced and uncertain statements in the assessment report itself, Ms. Mendoza stated at hearing that the assessment had identified "no weaknesses" in Student's prevocational skills even though the report explicitly stated that prevocational skills were a possible area of concern. Ms. Mendoza also stated that Student's learning potential was above her age-range and that Ms. Mendoza had "no concerns" about Student's ability to learn. Given the equivocal language in the assessment report itself, this testimony was not credible. On cross-examination, Ms. Mendoza admitted, for example, that Student had a weakness in not being able to follow two-step directions. Ms. Mendoza also admitted that Student's behaviors influenced her scores, but because her behaviors did not impede her pre-academic and pre-vocational scores which were high, "we did not have a clear picture" of how Student would do in school.

72. At hearing Ms. Mendoza and Ms. Carlson opined that Student used maladaptive behaviors to get what she wanted, i.e. to get her brother to stay with her. Once she got what she wanted, the behaviors ceased. Ms. Mendoza opined that Student demonstrated intent behind all her actions. Ms. Mendoza also opined that she believed

that Student had control over her behaviors. This opinion was unsupported by any evidence. The function of Student's behaviors had not been assessed and was not known. Ms. Mendoza's conclusion, that because Student wanted her brother, she acted out to obtain her desire, and then stopped with intention and control, was not supported by the assessment evidence. Nor, even had Ms. Mendoza's supposition been correct, did she undertake any analysis as to *why* the brother's presence should have been so important to Student, or what function he served for her. It was also not clear why, given Student's maladaptive behaviors, both Ms. Carlson and Ms. Mendoza had the firm impression that Student was in control of her behaviors. These witnesses had an evident opinion that Student's noncompliant behavior was being reinforced at home, and was voluntary. Their opinions were not satisfyingly explained.

MAY 30, 2017 IEP

73. The IEP team met on May 30, 2017. Ms. Mendoza served as interpreter at the meeting.⁵ District went over the assessment report. Ms. Mendoza summarized the assessment documents. Ms. Mendoza is fluent in both English and Spanish, has her California teacher English Learner Bilingual Certification and is a certified bilingual school psychologist. She translated the IEP discussion verbatim but summarized the documents.

74. The team discussed eligibility. District IEP team members stated that Student was demonstrating a moderate expressive language and social communication delay. District noted that Student's below average scores may have been impacted by

⁵ A Spanish translation of the May IEP was introduced into evidence but it did not exist at the time of the meeting. It was not established if, or when, it was provided to the family prior to the hearing.

noncompliant behaviors. District concluded that Student met the eligibility criteria for speech-language impairment.

75. The team also considered eligibility under the categories of autism, other health impairment and intellectual disability. District determined that Student did not meet the eligibility requirements under those criteria. Parent asked if, were Student to receive a medical diagnosis of autism, would District change her eligibility. Ms. Mendoza explained the difference between the medical versus educational criteria for autism, and that the law requires needs that the disability impacts access to education.

76. At hearing, Ms. Mendoza opined that a medical diagnosis of autism is quite typical at age three, but such a student can perform well in a structured environment such that the medical diagnosis may have no educational impact. Ms. Mendoza felt that Student did not meet the autism category because Student showed intent, had no stereotypical behaviors, no sensory sensitivity and her learning was above her age range. Ms. Mendoza explained that she had "a question" about how Student would do at school once she was in the school environment. Ms. Mendoza disagreed with Mother that Student lacked social communication, because Student indicated communicative intent through gesture, but she lacked vocabulary. Ms. Mendoza agreed with the speech and language impairment eligibility.

Baselines

77. The May draft IEP generated six baselines and goals, three in the area of socialization, and three in the area of communication. Ms. Carlson explained that the socialization goals were to address self-regulation. Even though Student engaged socially and reciprocally with the assessors, she had needs in the area of self-regulation that would fall within the three socialization goals.

78. Baseline number one in the area of socialization stated that Student was

able to sit and attend for up to three minutes, with one-to-one instruction, and up to nine prompts, per single task, depending on the activity, with her brother in the room. Without her brother present, she was not able to follow directives or interact with adults in any way other than protesting by screaming, crying and shaking her bottle. Therefore, for a classroom environment, her starting baseline would be zero percent, as her brother would not be in the room when staff assessed Student's progress on goals.

79. Baseline number two in the area of socialization stated that Student was not yet able to implement coping mechanisms, such as asking for a break or using a "break card" when she was upset. She was observed to have strong reactions when denied preferred activities and not to relent until her desires were accommodated, during assessment. Her baseline was stated as zero percent for implementing coping strategies when upset.

80. Baseline number three in the area of socialization stated that Student was observed to transition to preferred activities given minimal verbal prompting only, with her brother present. In the absence of her brother, she was observed to resist transitioning and attempt to leave the assessment area by opening the door. Student ignored bids to have her transition to non-preferred activities, but looked at the activity first before choosing not to transition.

81. Baseline number four, five and six were in the area of communication, specifically vocabulary, length of utterance, and conversational skills.

82. The IEP team determined Student had no needs requiring assistive technology.

Goals

83. The IEP team developed six goals, three in socialization and three in communication. Goal number one in the area of socialization, was that by an annual

review date of May 2018, Student would sit in a small group for 10 minutes while attending to the teacher and the activity and materials for at least 60 percent of the session, given no less than five teacher directed prompts, without disruptive behavior or leaving the group.

84. Goal number two in the area of socialization, was that by an annual review date of May 2018, Student would request a break by pulling a "break card" or asking for a break verbally, when frustrated or upset, in 70 percent of opportunities for two consecutive weeks.

85. Goal number three in the area of socialization, was that by an annual review date of May 2018, when given visual cues or other transitional cues, Student would independently transition to preferred or non-preferred activities, in at least seven out of 10 transitions per day over three school days.

86. Goal numbers four and five in communication targeted vocabulary and length of utterances.

87. Goal number six in the area of communication was that by an annual review date of May 2018, Student would verbally initiate play with at least one other peer and participate in at least four social exchanges (conversation, turn-taking, sharing) with no more than two visual or verbal prompts, in four out of five occasions.

88. The IEP team did not develop any sensory goals. Except as covered by the three socialization goals and the sixth communication goal, no baselines or goals were written in the specific areas of behavior, pre-vocational, self-help or daily living skills. Parent asked if a goal in the area of sensory regulation could be added because of Student's trouble with self-regulation and behavior. Occupational therapist Ms. Keim opined on the basis of her assessment that Student's sensory needs were not the cause of her behaviors, but she could provide no alternate explanation. Mother questioned whether if sensory regulation were not an issue, then what explained Student's

behaviors and how would these be addressed. District staff members responded that they “are having the same questions and will discuss options for supporting Student.” At hearing, Ms. Keim explained that although she could not explain why Student exhibited the behaviors if she had no sensory needs, District offered to conduct a functional behavioral analysis in order to “tease that out.” District proposed to conduct a functional behavioral analysis once Student was in the school environment; the results of the assessment would provide the team with the necessary information if a goal for self-regulation as it relates to behaviors was needed.

89. District Behavior Specialist Katerina Dewing explained, at hearing, that the purpose of a functional behavioral analysis is to discern the function of behaviors and shape the appropriate response, and to assess the need for additional supports if any. The assessment must be conducted in the setting in which the behaviors to be assessed may occur, i.e. in the classroom, so that the correct triggers or antecedents can be identified.

May 20, 2017 IEP Offer

90. District offered Student placement in the preschool program at Alvin Dunn Elementary School. The preschool program serviced both special education and general education students. As related services, District offered group speech of 1,200 minutes per year. The IEP team offered an accommodation to provide “[v]isual cues/scheduling to assist [Student] in navigating the school routine, communication, and following directions.” Classroom staff would also provide “assistance with toilet training/diaper changing.”

91. District offered “activities to support transition” as follows. The family was invited to observe the program and meet the instructional team, prior to enrollment, in order to ease the transition to preschool. The behavior team would “assist [Student] in

transitioning into the classroom upon her arrival and will begin tracking responses to classroom environment and will conduct a functional behavioral analysis within first 60 days. Someone from the Behavior team will be there on day one and for the first week to work with [Student] and support her transition to preschool.” Ms. Mendoza at hearing explained that the transition supports, and the offer to conduct a functional behavioral analysis, were District’s responses to Mother’s concerns.

92. Ms. Dewing explained at hearing that District intended the offer of a behavior team on the first day of school and during the first week to “support” Student’s transition to school. Behavior interventionist, Nelson Castillo, would provide support as needed, looking at areas of concern, and giving feedback to staff. Ms. Dewing would supervise Mr. Castillo, whose job was to coach school staff. He was not Student’s one-to-one aide. School psychologist Mr. Martinez would also play a support role. At hearing, neither Mr. Martinez nor Mr. Castillo could explain what “support” meant and their testimony concerning these “activities to support transition” was vague. Mr. Martinez could not answer what activities were envisioned, other than that the behavior person was to “support” Student to help with the transition and class schedule. Mr. Castillo could not answer, other than to repeat the word “support.”

93. The IEP stated that Student's behavior did *not* impede learning of self or others. This was based on the fact that no one from District had yet observed Student within a group setting; it was unknown to the District IEP team members how her behavior would affect her learning or the learning of others. District staff would observe her in the program, and upon implementation of the IEP, they would determine her behaviors based on data collection. No related services, such as aide services, were offered relating to behaviors.

94. During discussion of these issues at the IEP team meeting, Ms. Carlson expressed her uncertainties as to whether Student’s behavior was something she had

control over, because Student was able to participate in a number of activities without significant prompting. District acknowledged that Student demonstrated more behavior when her brother was absent. Parent did not agree with a notation on the special factors page where District indicated that Student's behavior did not impede her learning or the learning of others. Parent requested a behavior intervention plan based on the behavior concerns noted. District agreed that there were concerns in the area of behavior; however, Student was very inconsistent with her willingness to comply. Due to this inconsistency, the assessment team did not believe enough data existed to write a specifically tailored behavior intervention plan. The team offered the functional behavioral analysis to assess the function of Student's behavior and establish solid baselines for the purpose of drafting a behavior intervention plan.

95. At hearing, Ms. Carlson explained that at the May 30, 2017 IEP, Parents were asking for the IEP to state that Student's behavior impacted her learning and the learning of others, but District team members did not agree, because District staff did not observe such behaviors and did not think there were educational impacts. Also, the proposed socialization goals had crossover into behaviors, such that if behavior impacted Student's socialization, those goals would address it. Ms. Mendoza explained at hearing that the District IEP team members wanted to start Student in preschool with no behavioral supports and "see how she did."

96. Parents did not agree with District's offer of FAPE, specifically the absence of behavior interventions. The meeting terminated without Parents signing the IEP.

PARENT SUBMISSIONS AFTER THE MAY IEP TEAM MEETING

97. After the May 2017 IEP team meeting, Parents generated a document that cited portions of the assessments concerning Student's maladaptive behaviors as noted by the assessors in the assessment report. Parents cited to numerous observations in the

District assessment document. For example, Parent cited to Ms. Mendoza's home observation that Student threw herself on the ground when upset that she could not work her iPad, screaming and crying. Parents cited the assessment report of Student's difficulty transitioning to the evaluation room, demonstrating escalating behaviors that only calmed when brother entered the room. Parents cited the assessment reports about task-avoidance and refusal, the need for multiple prompts, and Student's inability to follow two-step directions.

98. Parents requested more specific positive behavior interventions, strategies, and supports than had been offered in the IEP. Parents specifically requested that a behavior intervention plan be created. They requested that the behavior intervention plan include specificity about the persons who would implement it; what steps would be taken if and when behavioral problems arose at school, and what measures and intervention strategies would be utilized.

JUNE 20, 2017 CONTINUATION IEP TEAM MEETING

99. District held a continuation of the IEP team meeting on June 20, 2017 to discuss Parents' written concerns regarding Student's behaviors. Mother felt there was enough information to support a finding that Student's behavior impeded her learning or the learning of others, such that the special factors box should be checked. The team discussed Mother's concerns, and District agreed to check that box, pending the results of the functional behavioral analysis.

100. The team discussed beginning the 60-day timeline for a functional behavioral analysis on the first day of school. Parent asked about behavioral supports in place during the assessment process. The accommodations were the only supports District offered, and these were discussed. District shared that the teachers and classroom aides received ongoing behavioral training and that behavioral strategies

were embedded in the classroom. In addition, a behaviorally-trained school psychologist was on campus as an additional resource available to support Student.

101. Parent wanted the IEP to reflect that classroom staff would be behaviorally trained staff, and that the school psychologist would support Student as necessary during the assessment data collection. Parent also wanted access to the behavioral data that was collected during the assessment. District agreed to provide Parent with a copy of the behavioral data at 30 days after the start of the school year.

102. No changes were made to Student's baselines, goals, or related services. No additional behavioral supports were offered. The following changes were made to the May 30, 2017 draft IEP document. First, the IEP team deleted from the May notes that prevocational and self-help skills were areas of need, and that in order for Student to receive educational benefits, goals would be written to address these areas of need. The IEP team considered the deletion to be a correction to the language in the May IEP because the language that pre-vocational and self-help goals were needed was a typographical error.

103. Second, on the special factors page, the June IEP checked the box that Student's behavior *did* impact her learning or the learning of others and added different language concerning why. The new language stated "[Student] has not been observed within a group setting as she does not attend one, and it is unknown how her behavior will affect learning of self or others, however, based on parental account of behaviors observed within the home and across settings, and in the spirit of collaboration between home program and school, IEPT discussed monitoring [Student's] behavior and determining further need for behavioral supports based on functional behavioral analysis results. Goals targeting socialization and self-regulation will serve as behavioral goals." Third, the IEP team added an accommodation for Student to have access to positive behavior supports during the school day, including a token board, visual

schedule, and teaching self-calming strategies.

104. Mother understood at the time that eligibility was still pending but she was consenting to implementation. She also understood that behavioral supports would be in place during the functional behavioral analysis process; that staff received behavioral training; that behavioral strategies were embedded in the classroom; that a behaviorally-trained school psychologist was on campus as an additional resource available to support Student; and that behavioral data would be collected as part of the functional behavioral analysis and shared with Parent.

105. The June IEP notes were orally translated and Parents signed consent to the IEP.

JUNE 2017 PRIVATE EVALUATION

106. Psychologist Susan Gehrig, Ph.D. performed a private evaluation of Student on June 13, 2017, and generated a report dated June 26, 2017. Dr. Gehrig did not testify at hearing. Dr. Gehrig's report was not presented to District in June when it was created. It was not presented to District until August 30, 2017, at an IEP team meeting described below.

107. Dr. Gehrig reviewed records, interviewed Parents, performed an informal play-based observation, and administered the following assessment tools: Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition; Vineland Adaptive Behavior Scales, Third Edition (based on a Parent Interview); and the Children's Autism Rating Scale, Second Edition-Standard Version. Dr. Gehrig's overall impression was that Student demonstrated behaviors consistent with DSM-5 diagnostic criteria for Autism Spectrum Disorder. She noted that since participating in the Regional Center's applied behavioral analysis program, Student had had fewer tantrum behaviors, showed more appropriate eye contact when making requests, and responded more readily to social interactions.

However, she continued to struggle with many basic social-emotional and reciprocal interactions. Her nonverbal communication (e.g., gestures, facial expressions) was not yet consistent. Her pretend play and imitation skills were developing, although still behind same-aged peers, and she continued to exhibit sensory-driven interests and motor mannerisms.

FIRST DAY OF SCHOOL

108. Janie Bringham was Student's preschool teacher. Ms. Bringham appeared to be a warm, gentle and soft-spoken person. Her demeanor was quiet and thoughtful, credible and not defensive, and was given great weight. She has a credential to teach severely handicapped students, and has taught for more than 25 years. Her preschool classroom routine was memorialized in a detailed nine- page brochure that she provided to all parents, so they would know what to expect. The brochure detailed the classroom routines and indicated that behaviors due to an adjustment period are common at the beginning of each year and are to be expected.

109. The class was a "non-categorical" class which meant it served students both with and without IEP's, and that the students with IEP's had varying disabilities. Ms. Bringham reviewed the IEP's of her students before the first day of school.

110. The class day routine began at 8:25 a.m. and lasted three hours. Students found their places at tables according to their names and then started playing for 15-20 minutes. For toileting, the class routine was twice daily during morning play and after recess, unless a student was on a specific toileting schedule. Students were asked in turn to go to the bathroom, by presentation of a toileting icon. Then they were taken to the bathroom. For the toileting routine, students were to sit on the toilet while an aide counted time. Then they washed their hands. They go through the routine, whether they needed to void or not. Students in diapers were taken through the same toileting

routine. There was adult assistance throughout the routine. The aide who assisted Student on the first and second day of school was Risa Williamson. Ms. Williamson did not testify.

111. After toileting, the schedule continued with circle time and movement or song. After circle time, students went into rotations. They had schedules to look at, to know which rotation to go into. The rotation activities were fun, 10-13 minute segments. Successful completion earned a reward. After rotations, students washed their hands, and had a snack. Then there was quiet time, with dim lights and books. After quiet time was a second toileting routine, followed by recess. After recess were closing ceremonies where everyone clapped for everyone else. If a student had earned enough rewards they got a "treasure" at the end of the day. Then there was music and dismissal, and the students were escorted out to meet their parents.

112. Ms. Bringham's 2017-18 class had seven children, five of whom had IEP's and two of whom were general education students. Three aides in addition to Ms. Bringham supported the classroom. Behavioral supports were embedded into the routine. The classroom had a visual schedule. The adults prompted students when necessary. They utilized a token rewards system; a visual calendar; and a circle-time board. The classroom had toys, lots of color, manipulatives, a play area, an area of circle time, three work tables and a bathroom.

113. August 22, 2017, was the first day of preschool. School psychologist David Martinez met Student with Parents and her brother that morning. Parents signed the functional behavioral analysis assessment plan. Parents were concerned about Student's transition to school. They arrived 20 minutes after the school start time. Mr. Martinez testified at hearing and appeared to be very thoughtful, not defensive, and credible. His testimony was given great weight. Student appeared to him to be happy. He observed Student for a short time after her family left. Student observed activities and walked

around the classroom. After the family left, Student began crying, but Mr. Martinez was not alarmed, as it was not abnormal for a preschool child to cry when left alone for the first time. It was common even for typically-developing children at age four and five.

114. Behavior interventionist Nelson Castillo was also present for Student's first day. His function was to "support" the classroom routine. Mr. Castillo's testimony at hearing was vague and nonspecific concerning what he understood his "support" role to constitute.

115. Mr. Martinez returned to the classroom at around 10:00 a.m. and observed Student sitting at a table with Mr. Castillo. Mr. Martinez asked Ms. Bringham how Student was doing. Ms. Bringham told him that Student had cried, off and on, but was adapting, and that she had no concerns. Mr. Martinez went to the school office where Mother had stayed, waiting. He told Mother that Student was doing well, better than expected for her transition to school.

116. Ms. Carlson observed Student in the classroom for 35 minutes on the first day of school. She witnessed Student transition from table-time to circle-time, and clap when others clapped. Student received a "crown" reward for a successful first day, and she smiled and hugged the teacher. She then went outside to meet Parents. Ms. Carlson's perception was that Student was happy and proud.

117. Ms. Carlson saw no behaviors that concerned her. Ms. Carlson felt that the behavior supports that were in place in the classroom were appropriate. She would not have been able to pick Student out among a group of typically developing same-aged children.

118. Ms. Bringham saw no maladaptive behaviors from Student on the first day of school. Student cried occasionally as was typical for preschool students. Student calmed herself by 10:00 a.m. She communicated to the aides. Ms. Bringham understood her. Student adapted to the environment and other children. She followed the class

routine. She participated in the toileting routine willingly. She transitioned without prompting and was not resistant. At recess she played with another girl. She tolerated touch. Ms. Bringham hugged her. She clapped for the other students and seemed to enjoy them clapping for her. She got a reward at the end of the day and seemed to enjoy that. Ms. Bringham thought it was a successful first day for Student. She wrote a report of the day's events, but it contained no data points and was not what Parents were expecting to receive.

119. Mr. Castillo contacted his supervisor Ms. Dewing during the first day of school, and reported that Student had cried occasionally, but the crying subsided and nothing else notable occurred. At the end of the day he reported that Student had stopped crying, seemed to be enjoying her day, and was greeted at session's end by Parents.

120. Student did not, to Ms. Bringham's understanding, exhibit autistic characteristics. She made good eye contact. Student ate on her own after an aide modelled for her. She spoke, although in mostly one and two-word utterances.

121. The preschool schedule was four days a week with Wednesdays off. The next day, Wednesday August 23, 2017, was not a school day.

122. Mother disputed that Student had a good first day of school. She took a video of Student at the end of the school day. The video was not presented into evidence. The video was shown to District team members at a later IEP team meeting. Mother's reaction to the video was that Student was agitated and overwrought. Mr. Martinez felt the video indicated happiness and excitement. Because the video was not introduced as evidence nor shown to the ALJ, no factual findings are made concerning what it depicted.

SECOND DAY OF SCHOOL

123. On August 24, 2017, the second day of school, Mr. Castillo was on duty and his function continued to be to support the classroom routine.

124. Ms. Bringham met Mother and Student at the bus. Student needed physical prompting to walk up the ramp and into the classroom. Mother later challenged that Ms. Bringham had pushed Student and hurled Student's backpack, but Ms. Bringham's credible testimony established that she only slightly guided Student up the ramp and toward the classroom.

125. Student cried at the beginning of the day, which per Ms. Bringham, was typical for young students as they learn separation from their parents.

126. For the morning toileting schedule, aide Ms. Williamson showed Student the toileting icon and Student refused by saying "no." The class strategy after such refusal is to continue offering the icon and to say "your turn" or "let's go." After several refusals, when the aide did this, Student then went willingly with her to the bathroom, according to Ms. Bringham's observation. Student was not forced into the bathroom, as Ms. Bringham credibly stated.

127. After Student went willingly toward the bathroom, Ms. Bringham did not witness Student in the bathroom during the morning toileting routine. Student was inside the bathroom for two or three minutes with the aide Ms. Williamson. Ms. Bringham did not see what occurred in the bathroom, nor did Mr. Castillo. Student was crying audibly and intermittently.

128. Mother entered the classroom as Student was finishing the toileting routine and on the way out of the bathroom. Mother appeared to Ms. Bringham to be angry and was talking very loud in Spanish, which Ms. Bringham did not understand. Amid a lot of very loud talking and confusion, Mother removed Student from school.

129. Ms. Bringham was surprised by Mother's appearance in the classroom. She welcomes parents on the first day of school to try to ease separation. But after that, she tries to separate students from their parent at the ramp, to ease them into their day. Unannounced parent visits are not common.

130. Mother called Ms. Mendoza and left a voicemail message about the bathroom incident. Ms. Mendoza called Mother back and re-directed Mother to speak to the IEP team. Mr. Martinez learned that Mother had removed Student from school, and he called her. He and Mother exchanged a series of very polite emails, resulting in the scheduling of another IEP team meeting to discuss the day's events.

131. Mr. Castillo contacted his supervisor Ms. Dewing and reported that Mother had come in and was concerned, was speaking in rapid Spanish that he could only catch portions of, and that Mother had removed Student from school. Mr. Castillo had taken no data regarding Student for the functional behavioral analysis on either the first or second days of school, as other than intermittent crying he had observed no maladaptive behaviors to note.

132. Mother's rendition of this day's events is that at the beginning of the day, on the ramp into school, Student threw herself to the floor and started to cry, kicking and yelling, and that Mr. Castillo did nothing, but that Ms. Bringham held Student up by her backpack while Student was kicking and resisting, so Ms. Bringham threw Student's backpack out of the way. Mother was upset that this was not the positive behavioral supports she was expecting, and that she expressed this to Mr. Castillo, who appeared indifferent to her. Mother determined at that point that she intended to remove Student from school. She tried to reach Ms. Mendoza and left her a voicemail. She also informed her husband of her intentions. She then went to the classroom and knocked on the door, then entered. She saw children playing. She heard Student who was "desperate," yelling and crying. She could hear Student but not see her, so she asked where Student

was. The cries were coming from another room. Beyond the frame of the doorway, Mother saw the face of a person facing her and blocking her view of the room behind, which is where Student's cries were coming from. Mother asked what that room was, and she was told that it was the bathroom. At that point the woman who was in that doorframe went inside and took Student into the classroom by the hand. Mother asked why Student had been in the bathroom by herself with no one helping her. Mother felt that Student had been locked up, as if she were being detained, judging by the way she was crying. She seemed desperate to Mother, and from what she witnessed there was no adult with her or doing anything to help her. Mother asked Mr. Castillo why Student was all by herself in the bathroom and Mr. Castillo said he did not know. Mother questioned Ms. Bringham why Student was being punished and was told that Student was shown the picture icon for the toilet, that Student said "no," then she refused a second time, then the third time she refused, the aide took her anyway. Mother responded that that was against Student's will. Ms. Bringham stated that the classroom has routines that all students must comply with. Mother's perception was that Student was not being assisted while in the bathroom as her IEP required in the accommodations. At that point, Mother took Student and left.

AUGUST 24, 2017 PARENT SUBMISSIONS

133. On August 24, 2017, Mother wrote an email with a six-page attachment, in Spanish, to various District recipients. The cover email complained that the IEP was not being implemented. The five-page attachment complained about both the first and second days of school. It reiterated Parent's IEP request for a "transition plan," because of Student's difficulty separating from her brother. It reiterated the IEP's agreement to have the behavior support team available to support Student in the transition and to conduct the functional behavioral analysis within the first 60 days. The document

complained these IEP supports were not being implemented. Mother felt there was insufficient support for the transition on the first day of school-she saw no visual schedule to support Student, and she complained that no one had been able to show or tell her anything about the transition supports. No behavior support team introduced themselves to her; she met only the teacher and an unidentified young man; she did not know what his role was she and she did not receive any support from him. Parent also disliked Ms. Bringham's first day log entry, finding that it was "superficial" and not the kind of behavior log Parents had been expecting pursuant to a functional behavioral analysis, which should target events, precedents, the type of behavior, how long it lasted, and how staff intervened. Parents were expecting much more support. Parents in this document reiterated their view that Student was autistic.

134. In regard to the second day of school, August 24, 2017, the document complained that at the school start time the teacher and behavior support person grabbed Student's arm and backpack and Student was crying and was about to throw herself onto the floor. Mother wanted to walk Student to the classroom, but the teacher only permitted her to go to the entrance. When Mother let go of Student's hand, Student threw herself onto the floor, screaming and crying. The teacher threw the backpack onto the floor and forcefully grabbed Student by her armpits and took her away, inside the classroom. The document complained that the behavior person who was there did nothing to support Student, so Mother reminded him that pursuant to the IEP Student was supposed to have transition support and she was not seeing any. It concluded by seeking more behavior supports.

135. A further document generated by Father at or about that same time that complained that the IEP was not being implemented, that there were no positive behavioral supports in place, and that Student was being punished by keeping her in the bathroom with a staff person.

136. August 24, 2017 was the last day Student attended school.

137. District policy, in the event that a restraint or seclusion is used, is for a staff member to complete a Behavior Emergency Report. Restraint or seclusion means any time staff lays hands on a student for safety concerns.

138. District scheduled an IEP team meeting in response to Parents' correspondence.

AUGUST 30, 2017 IEP TEAM MEETING

139. District convened an IEP team meeting on August 30, 2017. The discussion was heated concerning the bathroom incident. Parents asked why Student was being punished. Ms. Bringham expressed that no such punishment had occurred. The parties discussed their varying views of what had occurred. Parents brought further documents to the meeting, in addition to those submitted on August 24, 2017. The additional documents included a five-page document that presented the same complaints as Parents had presented in their August 24 submissions. It repeated that: the IEP had not been implemented; positive behavioral supports had not been in place; when Mother entered the classroom on August 24, Student was in the bathroom; and it requested a reassessment of Student on the basis of autism.

140. Parents presented District, for the first time, Dr. Gehrig's private evaluation report from June 2017. Parents asked the IEP team to consider the report. District said they required time to review it and would do so and would set another IEP team meeting.

141. The IEP ended without resolving the parties' differences.

MR. MARTINEZ'S SEPTEMBER 8, 2017 ADDENDUM TO DISTRICT ASSESSMENT

142. School Psychologist David Martinez reviewed Dr. Gehrig's report and the District's assessments, and generated a September 8, 2017 addendum to District's

assessments. Mr. Martinez reviewed Dr. Gehrig's impressions. He recounted the events of the first day of school as reported to him by Ms. Bringham, Mr. Castillo, Ms. Carlson and based upon his own observations. He recounted the discussion at the August 30, 2017 IEP team meeting. He wrote that both eligibility and placement depend on an adverse effect on educational performance. He recounted the autism eligibility criteria from the currently applicable California Code of Regulations, which require a significant effect on verbal and nonverbal communication and social interaction that adversely affect educational performance. He concluded, after reviewing the District's assessments, Dr. Gehrig's assessment report, and observations from Student's first day at school, that Student did not meet eligibility criteria as a student with autism. It was very important to Mr. Martinez that, when he observed Student on the first day of school, she was socially engaged with her peers. He did not believe that she had a developmental disability that significantly affected social interaction that adversely affected her educational performance.

OCTOBER 18, 2017 IEP

143. Mr. Martinez attempted to review his report at an IEP team meeting on October 18, 2017. Parents attended and stayed to the end of the discussion about Mr. Martinez's eligibility determination. They did not like his conclusion and did not want to further discuss the issue. The meeting lasted an hour and a half but discussion focused largely on the bathroom incident. Parents brought in a new 11-page document which in essence disputed the accuracy of the August 30, 2017 IEP notes page. District interpreted Parents' complaint as a request for an independent educational evaluation. District granted that request in a prior written notice letter dated October 27, 2017.

MOTHER'S TESTIMONY

144. Mother appeared as a credible witness, although it often appeared that

she was answering a different question than what she had been asked, such that her answers were often non-responsive to the question. Mother's answers were, however, detailed and she appeared forthcoming in her responses.

145. Mother is devoted to Student and her other children, and appears to have aptly adopted to the regional center's program, which trained her in applied behavioral analysis. Ms. Carlson's and Ms. Mendoza's impressions, that Student's behavior was not being appropriately managed at home, was inaccurate based on Mother's credible testimony. Mother and the family try to manage Student's behaviors, which occur when Student is separated from her brother, by anticipating situations before they occur, and giving Student instructions about the upcoming situation in the forms of social stories and visual schedules. The family has a book of pictures and figures, and food, which they use to explain to Student what situations are about to happen. For example, prior to a visit to the dentist, Mother will tell Student "tomorrow we will visit the dentist" then show a photo of a dentist. The social stories or scripts Mother used tell Student: "we will go to [location] to visit [person] who will be dressed in [the following fashion] and will do [the following things]." She shows Student photographs of how the locations and persons are likely to look. Prior to going to the two District assessment sessions, Mother used such a social story with Student to prime her where she was going. Days beforehand, Mother took photographs of the location and showed them to Student. She also found photographs of interior office locations that might look similar to the offices where the assessments were to occur.

146. Mother kept a notebook of her children's progress that contains all evaluations, services they have received, progress reports and photographs etc. Her folder contains all the children's achievements, what the family has been working on with them, etc. Student first received applied behavior analysis services when she was one year old, provided by the Regional Center, to teach calming skills, self-regulation,

social interaction and how to have better eye contact. The services were helpful and effective for Student. She made progress.

147. The family and Student used her iPad to communicate; the Regional Center behavioral services provider and speech therapist trained them on the applications to use. One application was for a personal schedule, which Student needed to review every day. She also used pictures and icons on the iPad to communicate. There are pictures on the iPad of what Student is going to do that day, and she can mark with an "x" that which she has accomplished.

148. According to Mother, Student always uses her iPad to communicate. According to Mother, but disputed by Ms. Mendoza, Student had the iPad with her at the assessment. According to Mother, but disputed by District witnesses, Student did not have *any* direct communication with *any* District personnel during the assessments. Her perception of the assessment was that Ms. Mendoza talked only with the brother and not with Student, and gave instructions to brother to then see whether Student could imitate actions that brother was taking as instructed. Mother felt it was not a personal one-to-one evaluation, but was always through the brother such that Student would follow the instructions given to him. According to Mother, the assessors asked the brother to do tasks, not Student. Mother appeared entirely credible in this recollection to the ALJ.

149. Mother informed Ms. Mendoza that Student used an iPad to communicate, during the in-home observation, when Student tried to get into one of her "apps" and the device did not work. However, Ms. Mendoza did not consider this important and she told Mother that all children get upset when things do not work.

150. Mother disputed at hearing that the accommodations were appropriate for Student. Mother believes that Student would not tolerate physical touch, and needed services to allow her to transition into a school setting with strangers. Mother

felt Student needed examples to be shown to her, photos for a visual schedule, and she required pre-teaching of new situations through the use of social stories.

151. According to Mother, Student suffered from hip dysplasia which affected her corporal movements. It affected how she sat and stood. When she walked, her movements were different on the left and right sides of her body. Mother perceived that Student forgot one-half of her body on occasion; if she was using only one side the other side did not work. Student received orthopedic medical services for her hip dysplasia in the past, in the form of special underwear that acted as a supportive cast, followed by physical therapy to reinforce her body and permit her to walk. However, Mother admitted that at the adapted physical education assessment she witnessed Student going up and down stairs.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁶

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)⁷ 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

⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "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 District*. (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 District* (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. (A).) 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.

ISSUE 1: CHILD FIND

5. Student contends that District failed to meet its “child find” obligation by failing to discuss eligibility under the category of autism. District contends that Student did not meet her burden of proof on this issue.

Applicable Law

6. The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities residing in the state who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).) This duty is commonly referred to as “child find.” California law specifically incorporates child find in Education Code section 56301, subdivision (a).

7. A school district’s “child find” obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. (See *Department of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp. 2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A school district’s appropriate inquiry is whether the child should be referred for an

evaluation, not whether the child actually qualifies for services. (*Ibid.*) Violations of child find are procedural violations of the IDEA and the Education Code. (See *Cari Rae S.*, *supra*, 158 F.Supp. 2d 1190 at p.1196).

8. "Child find" does not guarantee eligibility for special education and related services under the IDEA. It is merely a locating and screening process which is used to identify those children who are potentially in need of special education and related services. Once a child is identified as potentially needing specialized instruction and services, the district must conduct an initial evaluation to confirm the child's eligibility for special education. (34 C.F.R § 300.301; Ed. Code, § 56302.1.)

9. The IDEA and the California Education Code do not specify which activities are sufficient to meet a school district's "child find" obligation, and there is no requirement that a school district directly notify every household within its boundaries about child find. However, California law obligates a special education local plan area to establish written policies and procedures for use by its constituent local agencies for a continuous "child find" system. (Ed. Code § 56301, subd. (d)(1).) The school district must actively and systematically seek out "all individuals with exceptional needs, from birth to 21 years of age," including children not enrolled in public school programs, who reside in a school district. (Ed. Code, § 56300.) The school district's duty for "child find" is not dependent on any request by the parent for special education testing or services. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.)

Analysis

10. Student did not establish that District failed in its "child find" obligations. Student did not establish her more specific contention that District violated "child find" because it failed to discuss eligibility under the category of autism.

11. District appropriately engaged in "child find." District located and

identified Student, met with the Regional Center, engaged in the appropriate and legally-mandated process for a transition from Early Start to special education services as an eligible child approaches the age of three, assessed Student to determine whether she qualified for special education and related services, and found that she did. "Child find" does not address disputes about the content of assessments, eligibility categories, or IEP offers after children have been located and identified. "Child find" relates to the location and identification of students who may be in need of assessment, and not to the results of those assessments once conducted. Here, once District met with the Regional Center, identified Student and generated an assessment plan, it complied with its "child find" duties. For these reasons, Student failed to establish any "child find" violation. District prevailed on Issue One.

ISSUES 2 AND 4: PREDETERMINATION OF ELIGIBILITY IN THE MAY 30, 2017 IEP;
PARENTAL PARTICIPATION IN THE MAY 30, 2017 IEP AND CONSIDERATION OF
PARENTS' REQUEST TO DISCUSS STUDENT'S EVALUATIONS, SPECIFIC NEEDS AND
ELIGIBILITY

12. Student contends that District predetermined Student's eligibility, rejecting autism as Student's eligibility category in the May 2017 IEP.⁸ Student contends that District denied parental participation in the May 30, 2017 IEP team meeting with respect to Student's assessments and eligibility. District contends that Student failed to meet her burden of proof on these issues.

⁸ Student's contentions concerning the May 2017 IEP meeting are treated, in this Issue and the other Issues specifying the May IEP, as extending to the continuation IEP meeting in June 2017.

Applicable Law

13. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(b).) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693-5; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

14. An education agency's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*W.G. v. Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 84; *Deal v. Hamilton County Bd. of Education*. (6th Cir. 2004) 392 F.3d 840, 857-58.) Predetermination occurs when an educational agency has made its determination prior to the IEP team meeting, and is unwilling to consider other alternatives. (*Ms. S. ex rel G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131 ["A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification."].)

Analysis

15. Student offered no evidence that District team members predetermined Student's eligibility category. On the other hand, the parties offered significant evidence that Parents meaningfully participated in the development of the May and June 2017 IEP's, including voicing their disagreement over whether Student's primary disability was

autism. The IEP team's offer, although in disagreement with Parents, did not establish predetermination. Parents asked questions, shared observations, sought additional information, requested changes to the IEP, and submitted their concerns to District in writing at and after the IEP team meeting. Some of Parents' requested changes to the May 2017 IEP offer were made between the May and June IEP's. For example District modified the box indicating that Student's behavior impeded her learning, and added an accommodation for access to positive behavior supports during the school day.

16. Parents' disagreement with the designation of Student's eligibility category for special education and related services does not establish that District predetermined Student's eligibility category. Predetermination does not refer to disagreement after discussion, but to the lack of meaningful discussion itself. Here, although Parents disagreed, District clearly engaged in meaningful discussions with them. District included Parents in the process of determining Student's eligibility for special education and related services, and under what category, at the May 30, 2017 IEP team meeting and at subsequent IEP team meetings including the August 30, 2017 IEP team meeting at which Dr. Gehrig's independent assessment was considered. Student did not meet her burden of establishing predetermination. For these reasons, District prevails on Issue 2.

17. For the same reasons, there was no evidence that District denied parental participation IEP team meetings with respect to Student's assessments and eligibility. Disputes about the content of assessments and IEP's do not establish that there was a defect in the procedures leading up to the disagreement. An outcome may be disagreeable even though all proper procedures were followed. District did not commit procedural violations by failing to allow Parents full participation and consider Parents' request to discuss Student's evaluations, specific needs and eligibility. District prevails on Issue 4.

18. Moreover, whether Student should have been qualified under the disability category of “autism” is immaterial. The IDEA does not concern itself with labels, but with whether a student is receiving a free and appropriate education. (*Heather S. v. Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055 [“whether Heather was described as cognitively disabled, other health impaired, or learning disabled is all beside the point. The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education”]; *see also* 20 U.S.C. § 1412(a)(3)(B) [“Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.”]; Ed. Code, § 56301, sub (a).) The United States Department of Education has advised that “a child's entitlement is not to a specific disability classification or label, but to a free appropriate public education.” (*Letter to Fazio* (OSEP 1994) 21 IDELR 572, 21 LRP 2759.) A properly crafted IEP addresses a student’s individual needs regardless of his eligibility category. (See *Fort Osage R-1 School District v. Sims* (8th Cir. 2011) 641 F.3d 996, 1004 [category “substantively immaterial”]; *Hailey M. v. Matayoshi* (D. Hawaii, Sept. 7, 2011, No. 10-00733) 2011 WL 3957206, p. 3). “The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself.” (*Pohorecki v. Anthony Wayne Local School District* (N.D. Ohio 2009) 637 F.Supp.2d 547, 557.)

19. For these reasons, Student did not prevail on her claim that District predetermined or denied parental participation in the May 30, 2017 IEP team meeting, with respect to Student’s assessments and eligibility category.

ISSUE 3: MAY 30, 2017 IEP OFFER OF RELATED SERVICES

20. Student contends that District denied Student a FAPE by failing to offer

Student appropriate related services in the May 30, 2017 IEP for behavioral support, a behavior support plan, and a transition plan for her transition into preschool.⁹ District contends that its offer of a preschool program with embedded behavioral supports, accommodations including consultation support by a behavioral team, and a functional behavioral analysis to be conducted at the start of the school year, was appropriate.

Applicable Law

21. For the period between three and six years of age, California does not mandate compulsory education for typically developing preschool children. (Ed. Code, § 48200.) However, if a preschool child requires special education and related services in order to receive a FAPE, school districts must offer the child an appropriate program. (20 U.S.C. § Ed. Code, § 56345, subd. (a)(1)(B); Ed. Code, § § 56440 -56447.1.) Under the IDEA and California special education law, school districts must offer an IEP to children with disabilities who turn three years of age. (20 U.S.C. §1412(a)(1)(A); 34 C.F.R. § 300.101(a); Ed. Code, §§ 56001, subd. (b); 56026, subd. (c)(2).)

22. An IEP is a written statement that includes the student's present levels of academic achievement and functional performance. (Ed. Code, § 56345, subd. (a)(1).) An IEP must contain a statement of measurable annual goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general curriculum, and to meet each of the child's other

⁹ The term "transition plan" and "transition services" have legal definitions for post-secondary transition when a child turns 16 years old. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a); Ed. Code, § 56043, subd. (g)(1).) However, in this case, Parents used the term "transition plan" to mean behavioral related services to assist Student in entering into the preschool environment for the first time.

educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student to enable the student to advance toward attaining the annual goals, and to be involved in and make progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) An IEP must include services, supplementary aids, modifications, or supports that will allow the student to advance appropriately toward attaining the annual goals, and to be educated and participate with other students with disabilities and those who do not have disabilities. (20 U.S.C. § 1414(d)(1) (A)(IV); Education Code section 56345, subd. (a)(4).)

23. The educational benefit to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School District No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

24. A school district is required to use those assessment tools necessary to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b).)

25. 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).) A behavior intervention is the systematic implementation of procedures that result in lasting positive changes in the individual’s behavior. Children with disabilities who exhibit serious behavioral challenges are entitled to timely behavioral assessments as well as development and implementation of positive behavioral interventions and supports. (20 U.S.C. § 1400(c)(5)(F); Ed. Code § 56520, subd. (b).) IEP teams must consider and include appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs of children whose behavior impedes their own learning or the learning of their peers. A district’s failure to develop positive behavior interventions can amount to a denial of FAPE. (See, e.g. *Neosho R-V Sch. District v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-29 [lack of a cohesive behavior plan outweighed any slight academic benefit the student received was lost because of ongoing behavior problems that interfered with his ability to learn]; *C.F. ex rel. R.F. v. New York City Dept. of Education* (2d Cir. 2014) 746 F.3d 68, 80-81).)

26. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (“*Adams*”).) An IEP is “a snapshot, not a retrospective.” (*Ibid.*, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

Analysis

27. Student prevailed on Issue 3. Under the snapshot rule articulated in *Adams, supra*, 195 F.3d 1141, District’s IEP offer is judged as of the time of the IEP’s and not in hindsight. Student’s performance on the first and second days of school is instructive, but not dispositive of whether District’s offer was reasonable when it was

made. Student proved that the IEP offer of no behavioral related services was insufficient to offer Student a FAPE. District's failure to offer any related services directed to Student's behavior, was not appropriate in light of Student's maladaptive behaviors, and District assessors' uncertainty about Student's presentation.

28. Although at hearing Ms. Mendoza and Ms. Carlson presented themselves as unequivocal that Student was not autistic, their testimony did not answer the question of whether Student's behaviors nevertheless, regardless of her eligibility category, required interventions. Other than speech and language services of 1,200 minutes per year, the IEP offered no related services. District offered an accommodation to provide visual cues and scheduling. The classroom contained embedded behavioral supports and a high adult-to-student ratio. The behavior team would assist Student into the classroom and conduct a functional behavioral analysis. However, given the considerable uncertainty amongst the assessors about Student's presentation, these accommodations and supports were insufficient.

29. District's assessment contained numerous references to Student's maladaptive behaviors. Student tantrummed inconsolably when separated from her brother. The assessors assumed that Student could properly be assessed with her brother in the room, even though assessing her was impossible unless her brother were present. They offered no explanation for this assumption, given that brother would not be present with Student in a school environment and her baselines and goals acknowledged that fact. Even after her brother entered the room, Student demonstrated non-compliant and task-refusal behaviors. She required multiple prompts, demonstrating a maximum of one minute of sustained attention, and during that minute she required eight verbal prompts and one-to-one instruction. On another occasion she was able to sit with an examiner for up to three minutes but required up to nine prompts and one-to-one instruction. She displayed withdrawal behaviors and

eloped. She displayed behaviors that impacted her ability to engage with others and she required a range of supports to demonstrate her abilities. Student required on average five or more prompts to follow some simple tasks, depending on which examiner was giving them. Even with the additional prompting and wait time, she did not complete tasks or follow directives consistently. After her brother entered, Student was no longer aggressive, but she continued to be noncompliant.

30. The assessment summary concerning Student's pre-vocational skills stated that it was "likely" that Student's resistive behaviors were "environmentally reinforced" and "may" decrease with consistently applied, structured intervention. It stated that it was "difficult" to rule out "environmental contributors" and "learned behavior" when determining a pre-vocational concern for Student because she had not attended a preschool or been observed with typically developing peers. Thus, District's assessment confirmed that Student's behaviors were of concern, but concluded that they "may" decrease in school with interventions. Ms. Mendoza repeatedly used the words "task-avoidance" to explain Student's demonstration of some failing and severe skills. But, the assessment did not answer what services were appropriate to address her needs, nor did it address why Student was task-avoidant, nor how Student's "task avoidance" should be addressed.

31. The assessment report, and Ms. Carlson at hearing, opined that Student was making a choice whether to communicate. It was unclear what led to this opinion, as it was unsupported by any evidence other than Student's reported inconsistencies. Student sometimes asked for help and sometimes did not; thus District concluded that Student was able to ask for help if she chose to. Observing that Student sometimes answered others, Ms. Carlson opined at hearing that Student could communicate if she "wanted" to. The opinion expressed by Ms. Carlson as to Student's level of control, lacked an evidentiary basis, raising the question as to what Ms. Carlson's opinion was

based on. Ms. Carlson appears to have assumed that the family was not intervening appropriately with Student's behaviors at home. The assessment report and her testimony at hearing contained numerous, although oblique, indications that this was what she thought. But Mother's credible testimony at hearing belied this assumption. Thus, in the face of Student's observed and inconsistent behavioral deficits, it was not reasonable to conclude that the explanation underlying these deficits was Student's own choices. District failed to satisfyingly explain what led to the conclusion that because Student had inconsistent abilities, those inconsistencies meant she was choosing when to perform. Even if Student chose when not to communicate, this only leads to more unanswered questions – if it was a choice, why was Student making it, and how could she be encouraged to make a different choice?

32. In short, District's witnesses did not satisfactorily explain, either at hearing or in District's assessment, their interpretation of Student's presentation, that she could perform if she wanted to, and that her behaviors were voluntary and used to get what she wanted. Student's strong cognitive skills and pre-academic strengths made the assessors discount the seriousness of Student's behavioral needs. This was not reasonable. No evidence established that strong cognitive skills are inconsistent with unexplained behavioral needs.

33. The May IEP continued to indicate that District IEP team members had substantial uncertainty about these questions. But, District offered no behavioral services and District still did not think Student's behavior impacted her learning and the learning of others or had any negative educational impact. It is unclear what led District to that conclusion in May 2017. The May draft IEP generated three baselines and goals in the area of socialization, which, notably, acknowledged that District had *no information* about Student's present levels of performance when her brother was not present. Ms. Mendoza explained that the District members of the team wanted to start

Student off in preschool with no behavioral supports and “see how she did.” In the May 2017 IEP team meeting, Mother questioned whether, if sensory regulation were not an issue, what explained Student’s behaviors and how would these be addressed. District staff members responded that they had the same questions. At hearing Ms. Keim explained that, although she could not explain why Student exhibited the behaviors if she had no sensory needs, District offered to conduct a functional behavioral analysis in order to “tease that out.” When in the June IEP team meeting, the team did ultimately check the box that Student’s behavior did impact her learning or the learning of others, it contained an explanation indicating continuing uncertainty in this area, specifying that it was “unknown” how Student would perform within a group setting. Thus, District did not know how her behavior affected her learning, and its offer of preschool was a calculated experiment to further assess Student’s performance.

34. Under most circumstances, if a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) However, in this case, the District’s choice of methodology was unsupported by any credible data and inappropriate on its face, because the assessment itself provided no information as to how Student would fare in her brother’s absence. The failure to obtain critical assessment information about a student renders the accomplishment of the IDEA's goals, and the achievement of a FAPE, “impossible.” (*NB. v. Hell gate Elementary School District* (9th Cir. 2008) 541 F.3d 1202, 1210 (quoting *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 894); *Timothy O. v. Paso Robles Unified School District* (9th Cir. 2016) 822 F.3d 1105.)

35. District’s offer of placement and no related behavioral services, such as a behavior intervention plan or one-on-one support, was to be a means to see how Student did in school and to further assess her, because District did not understand the cause of Student’s behaviors and did not know how she would fare. But, District did not

explicitly offer a temporary diagnostic placement. Instead, it offered no behavioral services to a child whose behaviors were so extreme as to prevent her from being assessed at all in her brother's absence. Based on District's acknowledged uncertainty as to the cause of her behaviors, its failure to offer any related services or supports in the area of behavior, even so as to further assess her by means of a functional behavioral analysis, denied Student a FAPE. Student's remedies will be discussed below.

ISSUE 5: BEHAVIOR EMERGENCY REPORT AND MEETINGS FOR RESTRAINT AND SECLUSION

36. Student contends that District punished Student on the second day of school by restraining and secluding her in the bathroom, without following legally required procedures. District contends that the alleged events did not occur, and that Student failed to meet her burden of proof on this issue.

Applicable Law

37. The IDEA does not directly address the use of restraint and seclusion in school. However, if such methods are permitted by state law, and necessary for a particular child to receive a FAPE or to enable the child to participate in extracurricular and non-academic activities, they should be incorporated into the child's IEP or behavior plan. (*Letter to Anonymous*, 57 IDELR 49, 111 LRP 45428 (OSERS 2010); *Letter to Trader*, 48 IDELR 47 107 LRP 29537 (OSEP 2006).) A physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purposes of inducing a student who is acting out to walk to a safe location. (*U.S. Dept. of Education Restraint and Seclusion: Resource Document*, p. 10 (May 15, 2012).)

38. Emergency interventions may only be used to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the individual with exceptional needs, or others, and that cannot be immediately

prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. (Ed. Code, § 56521.1, subd. (a).) Emergency interventions may not be used as a substitute for a systematic positive behavior plan which is designed to change, replace, modify, or eliminate a targeted behavior. (Ed. Code, § 56521.1, subd. (b).)

39. An emergency intervention shall not be used for longer than is necessary to contain dangerous behavior posing serious harm to others or self. A situation requiring a prolonged emergency intervention requires staff to seek the assistance of a school administrator or law enforcement agency. (Ed. Code, § 56521.1, subd. (c).) Emergency interventions shall not use an amount of force exceeding that which is reasonable and necessary under the circumstances. (Ed. Code, § 56521.1, subd. (d)(3).)

40. In order to prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions, parents must be notified within one school day if an emergency intervention is used or serious property damage occurs. A behavior emergency report must be immediately completed by the school where the intervention occurred; kept in the student's file; and provide the name and age of the individual with exceptional needs; the setting and location of the incident; the name of the staff or other persons involved; a description of the incident and the emergency intervention used; and whether the individual with exceptional needs is currently engaged in any systematic behavior intervention plan; and details of any injuries sustained by the individual with exceptional needs, or others, including staff, as a result of the incident. (Ed. Code, § 56521.1, subd. (e).) An emergency behavior report must be immediately forwarded to, and reviewed by, a designated school administrator. (Ed. Code, Section 56521.1, subd. (f).)

41. If a behavior emergency report is written regarding an incident concerning a student eligible for special education with a behavior intervention plan, involving

either a previously unseen serious behavior problem, or where a previously designed intervention has been ineffective, there will be a referral to the IEP team to review and determine if the incident constitutes a need to modify the student's behavior intervention plan. (Ed. Code, § 56521.1, subd, (h).)

Analysis

42. Student failed to meet her evidentiary burden of proving that any incident occurred that invoked the required emergency procedures. The required procedures with respect to behavioral emergency reports, restraint and seclusion need not be followed when no such restraint, seclusion, punishment nor behavioral emergency occurred, as was the case here. Ms. Bringham, Student's preschool teacher credibly established that aide Ms. Williamson showed Student the toileting icon and after Student refused by saying "no," Student then went willingly with the aide to the bathroom. Student was not forced into the bathroom, as Ms. Bringham credibly stated. After Student went willingly to the bathroom, no evidence established that she was detained there. Although neither Ms. Bringham nor Mr. Castillo, nor any other testifying witness, actually saw Student in the bathroom during the morning toileting routine, Student was inside the bathroom only two or three minutes. Student was crying and Mother interpreted those cries as evidence that Student was being detained or punished. But, Mother did not actually witness Student inside the bathroom. Mother did not see Student being detained or punished during the incident. Mother was already upset that day that District was not supplying the positive behavioral supports she was expecting, and it is possible that she may have overreacted to Student's cries, feeling that her daughter was "desperate." In any event, there was no evidence to establish that any restraint, seclusion or punishment occurred. Ms. Bringham's gentle and caring demeanor at hearing raises a reasonable inference that she would not encourage or

tolerate punitive measures by staff in her classroom. Student failed to meet her burden of proof on this issue.

ISSUES 6-9: FAILURE TO ASSESS AND OFFER RELATED SERVICES FOR PHYSICAL THERAPY AND ASSISTIVE TECHNOLOGY

43. Student contends that District failed to assess Student, and offer her related services, in the areas of assistive technology and physical therapy. District contends that Student did not meet her burden of proof on these issues.

Applicable Law

44. 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).) No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) 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); Ed. Code, §§ 56320, subds. (a) & (b).)

45. Individuals who are both “knowledgeable of the student’s disability” and competent to perform the assessment, must conduct assessments of students’ suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

46. 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).)

47. 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 District* (9th Cir. 2006) 464 F.3d 1025, 1031-1032.) 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).)

Analysis

48. Student failed to establish that she had any suspected need that obligated District to conduct an assistive technology assessment, or to provide related services in assistive technology. Student's use of an iPad at home, during assessments, and the communication deficits identified by the speech language pathologist, were the only evidence offered by Student that she might have required assistive technology to communicate. However, Student offered no evidence that supported a conclusion that the iPad was directly related to an identified need for assistive technology, or that District knew or should have known that the iPad was essential to meet any particular need. District addressed her communication needs through communication goals, and speech therapy services. District prevails on Issues 8 and 9.

49. Regarding physical therapy, Ms. Kill's thorough adaptive physical education assessment established no reason for the District IEP team members to suspect that Student required physical therapy to navigate the school environment. Ms. Kill's assessment met all the legal requirements for assessing Student's physical ability to navigate a school environment, thus making a further assessment in the area of physical therapy, unnecessary. Ms. Kill was knowledgeable and competent to perform the assessment, used a comprehensive variety of assessment tools and strategies that yielded accurate information on what Student could do functionally. Student's motor skills, range of motion and strength were good. She kicked, swung her arms, crossed her midline, stomped exhibiting balance on either leg, walked backwards, stood independently, walked up and sat on stairs, and caught a ball. Student could run on uneven surfaces like sand, playground, rubber, concrete, and could go up and down on the curbs between the surfaces. She ran around the playground, leapt off the curbs and jumped up onto them while continuously running. Student went upstairs and down a slide without support.

50. Ms. Kill saw none of Mother's reported concerns with Student's balance. Ms. Kill had no concern about Student's gross motor skills, such as running, balance, standing, jumping, hopping, kicking, standing on one foot, etc. The adapted physical education assessment results showcased that Student had age-appropriate skills throughout. Student could walk backward, stoop, walk while carrying an object, jump in place, roll and push a ball, hurl an object overhand and the like. Ms. Kill's credible testimony established that Student had these physical skills. Her safety and mobility were not a concern. Student failed to establish that she had any suspected need obligating District to refer Student for a physical therapy assessment or provide related services in that area. District prevails on Issues 6 and 7.

REMEDIES

1. Student prevailed on Issue 3, proving District denied her a FAPE by failing to provide any related services in the area of behavior support as part of the May 20, 2017 IEP, as amended in June 2017. As proposed resolutions, Student seeks neuropsychological, occupational therapy, auditory processing, functional behavioral, and speech and language independent educational evaluations, arguing that although District already offered an independent psycho-educational assessment, independent assessments are required in all areas of suspected disability. Student also seeks an appropriate nonpublic school placement; compensatory education services and related services in speech and language and occupational therapy by a nonpublic provider; provision of a one-to-one applied behavioral analysis trained staff member in Student's IEP to ensure safety and transitioning; behaviorist consultation included within Student's IEP; school and nonpublic school options and assistance to Parents with the enrollment process; an IEP team meeting within 10 days of completed assessments to develop an appropriate IEP; a transition evaluation and plan; counseling services to Student and

Parents by a nonpublic agency; assessments in the area of physical therapy and assistive technology; a behavior emergency intervention report detailing what occurred on or around August 24, 2017, and an appropriate placement and services which takes into account Student's academic, social emotional behavior and speech and language needs.

2. 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 District* (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. District 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.*)

3. Student is entitled to an appropriate remedy for District's failure to provide appropriate related services to address Student's needs in the area of behavior, and further assessments regarding behavior.

4. As an equitable remedy, Student is entitled to a publicly funded independent behavioral assessment and independent psychoeducational assessment by qualified independent behavior and psychoeducational assessors of Student's choice.

5. 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.

6. 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. District shall, following independent educational evaluations, convene an IEP team meeting to address Student's special education and related service needs in the area of behavior. At that time, the IEP team shall consider the assessment results and decide upon appropriate services for Student designed to address her unique needs. Student is also entitled to have the assessors attend the IEP team meeting or meetings held to discuss their assessment reports, at public expense.

7. Pending the assessments and the IEP team meeting or meetings contemplated by this Decision, Student's placement shall remain the preschool placement. However, pending the independent assessments and further IEP team meetings ordered herein, District shall provide Student with a one-to-one applied behavioral analysis trained staff member as a related service for all hours Student

attends preschool, as well as supervision and consultation by a board certified behavior analyst. If District has no qualified behaviorist available on staff, District shall fund the services through a contracted non-public agency.

8. Student did not establish any need or entitlement to any of the other requested remedies, i.e. a neuropsychological, occupational therapy, auditory processing, or speech and language independent educational evaluations, nor for assessments in the area of physical therapy and assistive technology. Student established no need or entitlement to a nonpublic school placement or counselling. Student established no need or entitlement to a behavior emergency intervention report. No evidence was presented concerning compensatory education.

ORDER

1. District shall directly fund independent educational evaluations in the areas of psycho-education and behavior through assessors of Student's choosing, subject to the conditions stated in this Order. District shall, within 15 days of this Decision, provide Student with agency criteria for conducting the assessments.

2. Within 30 days of this Decision, Student shall inform District of Student's choice of independent psycho-educational and behavioral assessors, provided however that the criteria under which the assessments are obtained, including the location, limitations for the assessment, minimum qualifications of the examiners, 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 timely 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 and a copy of the reports, District shall

convene an IEP team meeting within 15 days of Student's notice, to review the reports and address Student's special education and related service needs in the area of behavior. District shall fund the in-person attendance of the independent educational evaluation assessors at an IEP for up to three hours, at a rate of payment consistent with existing District policy.

4. Pending the assessments and IEP team meeting contemplated by this Order, and except as otherwise ordered below, Student's placement and services shall remain as stated in her May- June 2017 IEP, as amended and signed on June 20, 2017.

5. Pending the independent assessments and further IEP team meeting or meetings ordered herein, District shall provide Student with a one-to-one applied behavioral analysis trained staff member as a related service for all hours Student attends preschool, as well as supervision and consultation by a board certified behavior analyst. If District has no qualified behaviorist available on staff, District shall fund the services through a contracted non-public agency.

6. The placement and services ordered in paragraphs 4 and 5 of this Order shall constitute Student's stay-put placement.

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 Issue 3. District is the prevailing party on Issues 1, 2, 4, 5, 6, 7, 8 and 9.

RIGHT TO APPEAL

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

(k.)

DATED: April 26, 2018

/s/

JUNE R. LEHRMAN

Administrative Law Judge

Office of Administrative Hearings