

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ETIWANDA SCHOOL DISTRICT.

OAH Case No. 2017110983

DECISION

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on November 27, 2017, naming Etiwanda School District. District filed its response to Student's complaint on December 7, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.) OAH granted the parties' request for a continuance on January 5, 2018.

Administrative Law Judge Alexa J. Hohensee heard this matter in Rancho Cucamonga, California on February 20, 21, 22 and 27, 2018.

Arthur Sloane, Attorney at law, represented Student. Student's foster mother (Parent) attended the hearing and testified on behalf of Student.

Constance Taylor and Lindsey Wrape, Attorneys at Law, represented District. Elizabeth Freer, District's Director of Special Education, and Royal Lord, Program Manager of West End Special Education Local Plan Area, attended the hearing on behalf of District.

At the parties' request, OAH granted a continuance until March 19, 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.

## ISSUES

1. Did District deny Student a free appropriate public education during the 2017-2018 school year and 2018 extended school year by failing to:
  - a. Conduct appropriate assessments, specifically: (i) assessment in the general education classroom to determine Student's unique needs for inclusion to the maximum extent possible, and (ii) a functional behavior analysis based on accurate behavioral data;
  - b. Identify accurate baselines for behavioral goals;
  - c. Report accurate information on Student's progress report from August 7, 2017, through October 27, 2017;
  - d. Develop goals to address Student's areas of need;
  - e. Allow parent meaningful participation in the individualized education program process by: (i) implementing the October 24, 2017 IEP and behavior intervention plan without parental consent, and (ii) allowing an occupational therapist to implement interventions without parental consent;
  - f. Offer placement in the least restrictive environment;
  - g. Offer a one-on-one behavioral aide for the entire school day, including during transportation;
  - h. Offer an appropriate behavior plan; and
  - i. Develop an IEP that was reasonably calculated to enable Student to receive educational benefit?
2. Did District deny Student a FAPE by failing to offer the following in the October 24, 2017 IEP:
  - a. Two hours per week of individual speech and language services;

- b. Twelve hours per week of an applied behavior analysis program, with eight hours per month of supervision and four hours per month of clinic meetings;
- c. Four hours per month of behavior consultation with Dr. David Paltin;
- d. One hour per week of direct occupational therapy, the Handwriting Without Tears program, and in-class consultation for writing;
- e. An iPad for use at home for homework and as a motivational tool; and
- f. All related services through 2018 extended school year and during holidays?

## SUMMARY OF DECISION

District conducted appropriate assessments of Student, including a functional behavior assessment based on accurate behavioral data. The IEP team that met on October 24, 2017, to review the assessments had accurate information on Student's present levels of academic and functional performance, including accurate baselines for Student's behavioral goals. The IEP team developed goals to address all of Student's needs, including goals for Student's academic, language and speech, fine motor and behavior needs. The October 24, 2017 IEP offered Student placement in a special day class for students with mild to moderate disabilities for 80 percent of her school day, with inclusion in nonacademic general education activities for 20 percent of her school day, which was the least restrictive environment for Student. District's offer of specialized academic instruction, individual and small group language and speech services, individual occupational therapy, and an appropriate behavior intervention plan was reasonably calculated to provide Student with educational benefit and enable her to make progress appropriate to her circumstances.

Student did not meet her burden of proving that an offer of FAPE required a one-on-one aide throughout the school day, including on the bus; additional language and speech or occupational therapy; a 12-hour in-home applied behavior analysis program; clinic-based behavior counseling, the Handwriting Without Tears program; an

iPad for use at home; or year-round related services.

District prevailed on all issues decided.

## FACTUAL FINDINGS

1. Student was a seven-year-old girl at the time of the hearing. Student is of African-American descent. She resided with her foster mother (Parent) within District boundaries at all times relevant to this proceeding.

2. At all relevant times, Student was eligible for special education and related services under the eligibility categories of intellectual disability and speech and language impairment.

3. Student enrolled in District during the 2016-2017 school year, with an IEP from another school district dated September 19, 2016 IEP. That IEP provided for Student to be placed in a kindergarten special day class for students with mild to moderate disabilities.

4. On July 28, 2017, Parent and District settled a dispute regarding educational claims for the 2016-2017 school year. The settlement agreement required District to conduct comprehensive assessments of Student at the beginning of the 2017-2018 school year, and to hold an IEP team meeting by October 6, 2017, to review the assessment results and develop an IEP for the 2017-2018 school year.

5. Pursuant to the settlement agreement, the September 19, 2016 IEP from the prior school district would be implemented pending development of a new IEP. That IEP called for Student to receive reports of progress on her annual goals every trimester.

## 2017-2018 SCHOOL YEAR

6. For the 2017-2018 school year, Student was placed in David Pagel's first through third grade special education classroom for students with mild to moderate disabilities. Mr. Pagel's classroom was smaller than the general education classrooms,

with only 12 students. Mr. Pagel was assisted by five instructional aides, for a student to teacher ratio in the classroom of two-to-one. The classroom aides had behavioral training and provided embedded behavioral support both in the classroom and during visits to general education classes for mainstreaming.<sup>1</sup> Mr. Pagel taught curriculum to each student at their developmental level, and incorporated embedded instructional and behavioral supports that helped any child with developmental delays to learn and minimize problem behaviors, such as visual schedules, hands-on manipulatives, positive reinforcement, small group learning and sensory movement breaks.

7. Student was a cheerful child, but when presented with difficult classwork or a task she did not like, Student frequently hid under the table, climbed onto the table, or ran around or out of the room. On the playground, Student would run away from adults rather than get in line to return to the classroom. Student also hit and kicked other students, sometimes screamed, and switched the classroom lights off and on every other day. These behaviors occurred during transitions between classroom activities and bathroom breaks, and when Mr. Pagel or the classroom aides were not paying enough attention to Student. Student was well-behaved during library and assembly times, which she enjoyed, and when lining up to go to recess, which she also enjoyed. Mr. Pagel and his classroom assistants noted that Student's behaviors occurred when Student was presented with a non-preferred task and when she wanted adult attention.

8. Mr. Pagel looked forward to the development of a behavior intervention

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<sup>1</sup> "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

plan as part of the assessment and IEP process. In the interim, he implemented standard behavioral interventions embedded in the classroom curriculum. These included utilizing a visual schedule to help Student with transitions, using preferred hands-on lessons with manipulatives, placing Student in smaller groups where she received more attention, prompting Student to stay in her seat, using a token board that allowed Student to earn time for an activity of her choice, having an adult block the door if Student tried to leave the classroom, and holding Student's hand during transitions to and from the playground. Mr. Pagel and the classroom aides frequently held the hands of very young students, which was an appropriate way to provide help and guidance.

9. Student had two behavior goals from the September 2016 IEP: (1) to keep her hands and feet to herself and (2) to stay on task for 10 minutes. Mr. Pagel worked on these goals with embedded classroom interventions, the assistance of classroom aides trained and experienced in working with children with behavioral problems, and consultation from a Board Certified Behavior Analyst who visited the classroom once a month to provide staff with strategies for addressing classroom behaviors. The September 2016 IEP did not include a behavior plan.

10. Mr. Pagel was a well-qualified special education teacher, with a master's degree in special education and a dual credential to teach students with mild/moderate and moderate/severe disabilities. The 2017-2018 school year was Mr. Pagel's first year as a credentialed teacher, although he taught special day classes as a student teacher during the 2016-2017 school year. Mr. Pagel's demeanor at hearing was calm and professional, and his responses were thoughtful and informative. He clearly enjoyed having Student in his classroom, and demonstrated a genuine desire to address Student's behavioral needs and assist her in making educational progress. His opinions on Student's behavioral and other educational needs, and the educational program to address those needs, were accorded substantial weight.

11. In August 2017, Shannon Saint Thomas performed District's psychoeducational assessment of Student. Ms. Saint Thomas had a master's degree in school psychology and was a credentialed school psychologist. Ms. Saint Thomas had conducted approximately 70 assessments per year for the prior four years, and assessed at least 15 students of African-American descent. She was familiar with the tests prohibited by the California Association of School Psychologists for use in measuring the cognitive ability of African-American students, and chose the Naglieri Nonverbal Ability Test<sup>2</sup> because it was not on the prohibited list. The NNAT is free of culturally loaded stimuli and is not an intelligence quotient test. The NNAT is appropriate to test cognitive abilities of African-American students, and Ms. Saint Thomas assessed students with the NNAT approximately three to five times per year.

12. Ms. Saint Thomas assessed Student in an office, where she interacted with Student on a one-on-one basis. Ms. Saint Thomas always assessed students in a controlled setting without distractions to get an accurate representation of each student's abilities. Student was cooperative at the beginning of the test, but required multiple behavioral supports as demands were placed on her. Ms. Saint Thomas frequently redirected Student, reminded her of behavioral expectations, gave clear and concise directions, and used forced choices. With these strategies, Ms. Saint Thomas obtained periods of compliance. However, Student refused to do tasks that required her to recall information previously given. Ms. Saint Thomas gave Student animal crackers as motivators and rewards for transitions between tasks that were difficult for Student, which was a strategy she used with many students to obtain compliance. Student needed a high rate of reward at the beginning of testing, although she gradually

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<sup>2</sup> The Naglieri Nonverbal Ability Test will be referred to as the NNAT. The NNAT is how the test was referred to by the witnesses and in the documentary evidence.

became more complaint and needed less reinforcement.

13. Ms. Saint Thomas used a variety of assessment measures of cognitive processing skills, including the NNAT, and a rating scale provided to Parent to elicit information on Student's developmental functioning. Student could not complete the NNAT, and scored in the low average to intellectually deficient range overall. Student was significantly below average in tests of auditory processing, phonological processing, visual motor integration, visual spatial processing, and processing speed. Student's developmental and social emotional functioning were significantly delayed, and Student had difficulty paying attention and attending to task. In light of Student's delays in adaptive behavior and global deficits in cognitive processing, coupled with significant attentional deficits, Ms. Saint Thomas concluded that Student continued to qualify for special education and related services under the eligibility category of intellectual disability.

14. Ms. Saint Thomas observed Student in Mr. Pagel's classroom, during lunch and at recess. Student exhibited noncompliance, such as running away when transitioning from preferred to nonpreferred tasks in the classroom and transitioning from recess to the classroom. Student interacted well with peers and adults when compliant, and exhibited good eye contact, social mannerisms and verbal exchanges. However, both in testing and observations, Ms. Saint Thomas noted that Student needed clarifying instructions, had difficulty following casual conversation, and exhibited limited language skills. In her opinion, Student displayed maladaptive behaviors, such as eloping and screaming, to gain attention.

15. Marilyn Olson, a District speech and language pathologist, conducted the speech-language assessment of Student over five sessions in August and September 2017. She reviewed Student's educational records, observed Student in the classroom and on the playground, interviewed Parent and Student's teachers, and administered



formal test measures.

16. Ms. Olson was a well-qualified assessor. She received a bachelor's of science in speech pathology and audiology in 1981, and a master's in speech pathology in 1982, with over 30 years of experience as speech-language pathologist in the school setting. Her testimony on Student's speech and language needs, and the educational program to meet those needs, was compelling and persuasive. Ms. Olson was also the only speech-language pathologist to testify, and her opinions were not contradicted by any other person with education, experience or training in that field.

17. Student could follow Ms. Olson's directions for completing formal testing with prompting and motivators. Ms. Olson observed that Student could follow simple directions at a group table during classroom assignments. Student also interacted appropriately with her peers on the playground, made appropriate requests at snack time, and responded appropriately to the classroom aide on the playground until requested to line up and return to class. During testing, Student said "no" when tasks became more difficult, and avoided tasks by crawling under or on a table, or walking or running to another part of the room.

18. On measures of receptive language, expressive language and vocabulary, Student scored at the four-year-old level. Student used language for a variety of purposes, such as greeting, informing, and requesting, and her communication abilities were within functional limits and adequate in context. Student used complete sentences, but made syntactical and morphological errors. ("Them are playing," "Me have markers," "Her getting cereal.") Student's voice and speaking fluency appeared normal, but Student scored in the very low to severe range for articulation due to sound substitutions and distortions. Ms. Olson found Student eligible for special education in the category of speech and language impairment.

19. Laura Passons conducted an occupational therapy assessment of Student

over three sessions in August and September 2017. Ms. Passons was a licensed occupational therapist with over 20 years of experience, and 10 in the school setting. Ms. Passons answered all questions at hearing with a professional demeanor, and demonstrated good recall of her assessment of Student. She provided factual support for her conclusions regarding Student's occupational therapy needs, and persuasive reasons for her program recommendations. Ms. Passons was the only occupational therapist to testify, and her opinions were persuasive and convincing.

20. Ms. Passons measured Student's fine motor skills with a standardized test of motor proficiency and a review of work samples. Formal testing was done in a quiet environment without distractions, with the assistance of a behavior aide during transitions. Ms. Passons measured Student's sensory processing with rating scales completed by Mr. Pagel and Parent. Ms. Passons observed Student in the classroom, on the playground, and during Ms. Saint Thomas's psychoeducational testing.

21. With regard to sensory needs, Parent's rating scale responses indicated Student might be under-responsive to touch or muscle/body sense. Parent reported that Student pulled away from touch, bumped other children, jumped a lot and chewed on objects, although this behavior was not observed by Mr. Pagel or classroom staff at school. It is not unusual for parents to report problems at home that are not present at school. Nonetheless, to test for under-responsiveness to stimuli, Ms. Passons did a trial of sensory items, which is frequently part of a sensory integration assessment. Ms. Passons gave Student a "disco sit" cushion that allowed Student to wiggle in her chair, and stretched a "theraband" between the front legs of Student's chair to create a trampoline-like surface for Student to bump her heels against. Both items provide students with opportunities for movement appropriate to the classroom and increase sensory input, and are provided to general education and special education students alike without the need for occupational therapy services. Student did not use either

item, indicating that she was not under-responsive to stimuli. Student also responded appropriately to touch in the sandbox and during a game of tag. During classroom music movement breaks, Student imitated body postures and demonstrated body awareness and good sequencing of motor movements. Student walked well on an uneven surface of woodchips and balanced on one foot. Ms. Passons concluded that Student was able to regulate her proprioceptive (muscle/body sense) system with input from her tactile (touch) and vestibular (movement/gravity) systems, and did not display sensory deficits when given opportunities throughout the day to engage in gross motor activities to obtain sensory input.

22. As to motor functioning, Student displayed good motor planning during preferred activities, but had difficulty completing multiple step tasks. She could use the bathroom independently, had a functional pencil grasp, and demonstrated the bilateral coordination and motor planning required to string beads, open containers and use scissors. However, on standardized tests, Student lacked the fine motor and motor planning skills to fold paper, cut along a line, copy a circle, or draw a “plus” sign. Student tested with deficits in the areas of organization of behavior and fine motor skills. Her fine motor abilities were at the level of tracing for imitation, rather than independently copying letters or shapes. Ms. Passons concluded that Student qualified for occupational therapy to support behavioral organization and fine motor writing in the classroom.

23. Elaine Sun, a District behavior specialist, conducted a functional behavior assessment of Student. Ms. Sun was a credentialed school psychologist and licensed educational psychologist, and had been a Board Certified Behavior Analyst for seven years. At the time of the assessment, she had 14 years of experience as a school psychologist and behavior specialist in the school setting, with three years of previous experience as a senior therapist providing one-on-one behavioral therapy in a clinical setting. Ms. Sun had a calm demeanor at hearing, and gave complete responses. Her

opinions regarding Student's behavioral needs were well-reasoned, and her opinions regarding those needs, and the program and supports to address them, were given significant weight. Ms. Sun was the only Board Certified Behavior Analyst or credentialed school psychologist to testify.

24. The purpose of a functional behavior assessment is to identify behaviors that interfere with learning in the school setting. After consulting with Mr. Pagel and classroom staff, Ms. Sun identified the three primary problem areas reported: asking for help, asking for attention and transitioning without elopement, and had District staff collect data on how often Student engaged in these activities appropriately and inappropriately over a two-week period. Ms. Sun collected this data for purposes of confirming that these were appropriate target behaviors and obtaining baseline information on how frequently the behaviors occurred. She determined the antecedents and consequences of Student's behaviors from observation and interviews with classroom staff. It was consistently reported, and Ms. Sun observed, that Student's elopement and aggression both occurred when Student was presented with challenging or non-preferred tasks or when she was seeking attention. During one of Ms. Sun's playground observations, Student was throwing wood chips. Ms. Sun did not consider this an extreme behavior, but believed that a behavior intervention plan to address attention seeking behavior would address throwing wood chips as well.

25. Ms. Sun observed Student in the classroom and on the playground for a total of six and a half hours over four days. She reported the frequency, intensity and duration of maladaptive behaviors during her observations in a functional behavior assessment report. She also reported her interviews with Mr. Pagel and Parent, and gave details of the observations. Student eloped three times when asked to do things she did not want to do (such as sit in a chair), or when she did not get attention (such as when she was walking back to class with Mr. Pagel and he turned to speak with other

students). Each elopement lasted from 16 to 36 minutes. When Student eloped, she would be prompted to return to task, get a break, or be reminded of expectations or classroom rewards she could earn by doing her work, such as play time with a preferred toy. Student complied with many directions, and often participated in class activities without maladaptive behaviors for 10 to 22 minutes. Student was talkative, but difficult to understand. She enjoyed playing with peers, but did not understand the concept of taking turns.

26. Ms. Sun concluded that Student engaged in maladaptive behaviors to seek attention and avoid non-preferred tasks. She noted that Student required a high level of attention from staff. Student required simple "first/then" instructions for classroom participation, and that many classroom tasks were above Student's independent academic level. Ms. Sun determined that Student needed to learn functionally equivalent replacement behaviors to gain attention and escape from instructional demands or non-preferred tasks, such as verbalizing requests for help and asking for attention or a break. She recommended that a behavior intervention plan be developed to systematically teach Student to verbalize her needs as a replacement behavior for elopement and attention seeking behaviors.

27. On September 5, 2017, Mr. Pagel sent an IEP team meeting notice to Parent proposing a September 15, 2017 meeting date. The notice was sent in a large yellow envelope inserted into Student's daily communication log in her backpack. Parent removed the notice from the log and read it, but did not respond.

28. On September 6, 2017, Mr. Pagel completed a standardized inventory of early development of Student's academic skills. In reading and writing, Student could recognize only a few upper or lower case letters, and did not appear to understand the difference between lower case and upper case or the sounds each letter made. She could not read color words, number words, grade level words, or high frequency words,

did not understand the concept of blending sounds, and was unable to read a first grade level passage. She could write the first two letters of her name, but could only trace other letters. In math, Student could rote count to 10 and identify shapes, but could not identify more than six numbers, and did not appear to understand the concept of "one more."

29. On September 7, 2017, Mr. Pagel sent another IEP team meeting notice to Parent in Student's communication log again proposing a meeting on September 15, 2017. Parent removed the notice from the log and read it, but did not respond.

30. On September 14, 2017, Mr. Pagel sent another IEP team meeting notice to parent in Student's communication log proposing a meeting on September 25, 2017. Student's advocate, James Peters, III, contacted the school and said that he would attend an IEP team meeting with Parent. He asked that the meeting be scheduled for October 24, 2017, which District agreed to in a meeting notice dated September 27, 2017.

#### OCTOBER 24, 2017 IEP TEAM MEETING

31. On October 24, 2017, District convened an IEP team meeting for Student. Parent attended by telephone, as did Student's advocate Mr. Peters and his assistant. Parent indicated that Mr. Peters would speak on her behalf, and did not speak during the rest of the call, other than to respond that she was still on the line.

32. District team members attending included special education teacher Mr. Pagel, assessors Ms. Saint Thomas, Ms. Olson, Ms. Passons and Ms. Sun, the school nurse, a general education teacher, a program specialist, a school administrator and District's counsel.

33. Mr. Pagel shared Student's academic achievement with the team. When asked if Parent had any input, Mr. Peters replied none at that time.

34. Mr. Pagel proposed annual academic goals in reading (identify all 26

uppercase letters and blend four phoneme words), writing (copy letters of Student's name with a model and visual prompts), and math (count to 30).

35. Ms. Sun presented her functional behavior assessment. She proposed four annual behavior goals for Student to learn functionally equivalent behaviors to address elopement and inappropriate attention seeking, including to: (1) verbalize a request for help or a break when presented with a nonpreferred task, (2) ask for attention when sought, (3) transition without elopement, and (4) decrease maladaptive behaviors to no more than three per instructional day. Ms. Sun reviewed Student's present levels of behavior, and proposed short-term objectives to document incremental progress. When given an opportunity to ask questions or to comment, Mr. Peters asked how data was collected and requested copies of the assessment protocols. Parent and Mr. Peters gave no further input.

36. Ms. Passons reviewed her occupational therapy assessment. Mr. Peters asked if Student was under-responsive, and Ms. Passons responded that Student was not under-responsive to sensory stimuli, and that regular movement breaks such as those provided in the special education classroom would enable Student to regulate herself. She noted that Student's organization of behavior benefitted from hands-on activities and positive behavior support. Ms. Passons had collaborated with Mr. Pagel to draft his proposed writing goal for Student to copy the letters of her name from a model with prompts, and recommended 30 minutes per week of direct occupational therapy for Student to work on the visual motor and fine motor skills Student needed to learn to make progress on that goal. When asked, Parent and Mr. Peters had no input on designing occupational therapy goals or determining services.

37. Ms. Olson reviewed her language and speech assessment with the team. Student's receptive and expressive language skills were at the four-year-old level, and although Student's pragmatic language, voice and fluency were within functional levels,

Student had significant articulation deficits. Ms. Olson found Student eligible for language and speech services, and proposed annual communication goals for Student to: (1) use four-word utterances with correct pronouns and verbs, (2) use "I" when commenting or requesting, (3) correctly produce p, g, ch, sh and l sounds, and (4) label five items when presented in a category (for example, items of clothing, animals, food). She recommended that Student be given clear and simple directions, with prompting and motivators, and that Student receive language and speech services approximately once per week for 20 minutes individually and once per week for 20 minutes in a group setting. Parent and Mr. Peters gave no input into designing the language and speech goals and services when given opportunities.

38. Ms. Saint Thomas summarized the psychoeducational assessment of Student's cognitive abilities. Student was significantly below average in all measured psychological processing areas. Ms. Saint Thomas concluded that Student demonstrated subaverage cognitive functioning and global deficits in adaptive behavior, which was consistent with prior assessments. Ms. Saint Thomas recommended that Student be presented material at her academic level, and with repeat of instructions, chunking of tasks, and a combination of visual and verbal stimuli. Parent and Mr. Peters did not contribute to the discussion of Student's abilities or achievement, although given opportunities to do so.

39. The team reviewed Student's present levels of performance in all areas, and noted that Student had made partial progress on all of her September 2016 goals, although none had been met. Ms. Passons was critical of the prior goal that Student write her name independently, as Student was still at a pre-writing level.

40. District members of the IEP team discussed development of a behavior intervention plan to support Student in replacing elopement and inappropriate attention seeking with appropriate behaviors. Parent and Mr. Peters provided no input,



although Mr. Peters requested that the discussion be brief. District team members documented that the behaviors occurred when Student did not have a high level of attention from staff, or when given multi-step directions or instruction above her academic level. The team identified a number of changes that should be made in the classroom to accommodate Student, including high levels of praise for desired behaviors, assigned class jobs, holding hands with staff during transitions, reviews of expected behavior, immediate and highly preferred reinforcement for transitions without elopement, staff to block exits when elopement was anticipated, consistent use of "first/then" instructions, regular review of a visual schedule, and scaffolding of instructions at Student's independent level. Strategies for teaching Student appropriate behavior included teaching her to say "help, please," frontloading for Student to ask for help before being presented with task demands, using modeling and role-play, teaching her to say "sit with me" and other appropriate verbalizations for attention, and using social stories, a visual schedule and frontloading of behavioral expectations to teach transition without elopement. The team listed positive reinforcements to be used, such as immediately honoring appropriate requests for help or attention paired with praise and tokens, and reactive strategies such as prompting Student to make an appropriate request, using firm and clear reminders of expected behavior, and "first/then" reminders. Provisions for measuring increase or decrease in problem behaviors with classroom data were also included.

41. The team discussed and adopted the proposed goals. Each of the goals was at Student's developmental level and objectively measurable. Parent and Mr. Peters declined to participate in the goals discussion.

42. The team considered supports and accommodations. Mr. Pagel noted that the September 2016 IEP called for Student to use an iPad, and Mr. Peters offered that Student needed the iPad to be sent home for learning and generalization of skills to the

home environment. Mr. Pagel told the team that Student did not use the iPad for learning or communication during the school day, although she enjoyed playing games on it and he used the iPad as one of multiple motivational tools in the classroom. The use of an iPad, in school or at home, was not included in the IEP as it was not a necessary aid or support. The team did add five minutes per month of consultation between the classroom teacher and Student's service providers, including the school psychologist, speech pathologist and occupational therapist.

43. District team members found Student eligible for special education under the categories of intellectual disability and speech language impairment. Mr. Peters requested that Student be found eligible as other health impaired, and incorrectly stated that this had been her previous eligibility category. District team members believed that they had correctly determined Student's eligibility, which determination was consistent with that of the last school district, and did not change the eligibility categories.

44. District team members adopted the behavior support plan, classroom supports, and teaching strategies recommended by Mr. Pagel, Ms. Sun, Ms. Olson, Ms. Passons and Ms. Saint Thomas.

45. District team members recommended that Student be placed in a special education classroom for students with mild to moderate disabilities, and that she spend nonacademic activities, such as snack, recess, lunch, physical education and assemblies in general education with her nondisabled peers, for a total of 20 percent of her school day. District team members believed that the benefits of a highly structured special education classroom with a small student-to-staff ratio and instructional strategies designed for students of Student's ability outweighed the benefit of Student participating in general education for the full day.

46. The special education and services offered in the IEP developed by the team included: specialized academic instruction in a special education classroom for

1420 minutes (80 percent of the school day), individual occupational therapy for 30 minutes per week, individual language and speech services in 20-minute sessions for 30 weeks of the school year, and group language and speech services in 20-minute sessions for 30 weeks of the school year. The IEP offered home to school transportation, and services during the extended school year to prevent regression of Student's academic skills over the summer break.

47. Mr. Peters requested that Student have a one-on-one behavior aide with her throughout the school day and on the bus. District team members believed that the supports discussed were sufficient for Student to make educational progress, but agreed to conduct a temporary special needs assistant assessment, or TSNA assessment. A TSNA assessment determines whether a student requires a one-on-one behavior aide throughout the school day, and includes development of an independence plan to minimize dependence on the aide.

48. Mr. Peters requested additional occupational therapy and language and speech services. Ms. Passons and Ms. Olson explained that the amount of services requested was not necessary for Student to make educational progress. District team members maintained the offered services at the levels recommended by Ms. Passons and Ms. Olson.

49. Mr. Peters also requested that Student be placed in general education for 80 percent of her school day, receive four hours of behavioral counseling with Dr. David Paltin at his office, that District implement behavioral data collection by the teacher, aide and school psychologist, that Student receive 12 hours of nonpublic agency behavior therapy and supervision in the home, that Student receive an iPad for use at home for homework and as a motivational tool, and that Student receive all related services over school holidays. He also requested another meeting be scheduled to adjust Student's goals.

50. The time allotted for the meeting had run, and District team members wanted to reconvene to discuss Parent's requests. Mr. Peters declined the offer of another meeting, indicating that Parent had no information to share, and that Parent's requests should be accepted or rejected immediately without any further input from Parent. Nonetheless, District team members agreed to schedule another meeting to discuss Parent's requests and amend the IEP offer if appropriate, and the meeting was adjourned.

51. On October 25, 2017, Mr. Pagel prepared an assessment plan for a TSNA assessment, and sent it home to Parent in Student's communication log. Parent removed the assessment plan from the communication log, but did not sign or return it.

52. On October 27, 2017, Mr. Pagel sent IEP team meeting notices to Parent in Student's daily communication log, proposing a meeting on November 7, 2017, but giving alternate times for the meeting. Parent removed the notice from the communication log and read it, but did not respond.

53. A few days later, Mr. Pagel sent home Student's report card for the first trimester, August 7 through October 27, 2017. The report card was the same one used for all District students, with marks for achievement and effort in grade level curriculum, as well as citizenship and work habits. Mr. Pagel's students were on an alternate curriculum for grade level subjects, such as reading skills, math and history, and worked on more than just their IEP goals. The report card was Mr. Pagel's means of informing parents of his students about their daily work completion with accommodations and support

54. Student's report card indicated that she was in a special day class, and that she received accommodations and supports through small group and individualized instruction in accordance with her IEP. Mr. Pagel graded Student at her developmental level, reporting that Student had shown satisfactory to outstanding effort in most of her

classes, although her effort required improvement overall, and gave her good or outstanding grades for achievement in her modified curriculum. Mr. Pagel explained how to read a report card to parents during Open House and parent/teacher conferences. Parent did not attend Open House or any scheduled parent/teacher conferences, and did not return Mr. Pagel's calls to meet with her. Parent testified unconvincingly at hearing that she was confused by the report card, and thought that Student was suddenly performing at grade level.

55. On October 31, 2017, District sent a prior written notice letter to Mr. Peters explaining its FAPE offer and the information relied upon for that offer. It denied Parent's request to place Student in a general education classroom with a one-on-one aide because Student's academic needs could not be met in a grade-level general education classroom, and because Student required a slower pace and support of a credentialed special education teacher and specially trained staff to address Student's academic and behavioral needs. District declined to provide a one-on-one behavior aide to Student in the classroom or on the bus until the TSNA assessment was completed, but noted that Student had not exhibited any behaviors on the bus to necessitate an aide. District declined to offer a home behavior program, clinic-based behavior counseling, or related services over the holidays because District believed that the program and services offered at school were sufficient to address Student's behaviors and allow her to gain educational benefit. District declined to offer an iPad for home use because Student was not given homework to complete on the iPad and it was minimally effective as a motivational tool. District declined additional clinical occupational therapy, a specific handwriting program, or additional speech therapy, as the services offered by District were sufficient for Student to make progress on her goals.

56. District reiterated that District's behaviorist would collect data on Student's behaviors as part of the behavior intervention plan, and that consultation between

service providers and Student's teacher had been included in the IEP. District offered to convene another IEP team meeting for Parent to provide input into the goals and to discuss adjustment of the goals, and to discuss at that meeting whether additional data should be taken in the classroom. The letter identified the information considered in responding to Parent's requests, and District's reasons for agreeing to, or declining, each of the requested services.

57. Mr. Peters responded to District's letter by requesting that Dr. David Paltin be permitted to observe Student in the school setting. District arranged an observation for the afternoon of November 9, 2017.

58. On November 9, 2017, Parent dropped Student off at school at 11:00 a.m., rather than at the start of the day. As a result, Student had difficulty getting into the classroom routine, and Student engaged in more inappropriate behaviors than usual. Student had shown significant progress in transitioning between activity centers in the classroom, but that day she had particular trouble with the routine and was running around the room and away from the classroom behavior aides.

59. Dr. Paltin had observed Student in kindergarten and attended an IEP team meeting that year. During that kindergarten observation, Student had followed some classroom activities and interacted well with other children. During the November 9, 2017 observation, Student got out of her seat to go to the drinking fountain and needed multiple prompts to return to an activity center and stay on task. Student appeared distracted, although Dr. Paltin could not tell if Student was having difficulty, was bored or was seeking attention. Dr. Paltin did not believe that Student's behaviors were any worse in first grade than kindergarten, but he also did not feel that they had improved. Although Dr. Paltin observed classroom staff redirecting Student with verbal prompting and gestures, he thought that they were generally ineffective in bringing Student back to task, and that any compliance was "just her own decision." Dr. Paltin did

not prepare a report of his observation, and District was not notified of his opinions.

60. On November 14, 2017, Mr. Pagel prepared two IEP team meeting notices and sent them home to Parent in Student's daily communication log. He proposed various times for a meeting date of November 29, 2017. Parent did not respond.

61. On November 15, 2017, District sent a letter to Mr. Peters requesting a response to its attempts to schedule an IEP team meeting to address Parent's concerns and parental consent to the TSNA assessment. Neither Mr. Peters nor Parent responded to District's second letter.

62. By the time of the hearing, and despite the inability of classroom staff to implement a behavior intervention plan due to lack of parental consent, Student's maladaptive behaviors, such as eloping, hitting and screaming, had decreased with use of embedded behavior supports in the classroom. Incidents of Student turning the classroom lights on and off decreased to once every three weeks. Academically, Student was counting to 30 and getting closer to understanding the concept of "one more."

63. At the time of the hearing, one incident had been reported to Mr. Pagel of Student misbehaving on the school bus by unbuckling her seat belt. Student was not injured, and did not engage in further incidents of misbehavior on the bus. Student's bus driver routinely reported to Mr. Pagel if the students in his classroom misbehaved or had injuries on the bus, and Mr. Pagel would have known if Student exhibited maladaptive behavior during transportation to and from school on the bus.

#### STUDENT'S EXPERT

64. Student called Dr. David Paltin as her sole expert. Dr. Paltin earned his Ph.D. and license as a clinical psychologist over 25 years ago. He has published articles on terrorism and threat assessment, institutional violence, the mental health of children and attention deficit hyperactivity disorder. Dr. Paltin is certified by the State of California to provide education-related psychological counseling. Dr. Paltin has

impressive credentials in the area of psychological development, but he was not questioned about, and did not offer an opinion on whether the results of District's psychoeducational assessment were accurate.

65. Dr. Paltin criticized Ms. Saint Thomas' use of the NNAT to assess a student of African-American descent, and postulated that case law prohibited all standardized testing of cognitive ability on students of African-American descent. However, Ms. Saint Thomas' specific testimony that the NNAT was not culturally biased or prohibited for use on African-American students by statewide guidance to school psychologists was more convincing than Dr. Paltin's statement that the NNAT was prohibited by his interpretation of case law.

66. Dr. Paltin could not identify the documents he had reviewed in preparation for his testimony, and seemed unfamiliar with the assessments in dispute.

67. Dr. Paltin stated that he would have conducted the functional behavior assessment in a general education classroom because he could not opine how Student would behave in a general education classroom without assessing her in that environment. He opined that he would have collected more data than Ms. Sun, used more highly educated data collectors, and that there was insufficient detail for him to understand the data collection sheets used by Ms. Sun, all of which fell short of establishing that baselines developed from that data were inaccurate or incomplete. Dr. Paltin was concerned that the behavior assessment had determined that Student was seeking attention, because he thought sensory issues were equally likely, although Ms. Passons testified that Student did not exhibit sensory issues that interfered with learning when given movement breaks. Dr. Paltin questioned the accuracy of Ms. Sun's conclusions, although he had no evidence to the contrary and was not himself qualified to conduct a functional behavior assessment to determine the motivations for behavior.

68. Dr. Paltin concluded that District denied Student a FAPE because District



failed to conduct appropriate assessments based on meaningful data, particularly whether Student could have succeeded in a general education placement. Dr. Paltin opined that Student required ongoing services of: a one-on-one aide in a general education classroom, one hour weekly behavior consultation at his offices, an iPad for sensory stimulation and attention, and that Student should receive all special education and related services year-round, including breaks and holidays. As compensatory education, he opined that Student should receive: inclusion support in the general education classroom by a nonpublic agency of Student's choice, clinical occupational therapy for one hour per week of two years, an independent functional behavior assessment, a 12-hour per week home applied behavior analysis program by a nonpublic agency of Parent's choice, two hours of tutoring per week, and that District fund Parent's attendance at two disability related conferences of Parent's choice.

69. Dr. Paltin was not a Board Certified Behavior Analyst, and there was no evidence that he had education, training or experience in the area of applied behavior analysis. Dr. Paltin was not a licensed speech and language pathologist or a licensed occupational therapist, and there was no evidence that he had received education, training or experience in either field. Dr. Paltin testified that he was familiar with, and assessed, the processes in the brain responsible for language and speech and motor control, but there was no evidence that he had any education, training or experience in assessing language or speech deficits, or in designing services to address language and speech deficits or to teach fine motor skills.

70. Despite the lack of credentials or experience in the areas of behavior intervention, applied behavior analysis, language and speech pathology and occupational therapy, Dr. Paltin frequently offered opinions on how Student should be assessed in these areas, Student's needs in these areas, and the programs to meet these needs. He also made recommendations on compensatory education in these areas. Dr.

Paltin had not assessed Student, and had only seen her twice in two years for a total of two hours. He failed to establish that he had any special knowledge, skill, experience, training or education to form the basis of his opinions. His unsupported and consistently affirmative responses to leading questions by Student's counsel as to whether he recommended the various amounts and types of relief sought appeared designed to support his client's case rather than present a reasoned opinion. Dr. Paltin's willingness to offer opinions in fields of expertise when he had no background or credentials seriously undermined his credibility and the soundness of his opinions in all areas. The opinions of Ms. Saint Thomas, Ms. Sun, Ms. Olson and Ms. Passons were more persuasive than those of Dr. Paltin in their respective areas of expertise.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>3</sup>

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

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

<sup>4</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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 IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School 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. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.* (March 22, 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.*, 137 S.Ct. 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. (*Endrew F.*, 137 S.Ct. at p. 1001.) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. Feb. 14, 2018, No. 15-56452) \_\_ Fed.Appx. \_\_, 2018 WL 847744.)

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

#### ISSUES 1(A) AND (B): ASSESSMENT AND BEHAVIORAL BASELINES

5. Student contends that District should have assessed her in the general education classroom to determine whether she could be appropriately placed in that setting. Student also contends that District failed to collect accurate behavioral data as part of its functional behavior analysis of Student for the development of behavior goals. District contends that its assessments were appropriately done and provided accurate information.

6. To meet the continuing duty to develop and maintain an appropriate educational program, the school district must assess the educational needs of the disabled child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.)

7. "An initial evaluation is the first complete assessment of a child to determine if the child has a disability under the IDEA, and the nature and extent of special education and related services required. Once a child has been fully evaluated. . . any subsequent evaluation of that child would constitute a reevaluation." (71 Fed. Reg. 46640 (Aug. 14, 2006).) California law refers to a reevaluation as a "reassessment." (Ed. Code, § 56381.)

8. No single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414 (a)(2),(3); 34 C.F.R. §§ 300.304(b)(2), (c)(4) (2006); Ed. Code, § 56320, subds. (e), (f).)

9. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) 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 the child a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

10. The evidence did not establish that Student should have been assessed in the general education classroom for inclusion.

11. Student was at a pre-academic, pre-writing level, and unable to access grade level curriculum. District's psychoeducational assessment found that Student was unable to identify or draw letters of the alphabet, a prerequisite skill to reading or

writing, and unable to understand basic mathematical concepts such as adding “one more.” All witnesses testified consistently that Student lacked the cognitive development or academic skills to participate in the grade level curriculum presented in general education classes. Student presented no rational argument for the proposition that she be assessed in an educational setting in which she would be unable to participate.

12. Student’s argument that she would have been able to access the general education classroom with a one-on-one behavior aide, and so should have been assessed for inclusion with a one-on-one aide, fails for two reasons. First, until and unless Student can access and participate in the curriculum in the general education classroom, her behaviors in such a setting are a secondary consideration. As discussed at Issue 1(f), the October 24, 2017 IEP team had compelling information that Student could not be educated in a general education classroom, and an assessment of Student’s behaviors in the general education classroom would not have provided the IEP team members with useful information to design Student’s educational program. Second, at Parent’s request, District did offer to do an assessment of the extent to which a one-on-one aide would support Student in the school environment, but Parent refused to consent to that assessment. Because District could not complete the TSNA assessment, no additional information on how a one-on-one assistant could help Student access the curriculum was provided to the team. Student cannot insist that one-on-one aide services be included in her IEP and at the same time refuse consent for District to assess for that service. Student’s musings on what such an assessment would have shown are no more than unfounded speculation.

13. As discussed at Issue 1(f), below, Student’s least restrictive environment was a special day class providing specialized academic instruction at her developmental level. District was not required to assess Student in the general education classroom to

determine if Student could be educated in a separate part of that classroom, with a separate curriculum, separate materials and separate instruction, that is, isolated and excluded from the academic activities surrounding her. School districts are required to ensure that students with disabilities are educated with their non-disabled peers to the maximum extent *appropriate*, not the maximum extent possible.<sup>5</sup> (34 C.F.R. § 300.114(a).) There is no requirement in the IDEA that a student be placed and fail in a less-restrictive setting before moving to a more restrictive one. (*Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 835.)

14. Student also asserts that District failed to collect accurate behavioral data as part of its functional behavior assessment. However, the weight of the evidence did not establish that the behavioral data collected was inaccurate or insufficient to identify and address Student's behavioral needs.

15. Dr. Paltin criticized a particular data collection form designed by Ms. Sun for failing to collect the duration, antecedents and consequences of the identified behavior. However, Ms. Sun testified that that form was designed to gather information on the number of incidents for baseline purposes, which it did. She explained that further information on the frequency and duration of identified behaviors would be done as part of implementing and measuring progress on the behavior intervention plan. Ms. Sun determined the antecedents or consequences of behavior through observation, teacher report, and parent input, independent of the baseline data on frequency of occurrence. California law recognizes that Board Certified Behavior Analysts are particularly qualified to conduct behavior assessments. (Ed. Code, § 56525, subd. (a).) Dr. Paltin was not a Board Certified Behavior Analyst and had not conducted a behavior

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<sup>5</sup> Student's complaint alleged, incorrectly, that District was required to place Student in the least restrictive environment to the maximum extent "possible."

assessment of Student, and there was no evidence that he was trained to perform, or had ever performed, a functional behavior assessment. His unqualified opinions were ineffective in challenging the accuracy or thoroughness of a functional behavior assessment conducted by a trained and experienced Board Certified Behavior Analyst. Ms. Sun's identification of the functions of Student's behavior were consistent with the observations of Mr. Pagel and classroom staff who worked with Student on a daily basis, and Ms. Sun persuasively opined that the data collected for the functional behavior analysis was sufficient to inform the IEP team in developing a behavior plan for Student.

16. Student asserts that the functional behavior assessment was flawed because it did not collect data on Student's behavior on the bus. However, Student presented no evidence that she exhibited maladaptive behaviors on the bus, except for one isolated instance of unbuckling her seat belt that was resolved without incident or injury.

17. Dr. Paltin was critical of all aspects of District's functional behavior assessment, including the amount of data taken, the method of collecting data, and the qualifications of the data collectors. However, his criticisms were based primarily on his incomplete information on each of those items, and Student offered no evidence that there were errors in the data collection, or that any of Student's behavioral needs had been insufficiently identified by the data collected.

18. Finally, District did not impede Parent's opportunity to participate in the decision making process regarding the behavioral component of Student's educational program or her inclusion in general education. Parent was a participant at the October 24, 2017 IEP team meeting, and present when the functional behavior assessment and other academic and functional skills were reported and discussed. A parent has meaningfully participated in the IEP process when he or she has an opportunity to discuss a proposed IEP and when parental concerns are considered by the IEP team.



(*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.) District IEP team members encouraged Parent to participate in the discussion of Student's unique needs and development of her educational program. However Parent chose not to participate or agree to another IEP team meeting that District team members wanted to schedule one to discuss the requests raised by Student's advocate at the conclusion of the October 24, 2017 meeting. Any lack of meaningful participation in the decision making process was the fault of Parent, not District.

19. Student failed to meet her burden of proving by a preponderance of the evidence that District denied her a FAPE by failing to assess her in the general education classroom to determine the appropriate amount of inclusion, or by failing to collect accurate behavioral data for the functional behavior assessment. District prevailed on Issues 1(a) and 1(b).

#### ISSUE 1(C): REPORTS OF PROGRESS

20. Student contends that she was denied a FAPE because Parent did not receive regular reports of Student's behavior from August 7, 2017, through October 27, 2017, or accurate reports of Student's academic progress, and was thereby denied participation in the IEP process. District contends that the report card was accurate, and that no reports of behavior were required because Parent had not consented to implementation of the behavior support plan.

21. An IEP team must review a student's IEP periodically, but not less frequently than annually, to determine whether the Student's annual goals are being achieved (20 U.S.C. § 1414(d)(4)(A)(i); Ed. Code, § 56380, subd. (a)(1).) The IEP team shall also meet whenever the student "demonstrates a lack of anticipated progress." (Ed. Code, § 56343, subd. (b).)

22. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational

placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.)

#### First Trimester Behavior and Academic Reports

23. The evidence did not establish the need to report on, or hold an IEP to address, Student's behavior or academic achievement prior to the agreed-upon IEP team meeting. Parent was given timely information on Student's behaviors and academic achievement at the October 24, 2017 IEP team meeting. Pursuant to a settlement agreement negotiated and signed by Parent, Parent had the benefit of psychoeducational, language and speech, occupational therapy and functional behavior assessments at the time of the meeting. Mr. Pagel, who worked with Student every day, presented current information on Student's academic performance and contributed to the development of a behavior support plan. The very purpose of the October 24, 2017 IEP team meeting was to review the assessments, determine Student's present levels and design a program to address Student's educational needs. While the assessments were taking place, there was no need to conduct an earlier IEP team meeting for lack of anticipated progress or other reasons.

24. Parent and the October 24, 2017 IEP team had sufficient information on Student's cognitive processing, developmental levels, academic achievement and behavior for Parent to meaningfully participate in developing an IEP for Student. Accordingly, even if the subsequently issued report card was inaccurate, it did not impede Student's right to a FAPE, significantly impede Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student,

or cause Student a deprivation of educational benefits.

### Report Card

25. The report card was not a report on progress on Student's annual academic or behavior goals. Student did not establish how the academic information on the report card, or its lack of behavior information, deprived Parent of the information she needed to participate in designing Student's IEP.

26. Parent was given timely information on Student's behaviors at the October 24, 2017 IEP team meeting. The September 16, 2016 IEP called for reports on progress on goals every trimester. The statement in Student's closing brief that Mr. Pagel had "the ability to slip a behavior notice in Student's backpack" does not impose on District an obligation for him to do so. Prior to the October 24, 2017 IEP, Student did not have a behavior intervention plan, and District was not required to provide daily reports on the frequency, severity or type of behaviors exhibited by Student.

27. An IEP must include a description of when periodic reports on the progress the student is making toward meeting the annual goals will be provided, such as through the use of quarterly or other periodic reports *concurrent with the issuance of report cards*. (34 C.F.R. § 300.320(a)(3)(ii); Ed. Code, § 56345(a)(3).) The IEP in effect at the beginning of the 2017-2018 school year required reports of progress on annual goals each trimester, which was concurrent with District's issuance of report cards.

28. The United States Department of Education, in its discussion of the 2006 regulations implementing the IDEA, noted that the IDEA does not require the use of report cards as a method of reporting a child's progress. (71 Fed. Reg. 46,664 (Aug. 14, 2006).) Guidance by the Department of Education's Office of Civil Rights has stated that report cards for students with disabilities must be at least as informative and effective as report cards provided for students without disabilities. (*Shenendehowa Cent. (N.Y.) Sch. Dist.* (OCR Jan.23, 2014) 114 LRP 23576). As long as the report card offers a meaningful

explanation of a student's progress, it may also refer to a Student's receipt of special education and related services. (*In Re: Report Cards and Transcripts for Students with Disabilities* (OCR 2008) 51 IDELR 50.)

29. Student's report card from the first trimester of the 2017-2018 school year complied with Department of Education guidance. It was in the same format and provided the same information as the report cards sent to nondisabled students. It gave marks for Student's achievement and effort in designated areas of the first grade curriculum, as well as citizenship and work habits, so was at least as informative and effective as the reports cards for general education students. Student's report card also expressly stated that Student was in a special day class and received accommodations and supports through small group or individualized instruction in accordance with her IEP. When read in conjunction with her IEP, it was apparent that Student was graded at her developmental level, on an alternate curriculum, and the report card provided a meaningful explanation of Student's progress in her daily classwork. Student worked on more than her IEP goals, and the purpose of the concurrent report card was to provide information on Student's work completion and effort with accommodations and support.

30. Student did not establish that the information in the report card was inaccurate. Dr. Paltin was critical of the grades assigned by Mr. Pagel because Student should have received "unsatisfactory" achievement grades in all academic areas if graded at grade level. This opinion was unfounded and unpersuasive. Dr. Paltin was not a credentialed general or special education teacher, and had no background in the first grade curriculum, so his assigned grades were speculative at best. He also failed to take into account that the report card clearly noted that Student was in a special day class and received small group and individualized instruction at her developmental level in accordance with Student's IEP. His opinion that the report card was an inaccurate report

of grade level standards achievement that would cause Parent to think that Student was suddenly performing at grade level lacked credulity. His opinion failed to take into account that Mr. Pagel met with the parents of each of his students to explain the report card to avoid confusion. Any suggestion that Parent was so out of touch with her foster daughter as to be misled into believing that Student was performing at grade level is beneath consideration. Lastly, if followed to its logical conclusion, Dr. Paltin's opinion would result in all students on an alternate curriculum receiving reports cards full of "unsatisfactory" marks, which would be devoid of meaningful information for parents on how their students are responding to specialized instruction at their developmental level.

31. The weight of the evidence also failed to establish any confusion by Parent over the grades in the report card was reasonable. Mr. Pagel made multiple attempts to speak with Parent to explain the information in the report card and answer any questions regarding Student's participation and progress in daily lessons. If Parent had a question regarding Student's grades, Parent could have responded to Mr. Pagel's calls, but she did not. Instead, Parent chose to ignore Mr. Pagel's attempts to offer clarification and guidance.

32. Student did not meet her burden of proving by a preponderance of the evidence that District failed to provide Parent with appropriate reports of Student's progress. District prevailed on Issue 1(c).

#### ISSUE 1(D): GOALS

33. Student contends that she was denied a FAPE because the October 24, 2017 IEP team failed to develop goals in all of Student's areas of need, specifically, attending to a structured task, following directions, problem solving, vocabulary and

following classroom routines.<sup>6</sup> District contends that the goals developed addressed all of Student's areas of need.

34. An IEP must include a statement of measurable goals, including academic and functional goals, designed to (i) meet the child's needs resulting from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and to (ii) meet the child's other 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); 34 C.F.R. § 300.320(a)(2)(i).) The IEP must contain annual goals that the child has a reasonable chance of attaining within a year, based upon the child's present levels of academic achievement and functional performance, and a statement of how the goals will be measured. (Ed. Code, §§ 56344 and 56345, subd. (a)(3).) The IEP must show a direct relationship between present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

35. The October 24, 2017 IEP included measurable annual goals to address all of Student's academic and functional needs. The goals were based upon comprehensive assessments conducted in accordance with the settlement agreement, and developed after the IEP team reviewed those assessments and Student's present levels of performance. District provided Parent with the opportunity to participate in the development of the goals in the October 24, 2017 IEP, but declined to do so.

36. In the academic areas of reading, writing and math, Student could write two letters of her name and count to 10, but could not identify or draw most letters or numbers. Ms. Saint Thomas testified convincingly that the goals in letter identification,

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<sup>6</sup> Student listed numerous alleged areas of need in her complaint allegedly not addressed by the October 24, 2017 IEP, but limited her closing argument on the evidence of the areas of need listed here.

phonological awareness, writing her name and counting to 30 addressed all of Student's academic needs. She explained that the annual goals took into account Student's developmental functioning and what Student could be expected to accomplish in one year, and that goals addressing pre-academic foundational skills were appropriate. Ms. Passons testified convincingly that Student's annual goal to write her name from a model was appropriate for Student, who was still at the tracing level in her development, and would address Student's fine motor difficulty with copying.

37. Student had poor articulation and misused pronouns, inconsistently named items and categories, and demonstrated delayed receptive and expressive language skills. Ms. Olson opined persuasively that Student's annual communication goals to use four-word utterances with correct pronoun, to use "I" when commenting and requesting, to correctly label items and categories, and to correctly produce specified sounds at the beginning, middle and end of words, were appropriate to meet Student's communication needs at her developmental level. The labeling goal addressed Student's need for an expanded vocabulary. Ms. Olson explained that Student needed to acquire foundational language skills before she could access and participate in more complex communication, such as responding to "why" questions or providing a logical conclusion to a sequential story. She opined that goals to address these areas – including problem solving - were developmentally inappropriate for Student and therefore likely to be unattainable within one year.

38. Student's present levels of performance and functional behavior assessment indicated that Student engaged in maladaptive behaviors to gain the attention of staff and avoid non-preferred tasks. Student could already attend to a structured task for 15-20 minutes unless it was non-preferred. Ms. Sun opined persuasively that the behavior goals to ask for help rather than elope from non-preferred tasks, to ask for attention when wanted, to transition without elopement and

to reduce episodes of maladaptive behavior addressed Student's social, emotional and behavioral needs. The goals were developmentally appropriate and attainable within one year with implementation of the behavior intervention plan. Ms. Sun explained that the behavior intervention plan provided functionally equivalent positive behaviors for Student to use instead of eloping, screaming, hitting or other maladaptive behaviors, and that implementation of the plan would allow Student to make progress on these goals. Progress on these goals would enable Student to attend to non-preferred as well as preferred tasks, follow directions and follow classroom routines, and separate goals in these areas were not required.

39. In sum, Student failed to identify an area of need resulting from Student's disability for which a goal should have been designed to enable her to be involved in and make progress in the general education curriculum, or to meet other educational needs of Student, but was not. Student failed to meet her burden of proving by a preponderance of the evidence that she was denied a FAPE because District did not develop goals in all Student's areas of need at the October 24, 2017 IEP. District prevailed on Issue 1(d).

#### ISSUE 1(E): CONSENT TO INTERVENTIONS

40. Student contends that District implemented a behavior intervention plan without Parent's consent by using animal crackers as motivators during the psychoeducational assessment, and by holding Student's hand during transitions as a restraint and blocking the door to prevent elopement from the classroom. Student also contends that Ms. Passon's use of a disco-sit and theraband in the classroom constituted occupational therapy interventions without consent. District disagrees.

41. Reassessments that occur throughout the course of the student's educational career, require parental consent, or the school district must file for due process to obtain an order permitting assessment. (20 U.S.C. § 1414(c)(3); Ed. Code, §



56381, subd. (f)(1); see 71 Fed. Reg. 46,640 (Aug. 14, 2006).)

42. A school district must obtain informed parental consent to an IEP prior to implementation of special education and related services offered in the IEP. (34 C.F.R. § 300.300(b)(4)(i); Ed. Code, § 45346(a).

43. Here, Parent consented to functional behavior and occupational therapy assessments as part of the July 2017 settlement agreement. Accordingly, Parent consented to actions taken by the assessors as part of the assessment, and for purposes of determining Student's functions of behavior and gross motor or sensory needs.

44. Ms. Saint Thomas testified that she used animal crackers to motivate Student to use her best effort on standardized tests. Her use of a common assessment strategy did not constitute an improper implementation of positive reinforcement rewards included in the behavior intervention plan, in part, because the psychoeducational assessment took place before the October 24, 2017 IEP and a behavior plan had not yet been developed.

45. Ms. Passons testified persuasively that her trials of a disco-sit and theraband were a typical part of a sensory integration assessment. Neither item is a component of occupational therapy services, and both are provided to students without disabilities as well as students with disabilities as needed to provide sensory input and provide focus and attention in the classroom. Ms. Passon's diagnostic use of these items for the limited period of the assessment did not constitute implementation of occupational therapy without parental consent.

46. Mr. Pagel used only the behavior strategies and supports embedded in the special day class curriculum, and neither he nor his classroom staff implemented the proposed behavior intervention plan at any time. Mr. Pagel and his staff commonly held the hands of his students, including Student, as a gesture of guidance and support for first graders and did not constitute the type of behavioral intervention that requires

parental consent. Similarly, having an adult stand in the doorway to block a student from eloping is common sense, and not an intervention requiring specific consent. District performed a functional behavior assessment and developed a behavior intervention plan to address behaviors that went beyond embedded classroom behavior supports, and District witnesses testified consistently and convincingly that the behavior intervention plan was not implemented due to lack of parental consent.<sup>7</sup>

47. Student did not meet her burden of proving by a preponderance of the evidence that District implemented the behavior plan in the October 24, 2017 IEP, or occupational therapy interventions, without Parent's consent. District prevailed on Issue 1(e).

#### ISSUES 1(F): APPROPRIATE PLACEMENT IN LEAST RESTRICTIVE ENVIRONMENT

48. Student contends that the October 24, 2017 IEP did not offer placement in the least restrictive environment. District disagrees.

49. In determining the educational placement of a child with a disability a school district must ensure that the placement decision is made by a group of persons, including the parents, knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children

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<sup>7</sup> Student argued that the presence of "Starburst" candies among the options for positive reinforcement in the behavior intervention plan demonstrated District's indifference to Student's allergy to strawberries. However, no evidence was offered that anyone ever offered Student a Starburst as a reinforcer, that Starbursts come in a strawberry flavor, or that Starbursts actually contain strawberries or strawberry juice. Parent could have addressed this by simply reminding the IEP team of Student's allergy during the development of the behavior intervention plan.

be educated in the least restrictive environment. (34 C.F.R. § 300.116.) The placement decision must also ensure that the child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

50. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that (1) children with disabilities are educated with non-disabled peers; and that (2) special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of general education was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].)

51. If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.) The

continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

52. The IDEA has been interpreted to create a strong presumption that students with disabilities be educated in regular classes with appropriate aides and services if needed, but not to create a mandate for full inclusion. (*Lachman v. Illinois State Bd. of Educ.* (7th Cir. 1988) 852 F.2d 290, 296, *cert. denied*, 488 U.S. 925.) A school district is not required to place a student in a general education classroom when the student will require so much modification in the curriculum that the regular program has to be altered beyond recognition. (See *ibid* [school district not required to fully mainstream a child who needed a full-time cued speech instructor working at his side to provide a different instructional methodology than that provided to the rest of the classroom].) The IDEA's mainstreaming preference is to be given effect only when it is clear that the education of the child with disabilities can be achieved satisfactorily in the type of mainstream environment proposed. (*Id.*, citing *A.W. v. Northwest R-1 Sch. Dist.* (8th Cir. 1987) 813 F.2d 158, 163, *cert. denied* 484 U.S. 847.)

53. The IEP team's determination that the educational and non-academic benefits derived from a mainstream program are minimal, and that a blended program would be better suited to meet the child's unique abilities and needs, is sufficient to overcome the preference for mainstreaming. (See *B.S. v. Placentia-Yorba Linda Unified Sch. Dist.* (9th Cir. 2009) 306 Fed. Appx. 397, 400.) Mainstreaming "is a policy which must be balanced with the primary objective of providing handicapped children with an 'appropriate' education." (*Ibid.*, quoting *Wilson v. Marana Unified Sch. Dist.* (9th Cir.

1984) 735 F.2d 1178, 1183.)

54. As to the first *Rachel H.* factor, the weight of the evidence established that Student would not receive educational benefit from a general education placement. Student had severe cognitive processing and academic deficits, and could not recognize most letters or numbers, could not understand basic math concepts, and still had to trace letters and simple shapes. Student's receptive language was at the four-year-old level, and expressively, she could not respond to "why" questions, provide a logical conclusion to a sequential story, or describe details in a picture. Student refused to recall previously given information and had difficulty following multi-step directions. Student was at a pre-reading and pre-writing level, and could not reasonably be expected to comprehend or participate in the first grade curriculum.

55. As to the second *Rachel H.* factor, the nonacademic benefits of a general education placement, the evidence did not show that Student would benefit socially from general education. Dr. Paltin opined that Student could have received non-academic benefit in a regular classroom from exposure to language and behavior modeling by typical peers because she "picks things up." However, as Dr. Paltin had only observed Student twice for short periods of time, and as he pointed to no specific observation or other information that informed this opinion, his opinion was speculative and unpersuasive. Student had difficulty following casual conversation and limited receptive and expressive language skills. Student had severe language processing deficits that would significantly interfere with her ability to absorb language through casual modeling.

56. Ms. Sun and Mr. Pagel testified convincingly that Student engaged in maladaptive behaviors to escape challenging classwork, and instruction above Student's developmental level, whether whole group or in small groups, could reasonably be anticipated to result in maladaptive behaviors such as eloping or attention seeking. Dr.

Paltin observed that Student participated with her peers and got feedback and reinforcement from her learning environment, but his observation took place in Mr. Pagel's classroom, where instruction was provided to the students at their developmental level. Although Student was well-liked and treated kindly by typically developing peers, these interactions took place during nonacademic activities, and the October 24, 2017 IEP team members reasonably concluded that Student would not derive nonacademic benefit from placement in general education classes for academics.

57. As to the third *Rachel H.* factor, a regular classroom placement would have adversely impacted Student's teacher and classmates. Student engaged in maladaptive behaviors such as screaming and running around the classroom when presented with nonpreferred classwork, and constantly sought attention. In a general education classroom, the classwork presented to Student would be above her cognitive and academic skills level, placing her in an environment that would dramatically increase the number of non-preferred tasks presented to her throughout the school day. Student's suggestion that a one-on-one behavior aide would minimize Student's disruptions fails to acknowledge that a general education placement would unnecessarily escalate antecedents, and is analogous to a medicine that addresses symptoms without curing the condition that caused the symptoms. The evidence suggested that placing Student in a class with typical peers and expecting her to participate in whole group instruction that she could not understand would have a detrimental effect on Student, her classmates and her teacher.

58. There was no evidence that cost was a factor in the IEP team's decision that Student could not have been satisfactorily educated in a regular classroom. In conclusion, each of the four *Rachel H.* factors weighed in favor of a placement outside of the regular classroom.

59. Student required instruction to be provided at her developmental level,

with simple directions and chunking of material, with a high level of attention from the teacher and staff. Student could only make meaningful academic progress in a special education classroom with a small teacher-to-student ratio and individualized instruction. She also required the regular movement breaks provided in a special day class to regulate her proprioceptive systems. A mild/moderate special day class with specialized academic instruction provided the instructional strategies and embedded supports identified by the October 24, 2017 IEP team as necessary for Student to learn, such as visual supports, access to tangible and non-tangible rewards, repetition of material, and small group instruction, that general education classes did not. Therefore, it was appropriate for the October 24, 2017 IEP to offer placement for Student's academics in a mild/moderate special day classroom, and no inclusion in general education for academics was warranted.

60. Applying the *Rachel H.* factors to the facts, Student could not have been satisfactorily educated solely in a regular education environment. Therefore, the least restrictive environment analysis requires a determination of whether District offered Student mainstreaming to the maximum extent appropriate per *Daniel R.R.*

61. District offered inclusion to Student during non-academic periods of the day, such as recess, lunch and assemblies, during which Student's developmental delays did not preclude participation with typically developing peers. Student's placement in a mild/moderate special day class for 80 percent of the day, with participation with typical peers in nonacademic activities for 20 percent of the school day offered Student an appropriate level of social interaction with typical peers and mainstreamed Student to the maximum extent appropriate.

62. Dr. Paltin opined that a one-on-one aide would have enabled Student to be placed in general education. However, as Dr. Paltin was neither a credentialed special education teacher, nor a Board Certified Behavior Analyst. He did not and could not

explain how Student could be educated in such a setting, or how Student's behaviors could be managed in a classroom based on whole group instruction, with little individual attention available from the credentialed teacher and presentation of material and classroom assignments beyond Student's comprehension and skill levels.

63. FAPE for a child fully integrated into a regular classroom typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Endrew F.*, 137 S.Ct. at pp. 1000-1001, citing *Rowley*, 458 U.S. at p. 204.) However, without an informed opinion on how Student would receive meaningful educational benefit in a classroom on grade level curriculum, even with the assistance of a behavior aide, Dr. Paltin reduced the IDEA's mandate that students with disabilities be educated to the maximum extent appropriate with their non-disabled peers to a mere proximity requirement. Such an interpretation violates both the letter and the spirit of the IDEA, which requires that an educational program be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew F.*, 137 S.Ct. at p. 1001.) Student's suggestion that she be fully integrated in a general education classroom because she enjoys interacting with her same-aged peers, despite being unable to comprehend or participate in the curriculum presented, is anathema to the IDEA's focus on meaningful educational progress.

64. Dr. Paltin's opinion that Student could be taught an alternative curriculum in a general education classroom by a one-on-one aide ignored several serious barriers to Student's ability to access the curriculum in such an arrangement. First, Student would receive instruction from a member of the behavioral support staff, rather than a credentialed teacher, who would be unable to teach or modify instructional materials. Second, the general education teacher would lack a credential in special education, and be unable to supervise or assist the aide in implementing modified lessons. Third, even



with prompting and redirection, Student would be required to learn her alternative curriculum in a classroom in which whole group lectures were taking place on grade level concepts, creating a constant stream of auditory and visual distractions not conducive to learning unrelated assignments. Fourth, Student and her typical peers would be working on different material, at different times, in different situations, such as small groups and activity centers. It is difficult to fathom how Student could model her peers under such circumstances, particularly if the one-on-one aide was constantly directing Student's attention away from the other students and to her own different work.

65. In sum, a mild/moderate special day class with embedded instructional, communication, and behavioral supports for 80 percent of the school day, and nonacademic activities with typical peers such as lunch, recess and assemblies for 20 percent of the school day, constituted mainstreaming to the maximum extent appropriate for Student. Accordingly, the October 24, 2017 IEP offered Student an appropriate placement in the least restrictive environment.

66. Student did not meet her burden of proving by a preponderance of the evidence that the October 24, 2017 IEP failed to offer her an appropriate placement in the least restrictive environment. District prevailed on Issue 1(f).

#### ISSUES 1(G) AND 1(H): BEHAVIOR SERVICES AND SUPPORT

67. Student contends that because the functional behavior analysis was flawed, District failed to develop an appropriate behavior plan for the October 24, 2017 IEP; specifically, that the behavior plan did not offer her a one-on-one behavior aide for the entire school day and during transportation. District contends that the behavior plan was appropriate, that Student did not require a one-on-one aide, and that District was prevented from gathering information on the support a one-on-one aide could provide because Parent did not consent to the TSNA assessment.

68. The IEP team must consider the use of positive behavioral interventions, supports and strategies when a child's behavior impedes his or her learning or that of others. (34 CFR §300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) The team may address the behavior through annual goals (34 CFR §300.320(a)(2)(i)), and may include modifications, support for teachers, and any related services necessary in the IEP to achieve those behavioral goals. (34 CFR §300.320(a)(4).)

69. Neither Congress, nor the U.S. Department of Education, nor any statute or regulation has created substantive requirements for the behavior intervention plan contemplated by the IDEA. (*Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221* (7th Cir. 2004) 375 F.3d 603, 615.) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but the implementing regulations of the IDEA do not require the team to use any particular method, strategy or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).)

70. As discussed at Issues 1(a) and 1(b), District conducted an appropriate functional behavior assessment that identified baselines for Student's school-based behaviors. It provided accurate and sufficient information for the October 24, 2017 IEP team to develop annual goals to address Student's behavioral needs. That functional behavior assessment determined the antecedents of Student's behaviors, identified the specific problem behaviors, and determined the function of the behaviors, enabling the IEP team to develop a positive behavior intervention plan, create strategies to teach Student appropriate replacement behaviors, and put behavioral supports in place.

71. The proposed behavior intervention plan developed by the October 24, 2017 IEP team accurately identified the antecedents to Student's maladaptive behaviors as presentation of non-preferred tasks and lack of attention, resulting in problem behaviors of elopement, non-compliance and screaming for the purposes of task avoidance and gaining attention. The behavior plan identified recommended positive

replacement behaviors with equivalent functions, specifically asking for help to escape non-preferred tasks and instructional demands and using appropriate phrases to gain attention from staff. The teaching strategies proposed in the behavior plan were reasonably calculated to teach and support Student in learning the replacement behaviors. Ms. Sun testified persuasively that having staff model, role-play and practice asking for help prior to presenting Student with demanding tasks, or to verbalize for attention, would teach Student the strategies necessary to achieve her annual behavior goals and remove Student's need to use problem behaviors. She convincingly explained that having Mr. Pagel and classroom staff provide Student with social stories, a visual schedule for transitions, and frontloading behavioral expectations would effectively teach Student to transition without elopement. Her testimony was consistent with that of Ms. Saint Thomas and Ms. Olson that reminders of behavioral expectations were often effective in obtaining compliance from Student for the difficult tasks presented during their assessments. The behavior plan also identified reactive strategies reasonably calculated to extinguish Student's problem behaviors, including prompts for replacement behavior such as having Student use her words to gain attention, firm and clear reminders of expected behaviors, first/then contingency reminders, and not engaging in verbal exchanges with Student after prompting when Student engaged in inappropriate attention-seeking behavior. It also included appropriate behavior goals consistent with Student's annual behavior goals, to verbalize requests for help for the purpose of escaping non-preferred tasks and instructional demands, and to verbalize requests for attention, rather than elopement or aggression.

72. The behavior intervention plan was developed with input from Parent by way of her interview with Ms. Sun for the functional behavior assessment, although Parent did not contribute to the behavioral discussion at the October 24, 2017 IEP team meeting. District's assessors and District IEP team members contributed to the

development of Student's behavior intervention plan. The IEP team also appropriately considered the use of positive behavioral interventions, supports and strategies to address the behaviors that impeded Student's learning and the learning of others.

73. In addition to the behavior intervention plan, the October 24, 2017 IEP team offered Student placement in the mild/moderate special day class with a low student to adult ratio and embedded behavioral and instructional supports. Additional aids and services included: visual supports, visual aids, social stories, and a token board; teaching strategies such as frontloading behavioral expectations, first/then contingencies, role-play, redirection and prompting; and consultation between the school psychologist, speech therapy provider, occupational therapist and Student's teacher. Ms. Sun and Ms. Saint Thomas testified persuasively and convincingly that the behavior intervention plan and additional supports offered were reasonably calculated to allow Student to make meaningful progress in light of her circumstances on October 24, 2017.

74. Dr. Paltin's criticisms of the behavior intervention plan, and his opinion that Student should have been given a one-on-one behavior aide throughout the school day and during transportation, were neither credible nor convincing. Dr. Paltin was not a Board Certified Behavior Analyst, and his curriculum vitae did not indicate any particular education, training or experience in functional behavior analysis. Although Dr. Paltin testified that he was qualified to provide clinical behavior consultation, he did not explain what that service entailed, how off-campus consultation could or would address Student's school-based behaviors, or why such a service should be included as a component of Student's educational program. He did not satisfactorily explain why Student required a one-on-one aide when she was already making progress with the small student-to-adult ratio in the special day class. As discussed at Issue 1(f), his opinion that Student could be placed in general education with a one-on-one aide was

highly speculative, unsubstantiated by the evidence of Student's abilities, contrary to the persuasive testimony of licensed and credentialed educators and related service providers, and unconvincing. In addition, Dr. Paltin's opinions and recommendations were not available to the October 24, 2017 IEP team, as he did not observe Student in first grade until November 9, 2017. As discussed at Issue 1(a), there was no evidence that Student exhibited maladaptive behaviors during transportation and needed one-on-one support on the school bus, and Dr. Paltin's opinion that Student needed a one-on-one aide on the bus to address her behaviors was unsubstantiated.

75. In sum, District appropriately addressed the behaviors that impeded Student's learning with annual behavior goals, a behavior intervention plan, and supplementary aids and services, and Student did not require a one-on-one aide during the school day or on the bus. The October 24, 2017 IEP offered a program that was reasonably calculated to address Student's behaviors and enable Student to make progress appropriate in light of her circumstances.

76. Student did not meet her burden of proving by a preponderance of the evidence that District denied her a FAPE by failing to offer her a one-on-one aide throughout the school day and during transportation. District prevailed on Issues 1(g) and 1(h).

#### ISSUES 1(I) AND 2 (A)-(F): INDIVIDUALIZED EDUCATION PROGRAM

77. Student contends that District failed to develop an individualized education program that was reasonably calculated to enable Student to receive educational benefit, specifically, that District failed to offer sufficient individual speech therapy, an in-home behavior analysis program, clinical behavior consultation, sufficient occupational therapy or Parent's preferred handwriting program, an iPad for use at home, or all related services through the extended school year and during breaks and holidays. District contends that it offered Student a FAPE.

78. For a school district's offer of special education placement and services to a disabled pupil to constitute a FAPE under the IDEA, the offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314; 20 U. S.C. § 1401(9).) The IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207; see also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006) 455 F.Supp.2d 1286, 1307-1309; *aff'd on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232.)

79. Applying the *Rowley* standard, as explained by *Endrew F.*, the weight of the evidence established that the October 24, 2017 IEP was designed to meet Student's unique needs and reasonably calculated to provide Student with educational benefit.

80. The IEP offered specialized academic instruction for 80 percent of her school day, or 1420 minutes per week. As discussed at Issue 1(f), Student required academic materials presented at her developmental level, with repetition of instruction, chunking of tasks, and visual and verbal supports which could only be provided in the mild/moderate special day class. Student had limited communication skills and difficulty following casual conversations, although she could follow simple one-step directions with prompting and use of motivators. Student was at the pre-reading, pre-writing academic level, and her cognitive processing delays and severe language deficits required that academic materials and concepts be presented through specialized academic instruction. Student could not access grade level curriculum, and could not comprehend or participate in grade level instruction Student was making progress on

her academic goals from the 2016 IEP with specialized academic instruction, and Mr. Pagel testified persuasively that specialized academic instruction for 80 percent of Student's school day would enable her to make progress on the proposed academic goals. In addition, with the support of classroom aides, Student was mainstreamed with typical peers during recess, lunch and assemblies, which provided her with role models and opportunities to generalize skills and socialize during non-academic activities, when her disabilities interfered less with participation. This level of academic and social emotional support was appropriate to ensure that Student received educational benefit.

### Language and Speech Services

81. Ms. Olson testified convincingly, and uncontradicted by any other language and speech professional, that approximately two 20-minute sessions of speech therapy per week were appropriate to meet Student's language and speech needs. This level of service supported Student's annual language, academic and behavior goals, and provided articulation and communication instruction at Student's four-year-old language level. The offer of half of these services delivered individually, and half delivered in a small group, provided Student with individualized instruction, particularly in articulation, that could then be generalized to a group setting. Monthly collaboration between the speech language pathologist and Student's teacher and classroom would also support generalization, and inform the speech provider on Student's ongoing speech and communication needs and performance in the classroom and on the playground. Accordingly, the 20 minutes of individual, and 20 minutes of group, language and speech services offered 30 times per year, and five minutes per month of collaboration between the speech pathologist and teacher, was reasonably calculated to provide Student with educational benefit.

82. Student asserted that District should have offered additional speech therapy because Student might engage in behaviors such as eloping prior to, or during,

speech therapy and not get the benefit of full sessions. However, at the October 24, 2017 IEP team meeting, members reviewed a functional behavior assessment, discussed Student's behaviors, drafted behavior goals and developed a behavior intervention plan to address Student's problem behaviors in conjunction with the discussion of language and speech deficits. Ms. Olson was a member of that IEP team, and took all of Student's needs into account in making her recommendations for language and speech services. In addition, Student's speculation that behaviors might occur during individualized speech therapy was contrary to her assertion that Student learned best in a one-on-one setting. Student did not require more speech therapy than offered due to behavioral needs.

83. The evidence did not establish that Student needed two hours per week of individual speech and language services. Dr. Paltin was not a licensed speech language pathologist, and his training and experience in assessing how the brain processed language was insufficient to qualify him as an expert on the design of programs for teaching articulation, receptive language, expressive language or communication skills, or on language and speech service delivery models. Ms. Olson testified persuasively that two hours per week of speech therapy would dramatically decrease the time available for classroom instruction, and adversely impact her academic progress. Student did not establish that she required two hours per week of individualized language and speech services.

#### In-Home Applied Behavior Analysis Program

84. Dr. Paltin opined that Student required a 12-hour in-home applied behavior analysis program with eight hours per week of behavior intervention and four hours per week of clinic meetings. However, Dr. Paltin did not explain how the in-home services were required to obtain educational benefit in the school setting, or the facts upon which he based this level of service. He testified incorrectly that Student was not



making behavioral progress in her current school program, which she was, even without implementation of the behavior intervention plan. Dr. Paltin was not a Board Certified Behavior Analyst, and offered no credentials to support his qualifications to offer an opinion on the design of an in-home applied behavior analysis program. Ms. Sun, who was an experienced Board Certified Behavior Analyst, testified persuasively that the behavioral supports offered by District were sufficient to address Student's behavior needs, as discussed at Issues 1(d), 1(g) and 1(h). She also persuasively testified that Student did not need a restrictive in-home behavior program to learn functionally equivalent appropriate behaviors to replace problem behaviors that interfered with her learning and the learning of others. Student did not establish that she required a 12-hour in-home applied behavior analysis program to obtain educational benefit in the school setting.

#### Behavior Consultation

85. Dr. Paltin opined that Student needed four hours of off-site clinical behavioral counseling because Student was "complex," but did not provide an explanation, let alone a persuasive reason, why Student required such a service to obtain educational benefit. The evidence did not demonstrate that Student required behavioral counseling to make progress on her behavior goals, or that clinical behavioral counseling would generalize to the school setting, and such counseling was not a required component of the October 24, 2017 IEP.

#### Occupational Therapy

86. Student had functional fine motor skills for self-help and adaptive living skills, but very limited drawing skills. Student's inability to draw a circle or "plus" sign, and her need to trace letters and shapes, placed her at a pre-writing level. The October 24, 2017 IEP offered 30 minutes of individual occupational therapy once a week, and five

minutes of consultation between the occupational therapist and Student's teacher, to support Student in progressing on her occupational therapy goal of writing her name and to monitor her sensory regulation. Ms. Passons persuasively testified that this was an appropriate level of services service to support Student in developing the fine motor skills necessary for writing.

87. Dr. Paltin opined that Student required one hour per week of direct occupational therapy and the Handwriting Without Tears program. Dr. Paltin was not a credentialed special education teacher or an occupational therapist, and his opinions on how Student should be taught to write in the classroom were superficial and unconvincing. Dr. Paltin did not provide a coherent rationale for opining that Student required the Handwriting Without Tears program, as opposed to a writing curriculum chosen by Student's occupational therapist. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) A district is simply required to provide an appropriate methodology; it is not required to provide the best methodology. (*M.M. v. School Bd. of Miami-Dade County, Fla.* (11th Cir. 2006) 437 F.3d 1085, 1102.)

#### IPad for Home Use

88. The evidence did not demonstrate that an iPad was necessary for Student to use at home for homework or as a motivational tool. Mr. Pagel explained that Student did not get homework that would be completed on the iPad, and that the iPad was not a particularly motivating reward. Therefore, an iPad for use at home was not a necessary component of the October 24, 2017 IEP.

#### Related Services During Extended School Year and Holidays

89. Under the IDEA, schools are required to provide extended school year services as necessary in order to provide a child with a FAPE. (34 C.F.R. § 300.309(a).)

“Extended school year services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” (*N.B. v. Hellgate Elementary School District* (9th Cir. 2008) 541 F.3d 1202, 1211-1212 (*N.B.*), quoting *MM ex rel. DM v. Sch. Dist. of Greenville County* (4th Cir.2002) 303 F.3d 523, 537-538.)

90. Here, Parent’s request for extended school year and services throughout school breaks and holidays. Per *N.B.*, Parents must show that year-round instructional days are necessary to permit Student to benefit from his education, that is, that the educational benefits accrued during the regular school year would be significantly jeopardized if Student were not provided with the additional weeks of instruction. However, Parents submitted no evidence that Student has suffered regression at any time, including during breaks in previous school years or over the summer months.

91. Dr. Paltin opined that Student required her educational program to be provided throughout the calendar year, without break, but did not offer any explanation or factual support for this assertion.

92. On the other hand, District witnesses testified persuasively that the October 24, 2017 IEP offered of specialized academic instruction, related services and supplementary aids and supports during the regular school year and extended school year was sufficient to ensure that Student made meaningful progress on her goals and retained those gains. Extended school year services are intended to prevent significant regression in their educational program that would take excessive time to relearn. (See *Cordrey v. Euckert* (6th Cir. 1990) 917 F.2d 1460, 147, *cert. denied*, 499 U.S. 938 (1981).) The October 24, 2017 IEP noted that Student displayed a moderate loss of previously taught skills following extended interruptions in instruction, but with a four-week extended school year program would recoup those skills in a reasonably short time of

one month or less. The evidence established that Student's educational gains would be maintained with the offered extended school year program and services, without the need for year-round services.

93. In sum, the weight of the evidence established that the October 24, 2017 IEP was reasonably calculated to enable Student to make progress appropriate in light of her circumstances, and offered her a FAPE.

94. Student did not meet her burden of proving by a preponderance of the evidence that the October 24, 2017 IEP was not reasonably calculated to enable her to receive educational benefit because it failed to offer additional language and speech services, a home applied behavior analysis program, clinical behavior counseling, additional direct or consultant occupational therapy, the Handwriting Without Tears program, an iPad for use at home, of year-round related services. District prevailed on Issues 1(i), 2(a), 2(b), 2(c), 2(d), 2(e) and 2(f).

## ORDER

All of Student's requests for remedies are denied.

## PREVAILING PARTY

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

## RIGHT TO APPEAL THIS DECISION

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

Dated: April 23, 2018

/s/

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ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings