

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

EDUCATIONAL RIGHTS HOLDERS ON  
BEHALF OF STUDENT,

v.

PITTSBURG UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018041136

DECISION

On April 25, 2018, Student filed a due process hearing request with the Office of Administrative Hearings naming Pittsburg Unified School District. Administrative Law Judge Theresa Ravandi heard this matter in Pittsburg, California, on June 19, 26, 27, and 28, 2018.

Joshua Cruz, Attorney at Law, represented Educational Rights Holders and Student. Foster Mother attended each day of hearing, with Foster Father attending the first two days. Student did not attend.

Alejandra Leon, Attorney at Law, represented Pittsburg. Tammy Watson, Pittsburg's Director of Special Education, attended each day as Pittsburg's representative.

At the conclusion of the hearing, the matter was continued at the parties' request to July 25, 2018, to afford them an opportunity to file written closing briefs. The record closed with the parties' timely submission of closing briefs, and the matter was submitted for decision.

## PROCEDURAL MATTERS

### STUDENT'S MOTION IN LIMINE

On June 18, 2018, Student filed a motion in limine seeking to exclude newly disclosed documents including nursing service logs, individual health plans, progress reports, and emails which had not been produced pursuant to Student's March 8, 2018 records request.<sup>1</sup> At the start of the hearing, both parties were heard as to this motion which Pittsburg opposed.

Only relevant evidence, defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," is admissible. (Evid. Code, §§210, 350.) Special education due process hearings "shall not be conducted according to the technical rules of evidence and those related to witnesses." (Cal. Code Regs., tit. 5, § 3082, subd. (b).) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objections in a civil action. (Govt. Code, §11513, subd. (c); Cal. Code Regs., tit.5, § 3082, subd. (b).)

California Education Code section 56504 requires a school district to provide parents with student records within five business days of a request for those records. Education Code section 56505, subdivision (e)(7) requires the parties to a due process

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<sup>1</sup> Student also filed a separate motion in limine seeking to exclude the testimony of Pittsburg's named expert Dr. Pamela Mills on the grounds that her testimony would be improper and unduly prejudicial. This motion was denied. Pittsburg did not call Dr. Mills as a witness.

hearing to provide documents and disclose witnesses to the other party at least five business days before the commencement of the hearing. The ALJ has the discretion to exclude from evidence any documents, or witness testimony not so disclosed. (Ed. Code § 56505.1, subd. (f).)

Student contended that because Pittsburg did not timely produce copies of the documents at issue pursuant to her March 2018 records request, it should be prohibited from using such documents at hearing. Student's argument is without legal support and is not persuasive. The ALJ's authority to exercise discretion to exclude evidence is limited to situations where this information was not provided to the parents at least five business days prior to the hearing. Student provided no legal authority requiring the exclusion of evidence that Pittsburg timely disclosed five business days prior to hearing. Whether Pittsburg denied Student a free appropriate public education by failing to timely respond to Student's request for education records, and any remedy for such a violation, was subject to a full evidentiary hearing. Accordingly, Student's motion in limine was denied.

#### STUDENT'S MOTION TO AMEND ISSUE 1

On the second day of hearing, Student verbally moved to amend Issue 1 to insert the word "appropriate" and thereby place at issue the appropriateness of Pittsburg's assessments of Student in the areas of academic-related support and health. Student contended that the issue, as articulated in the prehearing conference order, did not capture her issue as delineated in the complaint, and such an amendment was authorized pursuant to *M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189 (*M.C.*) cert. denied sub nom. *Antelope Valley Union High School Dist. v. M.C.* (2017) 138 S.Ct. 556 [199 L.Ed.2d 437]. Pittsburg opposed the amendment.

A party who requests a due process hearing may not raise issues at the hearing that were not raised in his request, unless the opposing party agrees to the addition. (20

U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) Where an ALJ restates a party's issue, the party's failure to object to the restatement will not be deemed a waiver of any claim that is fairly encompassed within the complaint. (*M.C., supra*, 858 F.3d 1189, 1196.)

Student's complaint and her prehearing conference statement clearly state that her assessment claim is as follows, "Did [Pittsburg] deny [Student] a FAPE by failing to provide assessments in all areas of her suspected disabilities sufficiently to address her disability-related needs since April 25, 2016?" Student limited this issue to the areas of academics and health at the time of the prehearing conference. Therefore, the Order following Prehearing Conference clarified Issue 1 as follows: "Did Pittsburg deny Student a free appropriate public education by failing to provide assessments in all areas of suspected disability, specifically, academic-related support and an individual health assessment, to sufficiently address her disability-related needs since April 25, 2016?"

Student's assessment issue as framed in the complaint and prehearing conference statement; clarified by Student at the prehearing conference; captured in the subsequent order following the prehearing conference; and confirmed by Student at hearing, raised alleged failures to conduct academic and health assessments to sufficiently identify her needs. Student's complaint did not otherwise place at issue the appropriateness of Pittsburg's assessments. As such, Student's motion to amend Issue 1 was denied.

## ISSUES

*Issue 1:* Did Pittsburg deny Student a free appropriate public education by failing to provide assessments in all areas of suspected disability, specifically, academic-related support and an individual health assessment, to sufficiently address her disability-related needs since April 25, 2016?

*Issue 2:* Did Pittsburg deny Student a FAPE by failing to offer and provide an appropriate educational program designed to meet Student's unique and individual needs from April 25, 2016, until the time of hearing?<sup>2</sup>

*Issue 3:* Did Pittsburg deny Student a FAPE by failing to provide a program in the least restrictive environment from April 25, 2016, until the time of hearing?

*Issue 4:* Did Pittsburg deny Student a FAPE by failing to provide Student's complete student records, as requested on March 8, 2018, thereby violating her procedural rights?

*Issue 5:* Did Pittsburg deny Student a FAPE by failing to address her lack of achievement toward her individualized education program goals and objectives from April 25, 2016, until the time of hearing?

*Issue 6:* Did Pittsburg deny Student a FAPE by failing to provide prior written notice regarding Pittsburg's decision to terminate occupational therapy consultations and one-to-one paraprofessional services?

*Issue 7:* Did Pittsburg deny Student a FAPE by violating Student's procedural rights by failing to include appropriate IEP team members at the September 19, 2017 IEP team meeting?

## SUMMARY OF DECISION

At the heart of this case is Pittsburg's disregard of its duty to obtain critical assessment information as to Student's educationally related health needs. Given Student's complex medical profile which resulted in frequent absences from school,

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<sup>2</sup> As clarified by Student during the PHC, this issue is specifically related to the areas of academic, one-to-one aide services, social-emotional supports, an individual health care plan, and transportation.

Pittsburg was required to conduct a health assessment to identify her health needs, and to understand the impact of her health and related treatment on her education, in terms of programming and access. Health is a core area of need for Student. As such, its failure to assess in this area, made it impossible for Pittsburg to offer and provide an appropriate educational program for Student for the 2016-2017 and 2017-2018 school years.

An educational program, no matter how well intentioned, will not constitute an offer of FAPE under federal and state law if it is not informed by assessment results and developed within the IEP team process with the meaningful participation of all team members. In addition to declining to assess Student's educationally related health needs, Pittsburg failed to utilize the IEP team process to develop and offer an individual health care plan for Student, including specialized health care services, resulting in a substantive denial of FAPE for the statutory period. Student's health and treatment needs specifically drove her transportation needs. Content with its limited understanding of Student's condition, Pittsburg failed to offer and provide transportation appropriate to her medical needs, resulting in a further denial of FAPE.

Equally concerning is Pittsburg's response of paring back Student's goals to address lower level skills each year, when she failed to make appropriate progress in light of her unique circumstances. Lowering expectations and then attributing Student's skill regression to her disability-related medical absences, while failing to provide an appropriate program, denied Student the chance to meet challenging objectives.

Lastly, Pittsburg did not timely provide Student with all requested education records. Student did not meet her burden of proof that Pittsburg failed to assess her in the area of academic support; or denied her a FAPE by failing to offer and provide required one-to-one aide services and social-emotional supports; provide appropriate mainstreaming; comply with prior written notice; or ensure the attendance of mandatory

team members at the September 2017 IEP meeting.

This Decision finds that Student is entitled to an independent health assessment; independent psycho-educational, academic, occupational therapy, and assistive technology assessments given her failure to make appropriate progress towards her goals and noted skill regression; 243 hours of compensatory education services to be provided by qualified non-public agency providers for specialized academic instruction, occupational therapy services, social skills programs, and assistive technology services to account for two years of deficient programming; and copies of all requested education records. Pittsburg shall be required to provide a six-hour training to staff members identified herein on the legal requirements of health assessments; the development of individualized health care plans; the offer and provision of specialized health care services; and addressing disability-related absences, including special education requirements for home hospital instruction.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is a nine-year-old girl who recently completed her third grade year at an elementary school within Pittsburg's jurisdictional boundaries.<sup>3</sup> Pittsburg initially assessed Student for special education and related services when she was three years old in October 2011 and found her eligible as a student with an orthopedic impairment. She remained eligible pursuant to this eligibility category at the time of hearing.

2. On December 6, 2017, the Contra Costa Juvenile Court detained Student

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<sup>3</sup> Identifying information such as the name of Student's school and staff, including witnesses, are not revealed to protect Student's confidentiality.

from the care of Parents pursuant to Welfare and Institutions Code section 319, vested temporary custody with the Contra Costa Child and Family Services Agency, and ordered that she be placed in licensed foster care. On January 23, 2018, Student went to live with Foster Parents within the boundaries of Oakley Union Elementary School District. On March 7, 2018, the Juvenile Court appointed Foster Parents as Student's educational rights holders pursuant to Welfare and Institutions Code section 361 and California Rule of Court, section 5.502. She remained with Foster Parents and subject to the jurisdiction of the Contra Costa Juvenile Court at the time of hearing.

3. For kindergarten through third grade, Student attended a special day class serving students with moderate to severe disabilities at the same elementary school within Pittsburg's boundaries. This elementary school is her "school of origin" or the school she was attending at the time she was placed in foster care.<sup>4</sup> Pittsburg remained the responsible local educational agency at all relevant times.

#### STUDENT AND HER UNIQUE EDUCATIONAL NEEDS

4. Student is a pleasant, social child with good communication skills and a sense of humor. She is well-liked at her school and has friends in her classroom and in the general education classes she attends.

5. Student was born with a severe form of spina bifida and is paralyzed from the waist down. She uses a wheelchair and independently maneuvers it in class and around school. She has hydrocephalus, an accumulation of fluid on the brain, which is managed by way of a ventriculo-peritoneal shunt. Student has multiple organ

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<sup>4</sup> "School of origin" means the school that the foster child attended when permanently housed or the school in which the foster child was last enrolled. (Ed. Code, § 48853.5, subd. (g).)



dysfunctions including only one, poorly functioning cystic kidney and a neurogenic bladder. She is unable to effectively void. Since spring 2016, she requires clean intermittent catheterizations every three hours which exposes her to an increased likelihood of urinary tract infections. Student experiences chronic constipation which is managed through a medically prescribed bowel preparation procedure.

6. Student's complex medical profile includes type II diabetes and obesity, both of which necessitate a special medical diet, and obstructive sleep apnea which requires her to use an assistive breathing machine at night to receive sufficient oxygen. She has asthma, is allergic to penicillin and latex, and is at risk of skin breakdown and infections stemming from her inability to use her lower extremities and her lack of physical sensation from the waist down. Student is medically fragile and has been frequently hospitalized for fevers, infections, skin grafts, and a toe amputation.

#### Early Assessments and Eligibility

7. In October 2011, Pittsburg's assessing psychologist reported that it was difficult to evaluate Student's cognitive skills as her backward head tilt and delayed fine motor skills hindered Student's ability to manipulate test items. Student showed moderately delayed skills with a relative strength in the area of communication. She attended a special day class preschool program with the assistance of a one-to-one aide, and received occupational therapy services. Ms. J, an occupational therapist with Pittsburg, worked with Student from preschool through the start of third grade, the 2017-2018 school year.<sup>5</sup>

8. As part of its fall 2013 Kindergarten Transition Evaluation, Pittsburg again

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<sup>5</sup> Ms. J is a California registered and licensed occupational therapist. She has worked in this capacity for over 20 years, specifically in the school setting since 2012.

assessed Student when she was five years old in the areas of cognition, pre-academics, adaptive behavior, and fine motor skills. Student's cognitive performance on verbal tasks was within age range. However, her fine motor delays, and difficulty coordinating her visual perception in light of her backward head tilt, lowered her non-verbal scores. Overall, she scored in the below to well below average range on pre-academic testing. She was able to count two, three, and five pictured objects, though she could not identify printed numbers or letters. Student showed significantly delayed adaptive skills and was dependent on adults to meet her daily care needs and help her participate in activities. The assessing psychologist determined that Student met the eligibility criteria of having an orthopedic impairment and other health impairment, and that a learning disability should be ruled out. The assessor recommended placement in a special day class for individual and small group specialized instruction and exposure to typically developing peers to increase her social skills.

9. In terms of Student's occupational therapy needs, the 2013 assessment noted global developmental delays, fine motor grasping skills in the very poor range, and poor visual motor integration skills. Student's levels of alertness and attention were noted to be low. The report recommended direct services; use of a slant board on her wheelchair tray to position materials at an angle for better viewing and to prevent eye strain; multi-sensory pre-writing strategies; and close adult support to demonstrate letter formation and provide physical guidance.

10. On or about November 18, 2013, Student's IEP team met to review these assessments. Pittsburg determined that Student remained eligible for special education pursuant to the eligibility category of orthopedic impairment. As this IEP was not admitted into evidence, it is unclear if Student was also found eligible as a student with other health impairment. Despite the noted concerns with Student's physical health

condition in the 2011 and 2013 assessment reports, Pittsburg did not conduct a health assessment.

#### FIRST GRADE, THE 2015-2016 SCHOOL YEAR

##### Student's Need for Health Care Services at School

11. During the 2015-2016 school year, Student was a first grader and continued to attend a special day class for students from kindergarten through second grade. At the beginning of the year, Pittsburg provided Student the services of a one-to-one aide to assist with toileting needs. Student was out of school for medical reasons from approximately the end of September 2015, through the middle of March 2016, with a few sporadic days of attendance in February 2016. When Student returned to school in spring 2016 following her extended medical leave, she required the provision of specialized health care services at school, specifically, intermittent urinary catheterizations.

##### PROVISION OF NURSING SERVICES IN LIEU OF AIDE SERVICES

12. Given her new medical need, Pittsburg substituted Student's aide services with nurse services. By February 2016, Pittsburg arranged for Maxim Staffing Solutions to provide nursing services for Student. A nurse was generally available for 4.5 hour shifts when Student was in attendance. Student did not introduce into evidence the operative IEP as of April 25, 2016, the start of the statutory period. Student failed to establish what the operative IEP required in terms of the provision of a one-to-one aide. As such, it cannot be determined whether Pittsburg failed to implement required aide services from April 25, 2016, through her next annual IEP team meeting in September 2016.

13. Children's Hospital Oakland had diagnosed Student as having type II diabetes in January 2016. On February 18, 2016, Parent provided Pittsburg with a

Medical Statement to Request Special Meals signed by a public health nurse. This request specified that Student required a high fiber, low sugar, and reduced calorie diet. Three months later, on May 18, 2016, Pittsburg's Child Nutrition Department provided written notification to Student's school and food services of her special diet and acceptable daily menu selections, after consulting with the prescribing nurse.

14. At hearing, Pittsburg introduced into evidence an Individualized Healthcare Plan for Student which listed the date of completion as March 29, 2016. It was unsigned; the author was unknown; and the distribution section indicating who received a copy and when, was blank. The Plan listed Nurse B, a licensed vocational nurse, as the qualified designated staff to perform Student's catheterizations and monitor her blood glucose levels. The dates when Nurse B completed training for each procedure were not entered. The Plan called for Student's healthcare provider authorizations and documentation of standard procedures to be attached. There were no attachments. The Plan required that Student receive urinary catheterization every three hours at approximately 10:00 a.m. and 1:00 p.m. with documentation of the amount of urine; daily skin checks; position changes every 90 minutes to 2 hours; glucose check when she is ill or symptomatic; encouragement to properly hydrate; and assistance with her specialized diet of no concentrated sugar, with meals less than 300 calories and snacks under 100 calories. The transportation plan was left blank.

15. Ms. Watson, Pittsburg's Director of Special Education, erroneously testified that health plans are not part of a student's IEP, and they are not developed during an IEP team meeting with the input of the IEP team.<sup>6</sup> Rather, Pittsburg develops the health

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<sup>6</sup> Ms. Watson holds an administrative services credential and has been Pittsburg's special education director for two years. Previously, she was Hayward Unified School District's special education director for three years, and served as director for a special

plan with parents and necessary school staff and reviews it annually outside of the IEP team process. This practice does not comport with the law as discussed in the legal conclusions below. Student's IEP team did not consider or discuss the March 2016 Plan, and it was not updated or otherwise revised during the 2016-2017 school year.

#### Medical Neglect and Frequent Absences

16. Pittsburgh was aware of Parents' struggle to meet Student's medical needs. Ms. K, principal of Student's elementary school, testified about her concerns that Student was subject to medical neglect and unsanitary and unsafe home conditions, dating back to kindergarten and continuing through the involvement of the Juvenile Court and Student's removal from Parents in the fall of 2017.<sup>7</sup> Ms. K found roaches crawling out of Student's backpack in class, and she would arrive at school without necessary components for her wheelchair. Parents did not ensure that she wore her protective leg gear at home when scooting along the ground. As a result, Student came to school with injuries on her legs from carpet tacks. Ms. K recalled an incident at home where Student cut her foot on a carpet tack and required medical treatment because the wound became infected. Another time, Student suffered a burn on her abdomen from spilling a cup of hot noodles on herself at home. Ms. K attempted to make a home visit to check on Student's wellbeing. From the outside, the house appeared in need of cleaning. When Student spiked a high fever at school, Parents delayed in picking her up and did not follow through with taking her to the doctor. These situations occurred prior

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education local plan area. Ms. Watson has worked in the field of special education for 34 years, with 16 years teaching experience.

<sup>7</sup> Ms. K holds an administrative credential. She has served as an administrator for approximately 14 years, the past seven years in her current position as principal.

to Student's September 2016 annual IEP team meeting, putting Pittsburg on notice that Parents would not necessarily be the best source of information as to Student's medical needs.

17. Ms. K described Student as resilient. Although she struggled academically, Student did not exhibit any challenging behaviors or demonstrate any social-emotional needs at school throughout the time period at issue, despite her neglectful home situation. Parents' noted deficiencies in addressing Student's medical needs placed a heightened level of importance on obtaining relevant medical information directly from Student's medical providers for the IEP team's consideration.

18. Student frequently missed school due to medical issues and illnesses. Her attendance record noted that she was absent a total of 83 school days during the 2015-2016 school year, and that 68 of these absences were due to illness. She received 29 days of home hospital instruction from October through December 2015.<sup>8</sup> From April 25, 2016, through the remainder of the 2015-2016 school year, Student missed approximately 13 days due to medical appointments, illness, and hospitalization.

#### Annual 2015 IEP Goals and Spring 2016 Progress Reports

19. At her annual IEP team meeting in approximately October 2015, Student's IEP team developed five goals. In the area of visual motor/printing, Student was able to write the first letter of her first name in uppercase and to trace two-inch capital letters of her name. When asked to trace lowercase letters of her name, Student would simply

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<sup>8</sup> Home-hospital instructional services are part of the continuum of special education placements and programs that must be made available to students who receive special education and are unable to attend school for medical reasons. (34 C.F.R. § 300.115(b)(1); see also Cal. Code Regs., tit. 5, § 3051.4; Ed. Code, §§ 56360, 56361.)

draw circles. An annual printing goal required Student to legibly print her first name in capital and lowercase letters with appropriate top to bottom form and with verbal and pointing prompts only, at 80 percent accuracy. Student's teacher, classroom staff, and occupational therapist were all responsible for implementing this goal.

20. Pittsburgh did not report Student's progress on this goal until March 19, 2016.<sup>9</sup> At that time, Student was tracing her first name more consistently and able to write two capital letters in her first name with prompts, and two other capital letters with moderate physical assistance. The June 2016 progress report notes virtually no further progress.

21. Student's 2015 annual visual motor/cutting goal required her to correctly hold scissors and cut out simple shapes within a quarter inch of a quarter inch wide line with minimal physical assistance at 80 percent accuracy. By March 2016, Student had nearly met this goal, and the June 2016 progress summary reflects that Student did meet this goal.

22. In the area of reading foundational skills, Student was able to recognize the letters in her name, but not all the letters of the alphabet. This goal required Student to name all uppercase and all lowercase letters of the alphabet with 80 percent accuracy. By March 2016, Student had not met the first or second short-term objectives of naming 15 and then 25 letters. She was able to identify three letters of her name in upper and lowercase. Over the next three months she made no further progress.

23. Student was able to read four high frequency sight words: "a," "to," "I," and "my." Her second reading goal called for her to read 50 sight words with 80 percent accuracy. Student's reading skills regressed. The March 2016 progress report noted that she could not read any sight words, and as of June 2016, she was only able to identify

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<sup>9</sup> The progress reports erroneously lists the year as 2015 rather than 2016.

the word "I" with 80 percent accuracy.

24. Student was able to count up to 10 with 80 percent accuracy and could recognize numbers 1 through 5. Her math goal called for her to solve 10 addition and subtraction problems up to the number 5 with the use of manipulatives. Student did not meet her first two short-term objectives, but by March 2016, she was able to solve addition problems within 5 with 80 percent accuracy. By June 2016, Student had almost met her goal and was solving 10 addition and subtraction problems up to the number 5, at 70 percent accuracy.

#### First Grade Report Card

25. At the end of the 2015-2016 school year, Pittsburg issued a final standards-based first grade report card for Student. In the areas of mathematics, reading, and writing, Student received an overall grade of "P" meaning she was progressing but below grade level. She earned the second highest grade of "G" for "good" in language conventions and speaking and listening. Student earned marks of excellent and good for all learning habits except for two marks of satisfactory for completing classwork and returning homework.

26. In terms of her progress towards end of year first grade level mathematics standards, Student received a "4" for end of year mastery in geometry: compares, composes, and divides shapes; "3" for approaching end of year mastery in measures, orders, and compares length; and tells and writes time to the hour and half-hour; "1" for insufficient progress in representing and writing numbers up to 120; and "2" for making progress in all other math standards including "uses understanding of place value to add and subtract." In reading standards, she received all 2's and 3's. For instance, she was assessed as making progress toward end of year standards in decoding and reading fluency, and as approaching mastery in asking and answering questions about key text details. Although she made insufficient progress in spelling, she was approaching



mastery in writing informative and explanatory texts and narrative pieces. This first grade report card reflected academic abilities that far exceeded Student's level of functioning as of the time of hearing. Student's academic abilities regressed over the 2016-2017 and 2017-2018 school years.

## SECOND GRADE, THE 2016-2017 SCHOOL YEAR

### Special Day Class and Mainstreaming

27. Student remained in her same special day class for second grade but she had a new teacher, Ms. M. This was Ms. M's first teaching position. She was a teaching intern during her first year as Student's teacher, and had a teaching mentor. She was qualified to instruct students with mild to moderate, and moderate to severe disabilities. She testified at hearing as to her class profile, schedule, and instruction. Student remained in her classroom as a third-grader the following year, so the factual findings regarding her classroom apply to both the 2016-2017 and 2017-2018 school years, unless noted otherwise.

28. Student's classroom consisted of generally eight students, most of whom had moderate to severe disabilities and functioned below grade level. Student was placed with comparable peers in terms of academic and social functioning abilities. There were three classroom paraprofessionals so the adult to student ratio was two-to-one. Ms. M provided specialized academic instruction which she individualized for each student. The class focused on functional academics, and social skills were a part of the daily curriculum. Student received individual and small group specialized academic instruction. The school day was from 8:00 a.m. until 2:20 p.m., with a morning recess and a 50-minute lunch period. There was a shortened day on Wednesdays with an early dismissal at 1:15 p.m.

29. Student had a nurse with her in class throughout the school day. It was

Ms. M's opinion that Student did not require an aide to assist her academically given the small class size and classroom aides. The nurse additionally assisted Student with attending to task and participating in her educational program. Twice a day, Student left class to go to the nurses' office for her catheterization procedures. There was no evidence as to how long this procedure took or what if any academic instruction she missed.

30. Depending on her arrival time to school, Student participated in breakfast before the start of the school day with classmates and typically developing peers. Ms. M's class had recess and lunch with first through third grade general education students. During both her second and third grade years, Student participated in a second grade general education music class for 45 minutes twice a week, and a second grade general education physical education class once a week. Ms. M's class was paired with the second grade general education classes as their class schedule did not interrupt her core academic periods.

During recess and lunch, Student played with friends she met on the playground and in her music and physical education classes.

31. Mr. J, Student's general education music teacher for the 2016-2017 and 2017-2018 school years, testified at hearing.<sup>10</sup> His second grade music class had approximately 22 students each year. Student and several of her classmates joined his music class twice a week with the support of three classroom aides. The aides supported Student in the class with mobility issues and accessing instruments. Student enjoyed music class and was willing to try a variety of musical instruments and choir activities. Mr. J saw nothing unusual about her ability to stay focused in class. Except for periods of

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<sup>10</sup> Mr. J has a single subject music credential and has taught elementary students for over 13 years.

absence, Student attended music class regularly and received the highest possible grades each trimester.

#### Spring 2016 Triennial Assessment Plan

32. On May 24, 2016, Pittsburg developed an assessment plan seeking parental consent to evaluate Student in the areas of academic achievement by the special education teacher; intellectual development, social-emotional functioning, and adaptive behavior by a school psychologist; language and speech communication development by a speech language pathologist; motor development by an occupational therapist and physical therapist; and health without identifying the examiner title. This plan also called for Pittsburg to complete a “visually impaired services assessment,” also without an identified examiner title. Parent signed consent to the assessment plan on May 27, 2016.

33. The assessment plan specified that for the health assessment, health information and testing would be gathered to determine how health affected Student’s school performance. Ms. Watson testified that a health assessment usually consists of a medical records review, parent interview, and hearing and vision screenings. She believed that Pittsburg did complete a health assessment as its school psychologist, occupational therapist, and speech language pathologist all reviewed and summarized Student’s medical information in their respective evaluation reports, and Student passed her hearing and vision screenings. There was no evidence that a nurse gathered and reviewed Student’s medical records or determined how her health impacted her educational needs.

34. Ms. M was not involved in any meeting to review Student’s health needs or to develop an individual health plan for her. She recalled seeing the March 2016 Plan in Student’s education file. She was aware of Student’s diabetes and restricted sugar diet but was not provided with any details of her special meal plan. In terms of food

management in the classroom, Ms. M relied on parent report and her recollection as to whether a particular student had a food restriction. At hearing, she acknowledged that Student had a lot of medical needs and allergies, including being allergic to penicillin and latex. She agreed that it was hard to remember all of Student's health information and that without a written, individualized, accurate health plan, needs could be missed and mistakes made.

#### September 2016 Annual IEP Team Meetings

35. On September 15, 2016, Pittsburg convened part one of Student's annual IEP team meeting. Parents, Ms. M, Student's occupational therapist Ms. J, and the vice principal attended. Parents agreed to excuse the attendance of the general education teacher. Pittsburg's assessors had not completed their evaluations because of Student's frequent medical absences. Therefore, the team reviewed Student's progress towards her goals.

36. Student did not meet her printing goal and was only able to print the first letter of her first name in uppercase. Her skill level remained as it had been at the time this goal was developed the year prior in October 2015. She met her visual motor cutting goal. In terms of reading, Student was far below second grade standards of reading simple stories. She remained unable to identify letters and did not make progress on her reading goals. Student's skills regressed from her 2015 baselines, and she was no longer able to recognize the letters in her name or read four high frequency sight words. Though previously on target to meet her addition and subtraction goal, Student's skills in this area also dropped, such that she was only able to calculate  $1+1$  and  $1+2$ .

37. Ms. M persuasively testified that Student's spina bifida negatively impacts her ability to learn in that she requires and expends more energy than her peers when engaged in the learning process. Using her arms to maneuver her wheelchair, and

maintaining focus, are difficult for Student. Her nurses and the classroom aides assisted Student with her academics and focus. Even so, Student's inability to maintain her prior skills put Pittsburg on notice that something was amiss.

38. Pittsburg concluded part one of the September 2016 IEP team meeting after reviewing past goals. Without a discussion of Student's needs, new goals, or what was being offered, Parents signed consent to the IEP. The team re-convened on September 23, 2016, to discuss assessment results and complete Student's annual IEP. Parents, Ms. M, the vice principal, the assessors, a county nurse, and a social worker were among those present. Parents again agreed to excuse the attendance of Student's general education teacher.

#### ACADEMIC ASSESSMENT

39. Ms. M was present for Student's academic assessment and participated in scoring her test results from the Woodcock Johnson Tests of Achievement, Fourth Edition. She authored an academic assessment report dated September 23, 2016, that explains what the administered subtests measure, and noted Student's scores. Her report also listed the dates that Student passed her vision screening (February 19, 2016) and hearing screening (September 2, 2016). On the Woodcock Johnson, standard scores of 90 to 110 fall in the average range of functioning. Student's composite scores for Basic Reading Skills (standard score 44), Written Language (standard score 40), Mathematics (standard score 55), Academic Skills (standard score 43), and Brief Achievement (standard score 40) all fell in the very low range. Ms. M provided Student's academic scores to school psychologist Ms. D who completed Student's psycho-educational evaluation.

#### PSYCHO-EDUCATIONAL ASSESSMENT

40. At hearing, the parties stipulated to the admission Student's September

23, 2016 psycho-educational evaluation report. Ms. D did not testify. For this assessment, she had Parent complete a health and developmental history questionnaire. Her assessment report briefly identified Student's medical conditions and referred the reader to Student's most recent medical discharge summary dated February 23, 2016, for additional information on Student's health needs. The reference medical report was not attached.<sup>11</sup> Ms. D did not complete a health assessment of Student, nor was she qualified to do so.

41. Ms. D's report included results from interviews and observations. Ms. M shared her observations of Student's academic delays, limited attention span of no more than five minutes, minimal motivation and effort, and poor work completion. Student was able to identify, verbalize, and share her feelings during her interview with Ms. Simon. Throughout her testing, Student yawned and stretched her upper body frequently, and appeared to fall asleep. Student admitted she was tired, and shared that she sleeps with an oxygen mask to help her breathe. She struggled to remember testing instructions and required physical and verbal prompts to stay focused and on task.

42. Ms. D administered selected subtests from the Developmental Neuropsychological Test, Second Edition. In the domain of Language, Student performed poorly and struggled to process verbal instructions and access information from long term memory. In the area of Visuospatial Processing, she performed very poorly, demonstrating significant weakness in visualizing and understanding spatial relations. In the domain of Memory and Learning, Student demonstrated a very limited capacity to maintain information in working memory in the presence of interference. She showed a relative strength for facial recognition, which the assessor concluded was

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<sup>11</sup> Pittsburgh did not provide this document to Student's attorney in response to a formal records request made in March 2018.

indicative of her social nature.

43. On the Test of Auditory Processing Skills, Third Edition, Student scored in the very low range in auditory cohesion with a standard score of 65 (average range 90-110). These results indicated that she had significant difficulties with comprehension and reasoning. On the Adaptive Behavior Assessment System, Third Edition, Ms. M rated Student as within the borderline range on the Conceptual domain (standard score 76) with an overall General Adaptive Composite in the low average range (standard score 85). Ms. M's adaptive rating scores revealed that Student had difficulty working independently and poor self-direction, and did not self-initiate or ask for assistance on tasks.

44. Ms. D noted in her evaluation report that because Student is African-American, she did not administer standardized intelligence tests and did not derive an intelligence quotient as these are not authorized in California.<sup>12</sup> Her report did not compare Student's Woodcock Johnson academic testing scores to her cognitive functioning scores. Even so, based on assessment data, Ms. D concluded that Student's significant challenges in auditory cohesion and maintaining information in working memory accounted for her limited academic progress. Ms. D determined that Student's strengths were her social and communication skills.

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<sup>12</sup> In *Larry P. v. Riles (I)* (9th Cir. 1974) 502 F.2d 963, and *Larry P. v. Riles (II)* (9th Cir. 1984) 793 F.2d 969, the Ninth Circuit Court of Appeals upheld district court injunctions preventing California schools from using standardized intelligence tests for the purpose of identifying African-American students for special education and services. (See also *Crawford v. Riles* (9th Cir. 1994) 37 F.3d 485, 486.)

## OCCUPATIONAL THERAPY ASSESSMENT

45. Ms. J's occupational therapy evaluation report briefly identified Student's medical diagnoses and history of hospitalizations due to skin wounds and infections on her lower extremities. She did not conduct a health assessment, was not qualified to do so, and did not consider her evaluation report to be a health assessment.

46. Ms. J observed Student to be adept in maneuvering her wheelchair around the classroom and school environment. To navigate ramps, Student pushed her wheelchair with one hand and held onto the rail with the other, with occasional assistance. Student's in-hand manipulation skills were slow and awkward for her age, and she needed encouragement to participate in fine motor pencil and paper tasks. She was not able to print her name, or trace letters on the line with proper letter formation. She required a slanted surface for work materials to facilitate hand grasp and for optimal viewing, as her trunk harness prevented her from leaning forward. Student showed significant delays in fine motor and visual processing skills, though Ms. J determined her skills were commensurate with her overall level of functioning. Ms. J recommended direct occupational therapy services, consultation services with school staff, and close-proximity adult support to demonstrate and physically guide Student on correct letter formation.

## SPEECH AND LANGUAGE ASSESSMENT

47. Student's speech and language evaluation report contained a short summary of medical history and diagnoses. Contrary to the dates provided by Ms. M's report, this report indicated that Student passed her hearing screening on August 26, 2016, and that her latest vision screen from October 2015 recommended a one-year re-evaluation. Such inconsistency highlighted the need for an accurate and comprehensive health assessment performed by a qualified assessor. The speech language pathologist did not complete a health assessment of Student, nor was she qualified to do so.



48. The assessor noted concerns with Student's stamina related to her medical needs. During testing, Student unhooked her body brace complaining that it was tight, but then became sleepy and re-attached it for support. The assessor noted Student's chest cavity and abdomen to be under-supported which caused strain on her respiratory system when trying to produce adequate airflow for speech production. After talking, Student needed time to rest and catch her breath. The report determined that her receptive and expressive language skills were age appropriate, and her grammar and vocabulary well-developed, though her language processing and pragmatic skills were on the lower end of average. The assessment report concluded that Student did not require speech and language services.

49. Pittsburg's 2016 triennial reassessment of Student did not make any determination as to a learning disability despite its 2013 evaluation recommendation that this be ruled out. Even so, all four evaluators assessed Student in the area of academic-related support as viewed from their separate, professional vantage points, and identified her strengths and weaknesses in this area, to be able to sufficiently address her needs. The evaluation reports corroborated each other in many regards and provided a consistent profile of Student's academic challenges, struggle to remember instructions and access working memory, limited attention span, limited skills in the areas of comprehension, reasoning and visual processing, and delayed fine motor abilities.

50. Similarly, most of the evaluations directly pointed to a need to better understand the impact of Student's medical condition on her educational program. This was the purpose of a health assessment. Pittsburg failed to conduct a health assessment of Student despite its own assessment plan, and Student's complex medical profile, which delayed and directly impacted her participation during the assessment process, and resulted in an inordinate amount of missed instructional time. Lacking this key

assessment information, Student's IEP team operated in a vacuum without an understanding of her health condition or treatment needs, and their impact on her education. Student's IEP team was ill-equipped to devise an IEP appropriate to her needs.

#### IDENTIFIED AREAS OF NEED, ANNUAL GOALS AND OFFER OF FAPE

51. Based on the assessment results, Pittsburgh identified Student's areas of need to be mathematics, reading foundations, and visual/fine motor skills, and offered four new goals. In mathematics, Ms. M pared back her math goal as Student's skills had regressed from June 2016 when she was adding and subtracting up to the number five. Building on her ability to count to 25, Student's new math goal required her to count and match up to 15 objects to the correct numeral with 75 percent accuracy. As written, this goal was set significantly below Student's baseline ability, and could be met once Student was able to count to one, given its "up to" qualifying language.

52. Student had not regained her October 2015 letter recognition levels wherein she could recognize the letters in her name. By September 2016, she could consistently recognize one capital letter of the alphabet. Ms. M abandoned Student's goal of reading high frequency sight words and scaled down her letter recognition goal. Student's revised reading foundations goal called for her to either recite or identify the alphabet when given a demonstration, modeling, or prompt with 25 percent accuracy in four of five trials. This goal targeted three different skills: reciting the alphabet for which there was no baseline and, therefore, no ability to measure her progress; letter identification; and letter sound identification for which there was no baseline. Further, its curious level of mastery was subject to various interpretations. It appears that Student would be deemed to have met this goal as written if she could recite 6.5 letters of the alphabet.

53. In the area of printing, Student was able to trace her name but could only

independently print one letter of her name. Student's "new" printing goal, was virtually the same as her prior printing goal from 2015 and again called for her to trace and recognizably imitate letters in her first name. Her final goal called for her to cut out simple shapes within one quarter inch of the line with pointing and verbal prompts only. Student's baseline indicated she was already demonstrating this skill. Further, this goal differed from her 2015 goal only in terms of a slightly lower level of assistance that would be provided.

54. The September 2016 IEP required Pittsburg to notify Parents of Student's progress on her goals each trimester. To support her goals, Pittsburg offered 380 minutes of individual and group specialized academic instruction per day.<sup>13</sup> For related services, Pittsburg offered 30 minutes of individual and group occupational therapy, at the rate of 30 sessions per year; 300 annual minutes of occupational therapy consultation; and 330 minutes per day of one-to-one "aide/nurse services." Under the section of supplementary aids, services, and other supports, the IEP identified that Student would have a nurse for toileting and other health related duties daily, as needed. Pittsburg offered continued placement at the same elementary school in a special day class, with Student spending 90 percent of her time outside the regular class environment and 10 percent with her typical peers. The IEP offered extended school

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<sup>13</sup> The 2016 and 2017 IEP's both specified in this service box, "Services will be postponed if she is on home/hospital care." There was no explanation of what "home/hospital care" would entail; who would determine that she should receive it; or when. While this notation purports to dismantle the entire structure of the Individuals with Disabilities Education Act's procedural requirements regarding the IEP team meeting process, and the use of an IEP document as a "blueprint for enforcement" (*M.C.*, *supra*, 858 F.3d 1189, 1199), home hospital instruction was not at issue in this hearing.

year services of 180 daily minutes of specialized academic instruction and 60 minutes per month of occupational therapy services.

#### NO IDENTIFICATION OF HEALTH CARE SERVICES

55. While the September 2016 IEP included a nurse for toileting and health related duties, it failed to identify Student's medical need for intermittent urinary catheterizations every three hours. The IEP was silent as to the specific specialized health care services Student required, even while her present levels of performance highlighted that her asthma could compromise her breathing such that she required close monitoring. Student's IEP team failed to discuss the specific health care services prescribed by Student's medical provider, including her catheterization procedures or her medical need for a special meal plan. While there was an unsigned, incomplete health plan developed for Student dated March 2016, this was not brought to the attention of Student's IEP team for consideration, and there was no discussion, development, or offer of an individualized health care plan for Student as part of this annual IEP.

56. Although Student's present levels of performance in the area of health mentioned Student's low trunk tone specific to her orthopedic impairment, and noted that she required adaptive seating; wheelchair with tray; brace for trunk and feet; and body support to be able to sit properly, none of these specialized items were included in Pittsburg's offer of services, nor anywhere else in the IEP document. As a new teacher and case manager, Ms. M was not familiar with the practice of capturing the IEP team discussions through written, contemporaneous notes. As such, Student's IEP's did not include meeting notes.

57. Pittsburg offered to provide Student with point-to-point special education transportation. However, it did not specify her need for a wheelchair accessible vehicle. Despite Student's complex medical profile and need for catheterization every three

hours, Pittsburg did not include any details regarding Student's transportation needs such as pick up or drop times in light of her scheduled procedures. At part two of the IEP team meeting on September 23, 2016, Parents again consented to the full IEP offer, initially presented on September 15, 2016.

#### Provision of Related Services

58. During the 2016-2017 school year, Student received services from a one-to-one nurse but not an aide pursuant to her IEP provision for aide/nurse services.<sup>14</sup> Student required catheterization every three hours throughout the 2016-2017 and 2017-2018 school years, as prescribed by her physician. Nursing invoices and time sheets detailed that nurses generally worked up to a 4.5 hour shift for those days when Student was present for her full school day, and performed her catheterizations as required. Pittsburg did not account for the discrepancy of approximately 60 daily minutes between its offer of 330 service minutes, and the average nursing shift.<sup>15</sup>

59. When in attendance, Student received occupational therapy services for 30 minutes each week with Ms. J both individually and in small group sessions through the 2016-2017 school year. There was no evidence as to the number of occupational therapy sessions that Student actually received. Ms. J maintained logs of her services on her own computer. Pittsburg did not maintain Student's service provider logs as part of Student's education records. Rather, these were maintained by the individual provider.

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<sup>14</sup> Whether this was a clear service offer under *Union v. Smith* (9th Cir. 1994) 15 F.3d 1519, was not identified as an issue for hearing and is not determined herein.

<sup>15</sup> Student did not identify as an issue for hearing, a failure to implement nursing services.

## Frequent Absences Due to Health Issues

60. Student's attendance for the 2016-2017 school year remained poor due to her medical issues and illnesses. Attendance records document that Student missed 67 days of school, 15 verified for illness and 31 excused by a doctor's note. However, the attendance notes reflect that nearly all of Student's absences were related to her health. In addition, on the days she was present, she often did not attend the full day. She was tardy for more than 30 minutes on 22 days, and left early on 8 days. Many of these partial days were also related to her complex medical condition.

61. Student did not receive any occupational therapy services after March 2017 through the end of the 2016-2017 school year. Given Student's fine motor and visual integration deficits, the occupational therapy services were a critical academic support.

Student did not attend school from April 10, 2017, through the end of the school year. On April 12, 2017, Student's pediatrician wrote a letter requesting two months of home schooling because Student had started a bowel flush procedure every three hours. Pittsburg contracted with LeRoy Haynes Center, a non-public school, to provide an educational specialist to work with Student during her medical absence from school from approximately April through June 2017. Pittsburg typically provides one hour per week of instruction for students on a program of home hospital instruction.<sup>16</sup> Attendance notes indicate that Student received one hour per day of home hospital instruction for a nine-day period from May 18 through 31, 2017.

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<sup>16</sup> No determination is made as to the whether this policy comports with the IDEA. Student did not identify as an issue for hearing the procedural or substantive validity of her home hospital instruction.

## Reporting on Goals and Academic Performance

62. Pittsburg failed to regularly report on Student's goal progress as required each trimester. Ms. M placed Student's goal progress reports, when available, in Student's backpack to be sent home at the close of each trimester. In December 2016, Pittsburg failed to report on Student's printing and cutting goals following the end of the first trimester. The first progress report for these two goals was March 10, 2017. Neither goal included short-term objectives against which to measure Student's progress. By March 2017, it was difficult to determine if Student had made any progress toward her printing goal. It appeared she remained at her baseline functioning from September 2016 in that she was still able to print the first capital letter in her first name; made circular marks to imitate other letters; and was proficient in tracing letters. Similarly, based on her March 2017 progress report for her visual motor/cutting goal, Student was still able to cut out simple shapes. The persons identified as responsible for implementing these two goals were the teacher, classroom staff, and the occupational therapist. However, at the time of the June 6, 2017 progress reports, Pittsburg noted that there was no progress to report for either goal as Student had not been seen by the occupational therapist since March 2017 and was currently on "home and hospital." Pittsburg failed to account for how it determined that Student would not receive her occupational therapy services during her home hospital program, or why a home hospital teacher would not continue to be responsible to assist Student on her goals and regularly report on her progress.

63. Ms. M reported on Student's progress toward her two academic goals at the first reporting period on December 7, 2016. By that time, Student did not meet her short-term math objective of counting and matching five objects to the correct numeral with 75 percent accuracy. However, she had made progress in that she was able to count and match up to the number three. With regards to her reading foundations goal,

by December 2016, Student was able to recite the alphabet and was beginning to recognize the letters of the alphabet, and the letter sounds for three letters. Given her ability to recite the alphabet, Student met her first short-term objective which called for her to recite or identify 12 letters of the alphabet with 25 percent accuracy.<sup>17</sup>

64. Student's academic goal progress reports for the second and third report periods on March 8, 2017, and June 6, 2017, failed to report on any progress. Rather, the reports simply stated that more time was needed due to frequent absences. As such, Student did not meet her second or third short-term objectives of counting and matching to the correct numeral 10 objects and then 15 objects. Similarly, whether Student was still able to recite the alphabet or whether she could identify 18 or all 26 letters with 25 percent accuracy was unreported and unknown.

65. Ms. M testified that Student did not meet her goals by the end of the 2016-2017 school year because of her medical diagnosis of spina bifida and related difficulties that resulted in her poor school attendance, including missing the equivalent of a full trimester. Her testimony was persuasive and illuminated Pittsburg's failure to determine how Student's health impacted her school performance and how to address her disability-related educational needs, including developing a program that she could access. Ms. M's mentor advised her not to issue a report card for Student during her first

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<sup>17</sup> There is an error in the short-term objectives in that the higher level skill is required to be demonstrated at the first report period and the easiest skill at the third. The greater concern is deciphering what each objective is actually requiring, i.e. what does it look like to recite or identify 12, 18, and then all 26 letters of the alphabet with 25 percent accuracy?



year of teaching. Therefore Student did not receive a report card at any of the trimesters or a final second grade report card detailing her progress, or lack thereof, towards second grade curriculum standards.

#### HAYNES' GRADE REPORT AND PROGRESS REPORTS

66. Pittsburgh introduced into evidence a Haynes Center report card dated July 2, 2017. This report card provided Student grades for what was noted to be a "fourth quarter." However, the grade level, the dates of attendance, the amount and type of instruction, and the level of work and standards taught were not specified. Student received a grade of C in Reading and Math and a grade of B in Language, with an A for effort. She received marks of Excellent for all work habits with one mark of Satisfactory for completing homework. Other than the nine days in May 2017 detailed on the attendance records, there was no evidence of how many additional hours of home instruction Student received during the 2016-2017 school year.

67. Although dated January 16, 2017, a Haynes Center progress report purported to provide updates through June 16, 2017, on Student's prior 2015 and 2016 annual goals. It was unclear who entered the progress report data, the date of the entries, and whether the accuracy and consistency rates noted for June 2017 referred to progress towards the listed goal, or to Student's reported level of functioning. These goal reports corroborated Pittsburgh's progress updates. The Haynes reports generally noted that Student could recite the alphabet with minimal errors if she had it in front of her and sang it, but she could not identify her letters or read any sight words. She needed help identifying numbers and counting, but could match objects to the correct numerals if given a choice of two answers, with an accuracy of 60 percent.

#### THIRD GRADE, THE 2017-2018 SCHOOL YEAR

68. Student continued to attend Ms. M's classroom as a third grader. There

was one other third grade student in attendance during the 2017-2018 school year. Pittsburg determined that Student should remain in this classroom for consistency in light of the amount of schooling she had missed and the friendships she had formed. The classroom in terms of peers, programing, and staffing ratio remained the same as the prior year.

#### Annual IEP September 2017

69. Student's IEP team met for her annual IEP on September 19, 2017. Parents, Grandmother, Mr. J the music teacher, Ms. M, and the vice principal attended the meeting. Parent agreed in writing to excuse the attendance of the occupational therapist. The excusal form specified that the occupational therapist's attendance was not necessary because she provided written input into the development of the IEP to the Parent and IEP team prior to the meeting. Ms. J's written input is contained in the IEP document within Student's present levels of performance section. Her update is nearly identical to that provided in the prior year's IEP, with additional details on Student's printing skills. The IEP noted improvement in Student's social-emotional functioning in terms of her willingness and ability to express her feelings when upset with peers.

#### ANNUAL GOALS

70. The IEP team reviewed Student's progress on goals. Student still required prompting in class to participate in academics. Ms. M kept a record log of Student's goal reporting trials and brought these with her to the IEP team meeting. Student met her reading goal as evidenced by her ability to recite the alphabet and identify nine letters. She again met her cutting goal, though it was noted that she benefitted from reminders to visually attend to cutting tasks. The team determined that Student did not meet her math goal of counting and matching 15 objects (rather than "up to 15 objects" as

drafted) as she was only able to match up to three items. She did not meet her printing goal, essentially remaining at her baseline functioning from September 2016, in that she could independently print the same capital letter for her name and approximate the other letters with 50 percent accuracy, usually just making circular marks.

71. Ms. M and Ms. Watson attributed Student's failure to achieve her goals to her poor school attendance and cognitive challenges related to her spina bifida. They did not consider Student's performance to be indicative of a lack of meaningful progress due to unidentified needs or a program deficiency. Their testimony was not persuasive as it failed to take into account that Student's disability resulted in her frequent medical absences. As such, their testimony essentially placed blame on Student's disability and did not acknowledge Pittsburg's duty to offer and provide a program that allowed Student to make appropriate progress in light of her circumstances.

72. The team determined that Student's areas of need remained mathematics, reading foundations, and visual/fine motor. Pittsburg offered three goals. Student's math skills regressed in terms of rote counting skills. She was able to independently count to 20, whereas she had been counting to 25 the prior year in September 2016. Her new math goal required her to represent a number of objects with a written numeral from 0-20 when given a manipulative, with 50 percent accuracy in six trials. In addition to targeting knowledge of numbers and basic counting, this goal also targeted fine motor skills. Student's new reading goal called for her to identify and name 15 uppercase and 15 lowercase letters of the alphabet with 80 percent accuracy in four of five trials. Ms. M did not develop short-term objectives for either of these two goals.

73. At the time of the September 2017 IEP team meeting, Student was able to independently print three capital letters for her name, and could recognizably copy after adult demonstration 10 additional capital letters. Ms. J developed a new printing goal which called for Student to legibly print her first and last name with appropriate top to

bottom letter formation, remaining between the lines on adapted paper after demonstration, with pointing and verbal prompts, with 80 percent accuracy in four of five trials. This goal was only slightly more ambitious than her 2015 goal to write her first name. Her first short-term objective focused on demonstrating mastery of this goal as to her first name. Her second and third objectives required attaining this goal at 60 percent and then 80 percent accuracy in three of five trials. The IEP required Pittsburg to again report on Student's progress toward her goals each trimester by means of a progress update.

#### OFFER OF FAPE

74. Pittsburg offered the same type and level services as that in the prior IEP from September 2016, specifically: 380 minutes per day of specialized academic instruction; 30 sessions of occupational therapy services of 30 minutes duration; 330 minutes per day of one-to-one aide/nurse services; a nurse as needed for toileting and health related duties; point-to-point transportation without specification of accessibility requirements or an arrival/departure schedule supportive of her catheterization needs; and extended school year services. This IEP similarly failed to include Student's required specialized health care service of intermittent catheterization in terms of procedures or schedule. Pittsburg did not develop an individual health care plan for Student as part of this IEP. Pittsburg continued to offer placement in the same special day class for 90 percent of the time and mainstreaming for 10 percent of the day.

75. The only service difference from the 2016 IEP was that Pittsburg proposed terminating Student's occupational therapy consultation service. Ms. J made this recommendation because she believed she had provided Student's classroom teacher and staff all the occupational therapy materials, techniques, and training necessary to support Student in her educational program. She did not include her recommendation to terminate Student's occupational therapy consultation services or the reason for her

recommendation in her written update to the team.

76. The IEP stated that the start date for the 330 daily minutes of one-to-one aide/nurse services was September 16, 2016, with no end date included. During the September 2017 IEP team meeting, Ms. M erroneously crossed out this service box. At the meeting, she clarified for Parents that this service was continuing. Parents signed consent to the September 19, 2017 IEP at the time of the team meeting, with this service box crossed out.<sup>18</sup> Ms. M testified that she later entered her handwritten notes that she wrote on the 2017 IEP document during the annual meeting into the Special Education Information System database and produced a clean and corrected copy of the final IEP document. Pittsburg did not provide Student or Foster Parents with a final, corrected copy of the September 2017 IEP pursuant to their records request in March 2018.

#### Provision of Related Services and Mainstreaming

77. During the 2017-2018 school year, Student continued to receive weekly 30 minute occupational therapy sessions when she was present at school, though from a different therapist. Pittsburg generally provided Student with a nurse for an average of roughly 4.5 hours per day, when Student was in attendance for most of the school day. Student continued to participate in a general education second grade physical education class on Fridays, and Mr. J's second grade music class twice per week.

#### Student's Medical Needs, Attendance, and Hospitalization

78. Despite Student's complex medical profile and related needs, Pittsburg did

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<sup>18</sup> The clarity of the IEP offer of nurse services, including any confusion regarding the dates for the service or any handwritten strike-outs, was not identified by Student as an issue for hearing and is not adjudicated herein.

not maintain an accurate record of her required medications. For instance, a February 2018 transportation request form mistakenly reported that Student was taking the medication OxyContin and also listed the medication Lisinopril. Neither of these medications were identified on Student's March 2016 Healthcare Plan. The next month in March 2018, a form entitled "Student Medications" correctly noted Student's prescription for Albuterol as needed, but erroneously included Levaquin, a time-limited antibiotic for which Student did not have a prescription at the time. On an emergency information form required by the county transportation division, Pittsburg noted that Student was in need of oxygen, without specifying that this was part of her nighttime sleep apnea treatment, and did not indicate Student's need for catheterization every three hours which would impact a bus schedule. Although Pittsburg noted that Student uses a wheelchair, it did not specify that she is paralyzed from the waist down and requires specialized body support to sit upright.

79. An individual health care plan is the mechanism through which an informed, accurate, comprehensive statement of a student's medical conditions, treatments, and health needs, and their educational impact, are documented. Lacking this, Student, who is already medically fragile, may on the best of days, experience minor programing challenges; on the worst of days, her health may be jeopardized.

80. Student continued to miss a significant amount of school due to medical issues. From the start of the school year through December 6, 2017, Student missed approximately 14 days, 11 of which were due to verified illness or medical reasons. Student was tardy 40 days, 23 of which she was late by more than 30 minutes. Student also left early three times. Many of these partial attendance days were due to health issues. On December 6, 2017, Student was admitted to the hospital for an infection related to suspected medical neglect. Contra Costa County Children and Family Services informed Pittsburg of Student's removal from Parents and hospitalization and that she

would be released to foster care. Pittsburg did not dis-enroll Student. On January 12, 2018, the county social worker informed Ms. M that Student would be placed with a family in Oakley, but would be returning to her Pittsburg elementary school, likely the following week. Student remained hospitalized until January 23, 2018, due to urosepsis, a serious systemic infection stemming from an untreated urinary tract infection.

81. On January 22, 2018, the county social worker faxed an address verification to Student's school identifying the location of her foster home in Oakley, so Pittsburg could re-initiate busing services. This fax indicated it was also sent to Pittsburg Special Education Department but it listed an incorrect fax number for that department. Although the Special Education Department did not receive this fax, it is attributed knowledge of correspondence provided to its employees and school sites. On January 23, 2018, Student was placed in the home of Foster Parents. That day, the county social worker informed Ms. M of Student's discharge to foster care, and faxed the foster placement paperwork to the school on January 25, 2018. The fax cover sheet asked the school when Student could begin attending.

82. Foster Mother is a registered nurse and a first time foster parent. She spent the night with Student at the hospital prior to her discharge to make sure she could learn about Student's medical needs and ensure she was equipped to provide the level of care needed. Student continued to require clean catheterizations every three hours which subjected her to an increased risk of urinary tract infections, both from the procedure even if done correctly, and from a failure to timely complete it. Foster Mother established that to safely and correctly catheterize Student, the nurse must be aware of Student's unique anatomical structure and take special care to avoid trauma. Pittsburg had not developed standardized catheterization procedures sensitive to Student's unique needs. Additionally, Student needed to be medically monitored for fever, signs of infection, and asthma attacks, and her medical diet needed to be strictly enforced.

83. Foster Mother shared Student's medical documentation with Pittsburg. On February 23, 2018, she provided medical instructions for a bowel cleanse procedure conducted at home, and Student's continued use of the medication Ditropan to relax her bladder. She provided Pittsburg with a renewed order for catheterization in February 2018 and a renewed March 6, 2018 Medical Statement to Request Special Meals. This statement identified Student as having type II diabetes, hyperglycemia and concomitant risk of urinary tract infections, and morbid obesity, and instructed that she required a diet of no added sugar and reduced calories. It further specified numerous foods to be avoided including juice, chips, fried food, and sugars, and suggested food substitutes such as nonfat milk, baked chicken and fish, whole grains, fruits and vegetables.

#### Transportation Issues

84. Upon Student's discharge from the hospital, Foster Parents waited a week hoping to hear from Pittsburg about Student's transportation to school. Although her school was approximately a 30 minute drive from their home, they agreed that she should remain in her school of origin. Having heard nothing from Pittsburg, and recognizing that Student wanted to return to school, Foster Parents lifted Student into their car and transported her with her wheelchair to school on January 30, 2018.

85. While Student was ready to go back to school, Pittsburg was not ready for her. Because there was no nurse available, Foster Mother performed Student's catheterizations at 9:00 a.m., and again at lunchtime, and then brought her back home after school. Despite Foster Mother's numerous requests, reminders, and inquiries, neither school staff nor Pittsburg administrators provided any assurance that transportation would soon be reinstated. Therefore, on February 13, 2018, Foster Mother attended Student's Juvenile Court dependency hearing to request educational advocacy for Student given Pittsburg's failure to arrange transportation. Effective March 7, 2018, the Juvenile Court appointed Adams Esq. as Student's Education Attorney, and



Foster Parents as Student's educational rights holders.

#### PITTSBURG'S OFFER OF COMPENSATORY SERVICES

86. Initially, Ms. Watson was not aware that Pittsburg's busing services did not travel out of its jurisdictional boundaries. Pittsburg's lack of knowledge of the limitations of its transportation arrangements and failure to timely secure suitable alternate services prevented Student from participating in her educational program. On February 21, 2018, Ms. Watson informed Foster Parent that Pittsburg would provide Student with 40 hours of special education instruction by a credentialed teacher through the non-public agency Haynes-S.T.A.R. Academy. This was offered as compensation for the approximately 15 days that Student had been without transportation, and to account for any future missed days pending appropriate travel arrangements. These services did not begin until the time of hearing.

87. Student missed school from January 31, 2018, through March 3, 2018, because Pittsburg failed to ensure transportation. During this time, Pittsburg did not provide her with any of her specialized academic instruction or occupational therapy services. On March 5, 2018, Pittsburg provided bus transportation, but failed to ensure that Student was placed on a route appropriate to her medical needs. Despite Ms. Watson's assurances that Student would be the only student on the bus to ensure a direct route sensitive to her medical conditions, on March 5, 2018, Student was the first child on the bus at 6:45 a.m., and the last child dropped off at approximately 4:00 p.m., risking a delay in her catheterization schedule and placing her health at risk. For her first two weeks back to school, Student was subject to inconsistent pick up and drop off times, often arriving home after 3:00 p.m., and once as late as 4:30 p.m.

88. As of March 16, 2018, having received prior approval from its Governing Board to contract with an outside provider, Pittsburg arranged for Student to travel directly to and from school with a private transportation company called Zum. Zum

promptly picked Student up at 7:10 a.m., and she arrived to school by 7:40 a.m., affording her the opportunity to enjoy breakfast with her classmates and typically developing peers prior to the start of school. Zum picked her up after school and brought her home by 2:50 p.m. Zum updated Foster Mother at all stages of the route to keep her apprised of Student's whereabouts and journey. From March 16, 2018, through the time of hearing there were no transportation concerns.

#### Resumption of Nursing Services

89. Through February 2018, Pittsburg contracted with Maxim to provide Student's nursing services. Pittsburg had a nurse lined up and ready for Student's return as of February 5, 2018. Beginning March 2018 though the time of hearing, Pittsburg contracted with a nursing agency called Ro Health to provide a nurse for Student. A nurse generally performed Student's catheterizations at 9:00 a.m. and again at 12:00 p.m. Foster Mother met Student's nurse on March 5, 2018, and trained her to properly catheterize Student in light of Student's unique anatomy.

90. On March 6, 2018, Foster Mother met with Student's nurse and nursing supervisor Nurse F to review Student's physician orders for catheterization procedures, special medical diet, and medication prescriptions. Foster Mother informed them which cafeteria meals were acceptable given Student's diabetic and caloric meal restrictions. Pittsburg never provided Foster Parent with a written procedure regarding Student's catheterizations or food protocols, or a copy of an individual health plan for Student.

91. Pittsburg introduced into evidence a School Care Plan dated March 9, 2018, purportedly authored by Nurse F. The Care Plan was not developed as part of the IEP team meeting process, and was unsigned. It specified that Student was allergic to penicillin and latex; required a restricted diet of 300 calories for lunch and breakfast without noting any snack restrictions or foods to be avoided as specified in her March 6, 2018 medical diet prescription; that she should be encouraged to hydrate; and required

catheterizations every three hours. The Care Plan specified that catheterizations were performed at 8:50 a.m. in the classroom bathroom, and at 11:50 a.m. in the classroom when the others have left, and that the nurse charted the amount, color, and odor of urine and observed any concerns with bowels. The Plan described that Student covered her eyes during the procedure and sometimes delayed the completion of her treatment. Additionally, the nurse was to auscultate for lung sounds if Student was coughing or short of breath and administer Albuterol as needed, check her skin for breakdown, and monitor for signs of infection. The Plan noted that Student's last shunt revision was in June 2016 and that she must be monitored for change in awareness level, complaints of headache, sensitivity to light, and dilated pupils.

92. There was no evidence as to the extent to which this Care Plan was relied upon. The information as to the location for Student's catheterizations was at odds with Ms. M's testimony that Student left class twice a day to go to the nurses' office for her procedures.

93. Since March 2018, Foster Mother has trained all three of the nurses that had worked with Student on how to properly perform her catheterizations. No one requested that she perform this training, but she felt it was her obligation as Student's specialized, medically-trained foster parent. In May 2018, Student experienced vaginal bleeding which Foster Mother attributed to trauma associated with an improper catheterization performed at school. Foster Mother acknowledged that bleeding can occur even if a catheterization is performed correctly. Student did not establish that this incident of bleeding resulted from improper school nursing care.

94. Foster Mother sent a notebook to school each day for Student's nurses to enter notes about Student's urine production and quality, and any medical concerns. The nurses completed these entries daily, and Foster Mother was in near daily communication with them. Student's nurses also completed separate nursing logs that

Pittsburg required them to maintain. Pittsburg routinely requests that nursing agencies send Pittsburg copies of these logs every six months. Maxim did not provide Pittsburg copies of the nursing logs it maintained for Student. Pittsburg requested these prior to hearing but had not received them. Pittsburg requested and received copies of Ro Health's nursing logs.

#### Academic Performance and Progress on Goals

95. Pittsburg did not report on Student's 2017 annual goal progress following the end of her first trimester on November 9, 2017. Pittsburg also failed to report on her progress following the end of the second trimester on February 22, 2018. Rather, the second trimester progress reports from March 2018 note that there was no progress to report on Student's printing goal "due to [S]tudent not being present at school." Similarly, Ms. M noted on Student's goal progress reports for math and reading, "Student has been out of school since December 2, 2017."

96. From March 2018 through the end of the 2017-2018 school year, Student's attendance dramatically improved. During this time period, she missed approximately two days due to illness, and twice left early for medical appointments. Ms. M noticed a corresponding improvement in Student's academic performance. Towards the end of the school year, Student wanted to work on higher level academic work. Therefore, Ms. M began to incorporate basic addition even though Student did not have all of her number knowledge.

97. Student did not complete any of her three short-term objectives for her name printing goal by the time of her third reporting period in May 2018. At that time, Student was able to independently and legibly print three letters of her first name with 60 percent accuracy. By the time of hearing in June 2018, she was able to write her full name. As of May 22, 2018, Ms. M reported that Student was able to write and represent numbers 0 through 10, but she did not note Student's level of accuracy. Ms. M opined

that Student was on target to meet her annual math goal. As to letter identification, by the May 22, 2018 goal reporting period, Student could identify 22 of 26 uppercase letters and 21 of 26 lowercase letters, though her level of accuracy and consistency was not reported.

98. Ms. M prepared a report card for Student for the 2017-2018 school year. However, she completed a kindergarten standards based report card. At the close of the first trimester, Student was making insufficient progress towards all kindergarten standards that had been addressed in class with the exception of one rating of a "2" noting that she was making progress toward end of year kindergarten standards in participating in group discussions. Student missed her entire second trimester of school. As of February 22, 2018, the close of the second trimester, Student could name 13 upper and 13 lowercase letters and produce the letter sound for 12 letters. She also recognized numbers 1 through 5. For the third trimester, Student had made insufficient progress toward most kindergarten year standards, and did not demonstrate mastery of any.

99. Over the course of her third trimester, Student demonstrated an improved ability to retain concepts. Even so, Student continued to function at the kindergarten level and had not regained academic skills she demonstrated over the 2015-2016 first grade year. Foster Mother believed that comprehensive, current assessments were required to determine how to support Student's learning. On April 9, 2018, Foster Mother requested an IEP team meeting and independent educational evaluations in the areas of academics, social-emotional functioning, speech and language, occupational therapy, and assistive technology. As of the time of hearing, Pittsburg agreed to fund an independent psycho-educational and academic evaluation. Ms. Watson acknowledged that Pittsburg did not have a complete understanding of Student's current educational needs.

## STUDENT'S MARCH 2018 REQUEST FOR EDUCATION RECORDS

100. On March 8, 2018, Student's attorney faxed Pittsburg a request for a complete copy of Student's education records. Student listed specific categories of records to be produced in addition to, "any and all other records that are directly related to Student and are maintained by [Pittsburg] or by a party acting on its behalf whether in printed format or maintained on a computer system." In response to this request, Pittsburg's Student Services Office sent a copy of documents contained in Student's cumulative file. These records did not include copies of Student's complete attendance records, or any individualized health plans or service provider logs. Pittsburg's response to Student's records request was postmarked March 13, 2018. Student did not prove that her attorney received these records more than five business days after the request. However, Pittsburg acknowledged that its initial response did not include Student's special education records which are maintained separately from her cumulative file.

101. Close to two months later, on May 9, 2018, Pittsburg provided Student's attorney with electronic copies of Student's master file which included her cumulative and special education records. This May 9, 2018 response still failed to provide Student with copies of her health plans or related service logs from nursing services and occupational therapy. An entry on Pittsburg's education access log noted that on May 15, 2018, Pittsburg sent to Student's attorney a copy of Student's nursing logs and a health plan, without specifying the dates of such records. There was a further entry for May 17, 2018, noting that additional nursing logs (date unspecified) were sent. Even so, the evidence did not establish that these additional records were delivered to Student's attorney. While there was evidence of emails with attached electronic files being sent to Student's attorney on May 9, 2018, there was no evidence of delivery confirmation of the nursing logs and health plans corroborating the hearsay entries noted in the education access log. In response to her written records request, Pittsburg did not

provide Student with copies of her assessment protocols, individualized health plans, occupational therapy and nursing logs, or email correspondence as requested by Student's attorney.

102. Five business days prior to hearing, when Pittsburg provided Student's attorney with its evidence binder, Student received a copy of her March 2016 Individualized Healthcare Plan; March 2018 School Care Plan; Maxim's daily nursing invoices and time sheets from Spring 2016 through February 2018; and Ro Health's daily catheterization log from March through May 2018. Pittsburg did not produce Maxim nursing logs in terms of the daily documentation of Student's catheterization procedures.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT<sup>19</sup>

1. This due process 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 et seq. (2006);<sup>20</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 students with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to

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<sup>19</sup> Unless otherwise stated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

<sup>20</sup> All subsequent references to the Code of Federal Regulations are to the 2006 edition.

meet their unique needs and to prepare them for further education, employment, and independent living; and 2) to ensure that the rights of students with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); 34 C.F.R. § 300.1; See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible student at no charge to the parent, meet state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a student with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031, subd. (a).) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the student to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each student with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the student'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 student 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 Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the



potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a student receives access to an education that is reasonably calculated to “confer some educational benefit” upon the student. (*Id.* at pp. 200, 203-204.)

4. Recently, in *Endrew F. v. Douglas County School Dist. RE-1* (March 22, 2017) 580 U.S. \_\_ [137 S.Ct. 988] (*Endrew F.*), the Supreme Court considered the meaning of the phrase “some educational benefit” for a student not being educated in the general education classroom. When a student is not able to achieve at grade level and progress through the regular curriculum, the student’s educational program must be “appropriately ambitious in light of his circumstances ... as every child should have the chance to meet challenging objectives.” (*Id.* at p. 1000.) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at p. 1001.)

5. 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. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 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 hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); See 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].) In this matter, Student bears the burden of proof as to the issues for hearing.

## ISSUE 1: PITTSBURG'S FAILURE TO ASSESS IN ALL AREAS OF SUSPECTED DISABILITY

6. Student asserts that Pittsburg denied her a FAPE by failing to provide assessments in the areas of academics and health to sufficiently address her disability-related needs.<sup>21</sup> Pittsburg argues that it did assess Student in these areas as part of her 2016 triennial reassessment and the assessments enabled it to sufficiently address her needs.

### Assessment Requirements

7. In order to meet the continuing duty to develop and maintain an appropriate educational program, the school district must assess and reassess the educational needs of a student with a disability. (20 U.S.C. § 1414(a) & (b); 34 C.F.R. § 300.305; Ed. Code, §§ 56320, 56321.) A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106 abrogated in part on other grounds by *Schaffer, supra*, 546 U.S. 49, 56-58 (*Seattle*).) The district must ensure that the student is assessed in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5.) These terms are used interchangeably in this Decision.

8. Students who may be eligible for special education "must be evaluated and assessed for all suspected disabilities so that the school district can begin the

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<sup>21</sup> In her closing brief, Student raises for the first time the issue of her eligibility for special education pursuant to the category of other health impairment. Eligibility was not at issue in this hearing and thus is not addressed in this Decision.

process of determining what special education and related services will address the child's individual needs." (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1110, cert. den. (Apr. 17, 2017, No. 16-672) 137 S.Ct. 1578[2017 WL 1366731] (*Timothy O.*)) A district is on notice of a suspected disability and required to assess in that area if a student has displayed symptoms of that disability. (*Id.* at p. 1119.)

9. After a student has been deemed eligible for special education, a reassessment shall be conducted if the district determines that the educational or related services needs including functional performance of the student warrant a reassessment, or if the parent or teacher requests reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless the parent and the district agree otherwise, and shall occur at least once every three years, unless the parent and the district agree, in writing, that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

10. The United States Department of Education attaches great importance on accurate, comprehensive evaluations as underscored by its regulation providing that parents who disagree with district evaluations may obtain an independent evaluation at public expense. (20 U.S.C. §1415(b)(1) & (d)(2); 34 C.F.R. § 300.502(b); Ed. Code, §§56506, subd. (b), 56329, subd. (b).) The failure to obtain critical assessment information about a student "render[s] the accomplishment of the IDEA's goals -- and the achievement of a FAPE -- impossible." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1210 quoting *Amanda J. v. Clark County School Dist.* (9th Cir.2001) 267 F.3d 877, 894 (*Amanda J.*)) A district's failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032-1033 (*Park*); *Orange Unified School Dist. v. C.K.* (C.D.Cal., June 4, 2012,

No. SACV 11–1253 JVS (MLGx)) 2012 WL 2478389, p.8.)

11. Given the importance of assessments, the IDEA and accompanying regulations set forth an extensive set of procedural safeguards to ensure that evaluations achieve “a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child.” (*Timothy O., supra*, 822 F.3d 1105, 1110.) “School districts cannot circumvent [their assessment] responsibility by way of informal observations.” (*Id.* at p. 1119; see *S.P. v. East Whittier City School District* (9th Cir., June 1, 2018, No. 16-56549) 2018 WL 2453865, at p.2 [an auditory skills assessment that consisted solely of observation and record review was insufficient to satisfy district’s evaluation obligation].) A district must ensure that the evaluation is sufficiently comprehensive to identify all of the student’s needs for special education and related services, whether or not commonly linked to the identified disability category. (34 C.F.R. § 300.304(c)(6).)

#### Pittsburg Assessed Student’s Academic Needs

12. Pittsburg’s psycho-educational and academic assessments of Student in September 2016 identified her levels of academic functioning, and personal strengths and weaknesses in the areas of working memory, language, visuospatial and auditory processing, and adaptive skills. Pittsburg assessed Student’s cognitive abilities and related these to her academic challenges. The assessor concluded that Student’s deficits in auditory cohesion and working memory accounted for her limited academic progress.<sup>22</sup> Given this assessment data, Student’s IEP team could sufficiently address her academic needs, to the extent these could be ascertained without the benefit of a health

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<sup>22</sup> Whether Student has a specific learning disability was not at issue in this hearing.

assessment. Student did not meet her burden of proof that she required a more comprehensive assessment in the area of academics, separate and distinct from an individual health assessment.

### Health Assessments

13. When a student has been diagnosed as having a chronic illness, as Student was, the student may be referred to the district for a health assessment to determine the need for special education. (5 Cal. Code Reg. § 3021.1(a).) A health assessment focuses on diagnoses, health history, and those specific health needs while in school which are necessary to assist a child with a disability. (*L.J. v. Pittsburg Unified School District* (9th Cir. 2017) 850 F.3d 996, 1008 (*L.J.*); see *C.N. v. Los Angeles Unified School District*, (C.D. Cal. October 9, 2008) 2008 WL 4552951 at p. 10 [health assessments conducted to determine need for support around student's tracheostomy and G-tube feedings].) State regulations require that the IEP team review the possible medical side effects and complications of treatment that could affect school functioning, and educational and social implications of the condition and treatment, such as the likelihood of fatigue, absences, or problems with fine and gross motor control. (5 Cal. Code. Regs. § 3021.1; *L.J., supra*, 850 F.3d 996, 1008.)

14. The assessment of a student shall be conducted by persons knowledgeable of the student's suspected disability. (Ed. Code, § 56320, subd. (g).) Any health assessments must be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the student being assessed. (Ed. Code, § 56324, subd. (b).) Medical services for diagnostic and evaluation purposes are included within the definition of related services. (20 U.S.C. § 1401(26); 34 C.F.R. §300.34; Ed. Code, § 56363, subd. (a).) Medical services means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services. (34

### Pittsburg Failed to Conduct a Health Assessment

15. Pittsburg's May 2016 assessment plan required it to conduct a health assessment of Student. Pittsburg's typical health assessment consists of hearing and vision screenings and a review of medical information provided by a parent. Its assertion that the school psychologist, occupational therapist, and speech and language pathologist all participated in completing a health assessment based on their review and summary of Student's medical information is legally insufficient. The law requires that a health assessment be conducted by a credentialed nurse or physician. Having the school psychologist obtain information from Parents by way of a health and developmental history questionnaire does not qualify as a health assessment, especially in light of Parents' questionable ability to meet Student's medical needs and provide an accurate account. In this case, hearing and vision screenings do not constitute a sufficiently comprehensive assessment. Pittsburg had a responsibility to look further and determine the impact of Student's known medical conditions and required treatment on her education.

16. Regardless of Pittsburg's position that it complied with its assessment plan in terms of what it considered to be a "health assessment," Pittsburg was on notice that Student's complex medical profile was negatively impacting her ability to attend school and regularly participate in her special education and related services, thus warranting a full health assessment to better understand her medical status. Student missed most of her first grade year due to her medical needs. Upon her return to school in April 2016, her health status had changed, and she required specialized physical health care services. Pittsburg provided her a nurse to perform her medically required intermittent urinary catheterizations at school. Student then missed more than two additional weeks of school through the end of the 2015-2016 school year, due to ongoing health issues.

17. Student's on-going, frequent, medical absences delayed Pittsburg's September 2016 triennial assessments. Throughout the assessment process, the assessors noted health concerns with Student's stamina and alertness levels, including falling asleep. They pointed out her needs for proper body support to remain upright in her wheelchair, and for presented materials to be specially positioned at a slant to reduce eye strain. Ms. M recognized that Student's medical condition and her need to physically propel her wheelchair was taxing and made it difficult for Student to physically and mentally attend to instruction.

18. Health was not simply a suspected area of disability, it was a core area of need for Student; an unaddressed need that prevented her from regularly attending school. State regulations highlight the importance of the IEP team addressing a special education student's medical absences. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d); see Cal Code Regs., tit. 5, § 3051.17, subd. (c) [district must assure that an IEP team meeting is convened when an eligible student experiences an acute health problem resulting in an absence of more than five consecutive days]<sup>23</sup>.) Pittsburg's failure to have a qualified nurse or physician determine the impact of Student's health on her school attendance and performance constitutes a procedural violation.

#### ANALYSIS OF PROCEDURAL VIOLATIONS

19. Procedural flaws do not automatically result in a denial of a FAPE. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 superseded on other grounds by statute (*Target Range*)). A procedural violation of the IDEA results in a denial of a FAPE only if the violation: (1) impeded the student's

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<sup>23</sup> This regulation references students with other health impairment under former eligibility regulation at Cal. Code Regs., tit. 5, § 3030, subd. (f).

right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2) & (j)); *Target Range, supra*, 960 F.2d 1479, 1484; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.)

20. The Ninth Circuit has held that a procedural error that causes a loss of an educational opportunity denies a student a FAPE. (*Doug. C. v. Hawaii Depart. of Education* (9th Cir. 2013) 720 F.3d 1038, 1047 (*Doug C.*)) "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been better considered.'" (*Id.* at p. 1047, quoting concurring opinion of Judge Gould in *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657.)

21. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304; *Doug. C., supra*, 720 F.3d 1038, 1043["Parental participation ... is critical to the organization of the IDEA."]; *Amanda J., supra*, 267 F.3d 877, 892 ["Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA."].)

22. The Ninth Circuit's holding in *L.J.*, is particularly instructive in this matter. In *L.J.*, the Ninth Circuit held that the district court erred in determining there was no denial of FAPE when the school district failed to conduct a health assessment of a student with attention deficit disorder and an emotional disturbance, and who was prescribed psychotropic medication. The Ninth Circuit concluded that the failure to conduct a health assessment rendered the district and IEP team unable to evaluate and address



L.J.'s medication and treatment related needs, thereby depriving him of an educational benefit under the rationale of *Doug C.*, 720 F.3d at 1043 [a FAPE is denied where procedural inadequacies result in loss of educational benefits]. (*L.J.*, *supra*, 850 F.3d 996, 1008.)

23. Similarly, had Pittsburg assessed Student to determine how her health and treatment needs impacted her access to her education and her school performance, then her IEP team likely would have more seriously considered alternative services and programming during the IEP process. The evidence showed that Student continually had needs associated with her medical conditions which resulted in frequent and extended absences that adversely impacted her academics and social opportunities. Because her health and the impact of her associated medical absences were never assessed, no matter what assistance Student received, Pittsburg would remain unable to appropriately address her disability-related educational needs. The failure to conduct a health assessment deprived the IEP team of critical information, significantly impeded Parents' ability to meaningfully participate, and resulted in a loss of educational opportunity. Operating with a very limited understanding of Student's health needs, Student's IEP team was unable to devise an IEP appropriate to her unique circumstances.

24. A full health assessment would have informed the IEP team of the social and educational impact of Student's health conditions, including spina bifida and paralysis, hydrocephalus and shunt revision, diabetes, obesity, asthma, and sleep apnea, and the impacts of associated medical treatment. It would have advised the team members of any missed instructional or social time related to Student's continual intermittent catheterizations and any social, emotional, or behavioral concerns associated with this particularly personal procedure. For example, Pittsburg's March 2018 School Care Plan noted that Student would cover her eyes during the procedure and sometimes delay the completion of her treatment. Further, a health assessment

would have provided Pittsburg with accurate and updated medical information as to Student's medications, allergies, medical diet, and any specific procedures governing her catheterizations in light of her unique anatomy, all of which would reduce the likelihood of errors and enable school staff to support Student's health needs. This health assessment would form the cornerstone for the proper development of an individualized health care plan for Student. Pittsburg's failure to assess deprived Student of educational benefit.

25. Student met her burden of proof that Pittsburg's failure to conduct an individual health assessment denied her a FAPE. Pittsburg had sufficient information at the beginning of the statutory period to know that Student had significant medical needs impacting her education such that it was required to conduct a health assessment. It would have been afforded 15 days to provide Parents an assessment plan. (Ed. Code, § 56321.) Even if Parents provided immediate consent on or about May 10, 2018, this would be within 30 days of the close of the school year which ended June 8, 2018. As such, Pittsburg was required to have completed a health assessment and convened an IEP team meeting within 30 days of the start of the 2016-2017 school year which began August 17, 2018. (Ed. Code, § 56344, subd (a) [an IEP shall be developed within 30 days after the commencement of the new school year if student was referred for an assessment within 30 days of the end of the school year].) Pittsburg's failure to assess Student denied her a FAPE from September 16, 2016, through the 2016-2017 and 2017-2018 school years. Student is entitled to an independent health assessment and other remedies detailed below.

26. Given Pittsburg's failure to conduct an individual health assessment, Student's IEP team lacked a fundamental understanding of her health needs; what placement and program would be appropriate to these needs; and how her needs impacted her ability to access her educational program. This assessment failure, which

persisted throughout the time at issue in this case, fatally flawed all subsequent IEP offers. Based on its failure to assess and identify her educational needs, Pittsburg could not develop an appropriate program, and thereby denied Student a FAPE for the 2016-2017 and 2017-2018 school years, for which Student is entitled to an award of independent educational evaluations and compensatory education as delineated below. Even so, this Decision will determine Student's remaining issues.

## ISSUE 2: PITTSBURG FAILED TO OFFER AND PROVIDE AN APPROPRIATE EDUCATIONAL PROGRAM

27. Student contends that Pittsburg denied her a FAPE beginning April 25, 2016, by failing to offer and provide an appropriate educational program designed to meet her unique needs with regards to academic one-to-one aide support; social-emotional support; an individual health care plan; and transportation. Pittsburg maintains that its IEP offers were appropriate to Student's needs and that it provided all required academic and health services including health plans. Pittsburg argues that Student did not meet her burden of proof that it failed to implement aide services pursuant to her 2015-2016 IEP, or that she required an academic one-to-one aide or social-emotional support, and that it is providing compensatory services for its transportation delays.

### Evaluating the IEP Offer

28. The Ninth Circuit has held that a district's decisions in writing an IEP cannot be judged exclusively in hindsight, since "an IEP is a snapshot, not a retrospective." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) An IEP for a student with a disability is measured as of the time that it was created. (*Ibid.*) This evaluation standard is known as the "snapshot rule." (*Ibid.*; *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439 (*J.W.*).) In reviewing the sufficiency

of an IEP's offer of FAPE, the snapshot rule looks at what is reasonable given the information available to the team at the time. (*Ibid.*; *J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801.)

29. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program, not that preferred by the parent. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child. (*Ibid.*) For a school district's offer of special education services to constitute a FAPE under the IDEA, the offer must be designed to meet the student's unique needs, comport with the her IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Id.* at 1314-1315; *Rowley*, *supra*, 458 U.S. 176, 203.)

30. The IEP must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089; See *Seattle*, *supra*, 82 F.3d 1493, 1500 [includes academic, social, health, emotional, communicative, physical and vocational needs.]) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467 (*San Diego*).) A school district is required to provide educational instruction, specially designed to meet the unique needs of a student with a disability, supported by such services as are necessary to permit the student to benefit from the instruction. (*Rowley*, *supra*, 458 U.S. 176, 188-189; *San Diego*, *supra*, 93 F.3d 1458, 1468.)

31. The IEP must include a statement of the special education and related

services and supplementary aids and services to be provided to the student, and a statement of required program modifications or supports, along with a projected date for the beginning of the services and modifications and their anticipated frequency, location, and duration. (20 U.S.C. § 1414 (d)(1)(A)(iv)&(vii); Ed. Code, § 56345, subd. (a)(4)&(7).) Students with low incidence disabilities such as a severe orthopedic impairment require highly specialized services, equipment and materials. (Ed. Code, §§ 56026.5 [a low incidence disability is a severe disabling condition, such as severe orthopedic impairment, with an expected incidence rate of less than one percent of the total statewide enrollment for kindergarten through grade 12]; 56000.5.) Therefore, for a student with a low-incidence disability the IEP must also include any specialized services, materials, and equipment that student requires. (Ed. Code, §§ 56345, subd. (b)(5).)

#### Related Services

32. Related services include transportation and supportive services such as occupational therapy, school nurse services, and medical services for diagnostic and evaluation purposes only, as may be required to assist a student with a disability to benefit from special education. (20 U.S.C. §1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subd. (a) [the term “designated instruction and services” means “related services”]; *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 890–91 [104 S.Ct. 3371, 82 L.Ed.2d 664] [requiring a school to provide clean intermittent catheterization to a student with spina bifida so she could attend special education classes]; *Cedar Rapids Community School District v. Garret F.* (1991) 526 U.S. 66 [119 S.Ct. 992, 143 L.Ed.2d. 154][district required to provide continuous nursing service as a related service].) These services may also include instruction in the home or hospital. (Ed. Code, § 56363, subd. (b)(4).)

33. School health services and school nurse services mean health services that are designed to enable a child with a disability to receive FAPE as described in the

child's IEP. (34 C.F.R. § 300.34 (c)(13) [school nurse services are services provided by a qualified school nurse; school health services may be provided by either a qualified school nurse or other qualified person].) An educational agency satisfies the FAPE standard by providing adequate related services such that the student can take advantage of educational opportunities and achieve the goals of her IEP. (*Park, supra*, 464 F.3d 1025, 1033.)

#### ACADEMIC AIDE SERVICES

34. A paraprofessional means a person who assists classroom teachers and other certificated personnel in instructing reading, writing, and mathematics. (Ed. Code, § 45330, subd. (a).) A paraprofessional includes an instructional aide as defined in section 45343, subdivision (a) of the Education Code [a person who assists a classroom teacher with her duties; in supervising students; and in authorized instructional tasks] and a teacher aide as described in section 45360 [a person who assists classroom teachers in carrying out activities directly related to the instruction of students]. (*Ibid.*)

#### Material Failure to Implement

35. There is no statutory requirement that a district must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 820-822 (*Van Duyn*). Only a material failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Ibid.*) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569 at p. 7.) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's

educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*Van Duyn, supra*, 502 F.3d 811, 822.)

#### STUDENT DID NOT PROVE A FAILURE TO IMPLEMENT IEP AIDE SERVICES

36. Pittsburg provided Student with an aide for a portion of the 2015-2016 school year, and then substituted her aide with a nurse in April 2016. However, Student did not introduce into evidence her operative IEP as of the start of the statutory period beginning April 25, 2016. It therefore cannot be determined what this IEP required in terms of the provision of a one-to-one aide for Student. Because the terms of the operative IEP with regards to aide services are unknown, it cannot be determined whether Pittsburg materially failed to implement required aide services. Therefore, Student did not meet her burden of proof that Pittsburg failed to provide her one-to-one aide services from April 25, 2016, through September 15, 2016, when Parents consented to the new annual IEP.

#### NO SHOWING STUDENT REQUIRED AIDE OR SOCIAL-EMOTIONAL SERVICES

37. It has already been determined that Pittsburg's failure to conduct a health assessment rendered it unable to devise an appropriate program for Student. It is against this backdrop that Student's specific allegations of program deficiencies are analyzed. Student contended that she required a one-to-one aide to provide academic support. Pittsburg's 2016 assessments of Student showed that she required a small classroom setting with specialized academic instruction individualized to her level and provided in small group and individual sessions. She also required prompting to participate in reading, writing, and math. Ms. M's classroom was structured to meet Student's academic needs. Given the presence of three classroom aides, the adult to student ratio was two-to-one, affording Student the opportunity to have close adult support and instruction. Further, Student's nurse also provided academic support and

re-direction to task as needed. Student did not meet her burden of proof that she required a one-to-one academic aide to receive educational benefit.

38. Student contended that Pittsburg denied her a FAPE by failing to offer and provide social-emotional supports or services. She experienced a neglectful home situation, frequent medical absences including hospitalizations, and subsequent placement into foster care. Even so, Student did not exhibit any negative emotional effects and was described as resilient with a good sense of humor. She had friends, played with them at recess and lunch, participated in class, and enjoyed performing in her general education music class. Though her pragmatic skills were noted to be low average, she participated in the class social skills curriculum and was able to express her feelings. Student did not establish that she had social-emotional needs such that she required the provision of additional supports or services to access her education.

#### Requirements for Health Care Services and Individual Health Plans

39. Health and nursing related services may include specialized physical health care services if necessary to meet a child's unique educational needs. (Cal. Code. Regs., tit. 5, § 3051.12, subd. (b).) Specialized physical health care services are "those health services prescribed by the child's licensed physician and surgeon requiring medically related training for the individual who performs the services and which are necessary during the school day to enable the child to attend school." (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(1)(A).) Specialized physical health care services include catheterization. (Cal. Code. Regs., tit. 5 § 3001, subd. (s); Ed. Code, § 49423.5, subd. (d).)

40. Standardized procedures to be used for the provision of physical health care services shall be maintained for each individual with exceptional needs. (Cal. Code. Regs., tit. 5 § 3051.12, subd. (b)(3)(E).) Standardized procedures are to be developed through collaboration among school administrators and health professionals in the provision of the specialized physical health care services. (Cal. Code Regs., tit. 5, §



3051.12, subd. (b)(1)(B).) Continuing specialized physical health care services required in order for the student to benefit from special education shall be included in the student's IEP. (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(3)(A).) For a special education student with a medical condition or who requires medical treatment for a chronic illness, the IEP team shall review, and if appropriate, revise the IEP whenever there is a significant change in the student's medical condition. (Cal. Code Regs., tit. 5, § 3051.4, subd. (c).)

41. The IEP is "the centerpiece of the statute's education delivery system for disabled children." (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686].) The IEP is a comprehensive plan prepared by a student's IEP team and must be drafted in compliance with a detailed set of procedures that emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. (*Endrew F.*, *supra*, 137 S.Ct. 988, 994 referencing 20 U.S.C. § 1414(d)(1)(B).) "[T]he purpose of an IEP is to embody the services and educational placement or placements that are planned for the child." (*N.E. v. Seattle Sch. Dist.* (9th Cir. 2016) 842 F.3d 1096-97 (*N.E.*)). The IEP "embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP." (*M.C.*, *supra*, 858 F.3d 1189, 1197.) A failure to include the required specificity as to the programming offer would "render the IEP useless as a blueprint for enforcement" and infringe on parental participatory rights which include the development and the enforcement of an IEP. (*Id.* at pp. 1197-99.)

#### FAILURE TO MAKE IEP OFFER OF HEALTH CARE SERVICE AND HEALTH PLAN

42. As discussed above, because Pittsburg failed to conduct a health assessment, Student's IEP team did not understand her educationally related health needs. As such, Pittsburg could not have devised an informed, individualized, and thereby appropriate offer of a health care plan or health care services. In addition, Pittsburg bypassed the IEP team process, and never brought its proposed March 2016

Health Plan to Student's IEP team for consideration and review. Following her extended medical absence in spring 2016, Pittsburg did not hold an IEP team meeting to offer Student a health plan or health care services as part of her IEP's, despite her significantly changed medical condition and need for intermittent catheterizations. Pittsburg cannot circumvent the IEP development process by simply providing what it determined to be suitable nursing services to meet Student's changed medical needs.

43. Pittsburg additionally failed to include Student's health care services in the written IEP offers as required by state regulation, specifically her need for clean intermittent catheterizations every three hours. Nor did Pittsburg offer an individual health plan for Student as part of her 2016 or 2017 annual IEP's. Once a nurse compiled necessary components for Student's individual health plan based on physician prescriptions and medical recommendations, Pittsburg was required to bring this proposal or draft health plan to Student's IEP team for full consideration and review, and to offer this as part of her IEP health care services. Beginning April 25, 2016, Student established that Pittsburg failed to offer and provide an individual health plan and health care services in accordance with state regulatory requirements, and pursuant to the IDEA's IEP content requirements and development process. This failure constitutes a procedural violation. "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan." (*Amanda J.*, *supra*, 267 F.3d 877, 882.)

44. Pittsburg's failure to offer an individual health plan and health care services as part of Student's IEP significantly impeded Parents' ability to participate in the decision-making process. It additionally prevented Foster Parents' from understanding how Pittsburg intended to address Student's significant health needs; monitoring and enforcing her health care services; and evaluating whether the services Student received were adequate. Furthermore, Student's IEP team required the health

information that would comprise the health plan to fully understand the impact of Student's health needs on her educational programming and day-to-day class functioning. Had Pittsburg addressed Student's need for a health plan in the context of her annual IEP team meetings, the team would have likely "better considered" alternate programming options under the analysis of *Doug C.* As such, this procedural violation denied Student a FAPE from April 25, 2016, through the 2017-2018 school year. Having so determined, there is no need to address the substantive validity of the March 2016 or March 2018 health care plans. (*Amanda J.*, *supra*, 267 F.3d 877, 895.)

#### Failure To Offer and Provide Appropriate Transportation

45. The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) transportation in and around school buildings; and (iii) specialized equipment (such as adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16).) Decisions regarding such services are left to the discretion of the IEP team. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46576 (Aug. 14, 2006).) Taking into consideration local transportation policies, a district must provide transportation only if a student with a disability requires it to benefit from her special education. (20 U.S.C § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, §§ 56342, subd. (a), 56363, subd. (a).)

46. Pursuant to the September 2016 and 2017 annual IEP's, Pittsburg offered Student point-to-point transportation services, without any further specifications. The IEP offers of transportation were not appropriate because they failed to include pertinent details such as Student's need for an accessible vehicle with a wheelchair lift, and a transportation schedule which would be dictated by her health care service need for catheterizations every three hours. These details as to her scheduled health care procedures were necessary to develop an appropriate offer of transportation.

47. Student's health needs and catheterization schedule necessarily impact her

transportation schedule. For example, if she completed her home morning schedule including catheterization at 6:30 a.m. to be ready for scheduled bus pick-up at 7:00 a.m., she would require a morning catheterization at school by 9:30 a.m. Her next procedure would need to occur at 12:30 p.m., and she would require a bus schedule that ensured her arrival home by 3:30 p.m., before her next scheduled catheterization.

48. The 2016 and 2017 IEP transportation provisions were not reasonably calculated to provide Student a FAPE because they did not include a specialized transportation plan that fully addressed her medical needs. Furthermore, Pittsburg's failure to include within Student's IEP's a specialized transportation schedule and all related safety equipment she required due to her health, violated state law which requires that Student's IEP identify all specialized transportation and equipment services given her low incidence disability. Similar to the above analysis of the health care services missing from Student's IEP's, this failure to include specific transportation requirements also violated the IDEA's content requirements for IEP's, and contravenes the Ninth Circuit's holdings in *N.E.* and *M.C.* This additional procedural violation also denied Student a FAPE because it significantly impeded parental participation in the decision-making process including the development and enforcement of the IEP.

49. Finally, Pittsburg failed to implement Student's IEP transportation services. Pittsburg was aware that Student was discharged from the hospital as of January 23, 2018, when the county social worker informed Ms. M of this event. The day prior, Student's county social worker had informed Pittsburg that despite the location of her foster home in Oakley, Student would be returning to her elementary school and was in need of transportation. It is reasonable to afford Pittsburg a one-week period, until January 30, 2018, to have ensured the availability of Student's transportation services. Pittsburg failed to provide Student with any transportation from January 30, 2018, until March 5, 2018. This constitutes a material failure to implement her IEP and a per se

denial of FAPE, as Student was denied any access to her education.

50. The next two weeks, from March 5 through 15, 2018, Pittsburg failed to provide appropriate transportation in light of Student's health care needs. For this period of time, Student was subject to an inconsistent bus schedule that jeopardized her ability to receive the timely catheterizations she medically required. During this time, nursing staff routinely performed Student's second catheterization at noon, which meant she required her next procedure by 3:00 p.m. Student's bus brought her home after 3:00 p.m., and once as late as 4:30 p.m. It was not until March 16, 2018, that Pittsburg provided suitable transportation with a consistent morning pick-up at 7:10 a.m., early arrival to school, and return home before 3:00 p.m.

51. Pittsburg's failure to implement Student's transportation services denied her a FAPE from January 30, 2018, through March 15, 2018. Pittsburg offered Student 40 hours of compensatory non-public agency services, in the form of academic instruction by a credential special education teacher, to compensate for its transportation failures. As such, an award for this violation will be off-set by any compensatory hours provided to Student, as discussed below.

52. In summary, Student met her burden of proof as to Issue 2 that Pittsburg denied her FAPE by failing to offer and provide an appropriate educational program because it lacked a prerequisite understanding of her health needs; failed to develop and offer a health care plan and health care services through the IEP process (beginning April 25, 2016); and failed to offer and provide health-related transportation services appropriate to her needs. Student is entitled to compensatory education services for two academic years, as detailed below.

### ISSUE 3: MAINSTREAMING AS STUDENT'S LEAST RESTRICTIVE ENVIRONMENT

53. Student asserts that Pittsburg denied her a FAPE by failing to provide her a program in the least restrictive environment, specifically, by not providing

mainstreaming for 10 percent of her school day and not ensuring she was educated with her same-aged peers. Pittsburg contends that Student was appropriately mainstreamed in that she daily participated in breakfast, lunch, and recess with typical peers from first through third grade, and attended general education classes three times per week.

54. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (a)(2); Ed. Code, § 56040.1, subd. (b).) The IDEA requires, to the maximum extent appropriate, that a child with a disability must be educated with children who do not have disabilities. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, §§ 56040.1, subd. (a), 56342, subd. (b).)

55. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit has required four factors to be evaluated: 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, 1403-1404.) However, when the student cannot be educated in a general education environment, the least restrictive environment analysis requires determining whether the student has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1050.)

### Student Did Not Establish a Mainstreaming Violation

56. Student did not contend that she should be educated in the general education environment, but rather that she had not been mainstreamed for 10 percent of her school day as required by her IEP's. Student's school day was 6 hours and 20 minutes long, four days a week, and approximately 5 hours and 15 minutes one day per week. During her daily 50 minute lunch period and during recess, Student had access to same-aged, typically developing peers. She attended three 45-minute general education classes each week with second-graders. This schedule allowed for at least 10 percent mainstreaming time as required by her IEP.

57. Ms. M's class was scheduled to join the second grade music and physical education classes because these classes occurred at times that would not conflict with her core academic instruction. Therefore, even when Student was a third-grader, she participated in general education second grade classes. Administrative convenience is not a legitimate factor in determining appropriate mainstreaming opportunities. Even so, Student did not prove that attending second grade general education music and physical education classes, during the 2017-2018 school year, when she was a third-grader, denied her a program in the least restrictive environment. She did not establish that the general education classes did not have peers her age, or that being mainstreamed with a class one grade level lower than her class, denied her appropriate mainstreaming. Student did not meet her burden of proving a denial of a FAPE in this regard.

### ISSUE 5: LACK OF ACHIEVEMENT TOWARD IEP GOALS

58. Student maintains that Pittsburg denied her a FAPE by failing to address her lack of achievement toward her IEP goals, including failing to report on her progress

and provide appropriate means of measuring this progress.<sup>24</sup> Pittsburg contends that Student was making progress on her goals commensurate with her cognitive abilities and in light of her circumstances which included frequent absences. Pittsburg asserts that it provided progress reports to the extent Student participated in her program.

#### Annual Goal Requirements

59. Federal and State law specify in detail what an IEP must contain. Among other things, it must include a statement of the student's present levels of academic achievement and functional performance, including the manner in which the student's disability affects her involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from her disability to enable the student to be involved in and progress in the general education curriculum; and (2) meet each of the child's other educational needs that result from her disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).)

60. The IEP team develops measurable annual goals that address the student's areas of need and which the student has a reasonable chance of attaining within a year. (Ed. Code, § 56344; *Letter to Butler* (OSERS Mar. 25, 1988) 213 IDELR 118; U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12406, 12471 (1999 regulations).) The purpose of goals is to assist the IEP team in determining whether the student is making progress in an area of need. (Ed. Code, § 56345, subd.

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<sup>24</sup> In her closing brief, Student alleges for the first time that Pittsburg predetermined her goals. This was not identified as an issue for hearing and is not addressed herein.



(a.) As such, the IEP must also contain a statement of how the student's progress towards her goals will be measured and when the parent will receive periodic reports on the student's progress. (20 U.S.C. §1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the offered educational services. (Cal. Code Regs., tit. 5, § 3040, subd. (b).) The goals may differ, but every child should have the chance to meet challenging objectives. (*Endrew F., supra*, 137 S.Ct. 988, 1000.)

### Measuring Educational Benefit and the Role of the IEP Team

61. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. 176, 202.) "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." (*Endrew F., supra*, 137 S.Ct. 988, 1001.) The Ninth Circuit instructs that, "[T]he correct standard for measuring educational benefit under the IDEA is not merely whether the placement is 'reasonably calculated to provide the child with educational benefits,' but rather, whether the child makes progress toward the goals set forth in her IEP." (*San Diego, supra*, 93 F.3d 1458, 1467.) The IEP team shall review the student's program periodically, but not less frequently than annually, to determine whether the annual goals are being achieved, and shall revise the IEP to address any lack of expected progress towards the annual goals. (20 U.S.C. § 1414(d)(4)(A)(i)&(ii)(I); 34 C.F.R. § 300.324(b)(1)(i)&(ii)(A); Ed. Code, § 56341.1.) The IEP team is required to meet whenever a student demonstrates a lack of anticipated progress. (Ed. Code, § 56343, subd. (b).)

62. "The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement." (*Endrew F., supra*, 137 S.Ct. 988, 999.); *Rowley, supra*, 458 U.S. 176, 179.) A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with her abilities.

(*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 131; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569.) However, a district may not discharge its duty under the IDEA by providing a program that “produces some minimal academic advancement no matter how trivial.” (*Amanda J., supra*, 267 F.3d 877, 890 citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.) An educational program that aims so low is tantamount to “sitting idly ... awaiting the time when they were old enough to ‘drop out.’ ” (*Rowley, supra*, 458 U.S., 176, 179.)

#### Pittsburg failed to Address Student’s Lack of Progress

63. Student’s situation is factually similar to that presented in the case of *Endrew F. v. Douglas County School District RE 1* (D. Col. 2018) 290 F. Supp.3d 1175, 1179 (*Endrew II*). Endrew attended preschool through fourth grade in his local district’s public schools. Each year his IEP remained largely the same in terms of goals and services. Parents removed him to a private school out of concern that his academic and functional progress had essentially stalled, and the district had failed to assess and address his behavior needs. The private school implemented a behavior plan and increased the demands of his academic goals. With his behaviors addressed, Student made academic progress.

64. On remand from the Tenth Circuit following the United States Supreme Court’s clarification of the FAPE standard [appropriate progress in light of a child’s unique circumstances] the district argued that its IEP offer was reasonably calculated to enable Endrew to make appropriate progress. According to the school district, it increased Endrew’s objectives, but his limited cognition and the impact of his autism and attention deficit symptoms significantly impeded his ability to access and participate in his education. On remand, the district court found the IEP denied FAPE as it continued a pattern of unambitious goals with the same goals carried over, others abandoned when Endrew could not meet them, and only minor increases in other

objectives. Additionally, the district's failure to assess Endrew's behavior needs and develop a formal behavior plan, rendered it unable to properly address his behavior which negatively impacted his ability to make progress. This assessment failure diminished the reasonableness of the IEP offer. (*Endrew II, supra*, 290 F. Supp.3d 1175, 1183-84.)

65. Pittsburgh carried over Student's academic and occupational therapy goals, and more often than not, pared back these goals to target lower level skills. Pittsburgh eliminated a basic reading goal when Student was unable to attain it. Student's baseline goal functioning remained static year to year, and some of her skills regressed over time.

66. For example, in September 2016, Student's baseline functioning in printing essentially remained at her 2015 level: she could recognizably print one capital letter for her name. Pittsburgh carried over Student's 2015 annual printing goal which called for her to trace and print her first name. By September 2017, Student did not meet this recycled goal. She essentially remained at her prior skill level in that she could print the same capital letter for her first name, but usually just made circles for the other letters. She could also imitate 12 other capital letters of the alphabet. Her 2017 annual printing goal called for a slightly increased level of functioning, namely, to legibly print her first and last name with appropriate formation. By May 2018, she was able to print three letters of her first name.

67. Even though Student could cut out simple shapes by September 2016, this goal was carried over with only a slight revision in terms of the level of assistance provided. Student again met this goal in September 2017. In October 2015, Student was able to read four high frequency sight words, and her goal was to read 50 words. By June 2016 her skills regressed to reading only two words. Pittsburgh abandoned this goal in September 2016. Student's other reading goal in 2015 called for her to identify all

upper and lowercase letters of the alphabet. At that time she could recognize the letters in her name. Student's progress appeared to stagnate. By September 2016, she was still trying to identify letters in her name, and could consistently identify only the first letter of her first name, the same capital letter she could print. Pittsburg significantly pared back this goal in 2016, calling for her to recite or identify the alphabet with 25 percent accuracy. She met this goal as demonstrated by her ability to sing the alphabet song and identify nine letters. Pittsburg's September 2017 goal of naming 15 upper and 15 lowercase letters was less ambitious than her 2015 goal.

68. Similarly, Student's math skills regressed. In June 2016, she was solving addition and subtraction problems. By September 2016, she was only able to solve two equations ( $1+1$  and  $2+1$ ) at 80 percent accuracy. Pittsburg abandoned her math calculation goal. Her new annual math goal targeted lower level counting and matching skills. She did not meet this goal by September 2017. Student's baseline math skills of counting to the number 20 had regressed from her 2016 skill level of counting to 25. Her 2017 baseline of identifying numbers one through three was lower than her 2015 baseline of recognizing numbers one through five. Pittsburg only slightly revised her math goal in 2017, requiring her to now count and match up to 20 items rather than 15 items, and to represent the number of objects with a written number but at a reduced accuracy rate of 50 percent.

69. Pittsburg failed to regularly report on Student's progress, or lack thereof, towards her annual goals. Pittsburg pointed to Student's extended absences as the reason for not reporting progress. There were no progress reports for her printing goal in December 2016, June and December 2017, and March 2018. As to her alphabet and math goals, Pittsburg provided no progress update for March, June, and December 2017, and March 2018 due to frequent absences.

70. Similar to the district's position in *Andrew II*, Pittsburg asserts that Student

did make some progress and blamed her circumstances of frequent school absences and low cognitive abilities for impeding her ability to make greater progress. Pittsburg overlooks the impact of its failures to assess and, therefore, address Student's health needs, and to review and revise her IEP in light of her disability-related absences to ensure her ability to participate in and benefit from her education.

71. From April 25, 2016, through the end of the 2015-2016 school year, Student missed approximately 13 school days because of her health status or medical treatment needs. During the 2016-2017 school years, 66 absences were because of medical issues. During the 2017-2018 school year, Student missed approximately 60 days due to health issues and related transportation problems. For these approximate 139 missed school days, Pittsburg abandoned the IEP team meeting process. Having failed to hold an IEP team meeting to determine how to address barriers to learning such as her medical absences, Pittsburg cannot hide behind its belief that Student was unable to avail herself of an educational program.

72. Although Pittsburg overall acknowledged its duty to provide transportation to enable Student to reach school, and its duty to provide catheterizations to allow her to remain through the school day, it disregarded its obligation to convene Student's IEP team to address her lack of anticipated progress year after year and consider any necessary revisions in light of her medical absences. Pittsburg had a responsibility to convene an IEP team meeting to determine what alternate programming could be offered and provided consistent with Student's health needs to enable her to receive educational benefit. Student's IEP team had a duty to tailor an appropriate program in light of Student's unique circumstances, rather than sit by and await her return to school.

73. Student met her burden of proving that Pittsburg failed to appropriately address her lack of progress towards her annual goals during the 2016-2017 and 2017-

2018 school years. Its failure to provide a regular accounting of her progress following each trimester, and to convene an IEP team meeting to address Student's lack of anticipated progress, significantly impeded Parents' participation and deprived Student of educational benefit. Pittsburg reacted to Student's lack of goal progress by lowering its expectations for Student's progress. As such, Pittsburg denied Student a FAPE by failing to provide Student with an appropriately ambitious IEP that provided her the opportunity to meet challenging objectives.

#### ISSUE 4: PROVISION OF EDUCATION RECORDS

74. Student contends that Pittsburg failed to timely provide a complete copy of her education records pursuant to her written request on March 8, 2018. Student argues that Pittsburg's delay in disclosing numerous records, including her special education file, until May 9, 2018; its act of withholding copies of her health plans, nursing logs, invoices and time sheets, and selected emails, until five days prior to hearing; and its failure to produce Maxim's nursing logs, occupational therapy logs, testing protocols, and all emails significantly impeded Foster Parents' ability to participate in the decision-making process, including the due process hearing, resulting in a denial of FAPE. Pittsburg asserts that it provided Student with copies of all requested educational records by May 17, 2018, and that emails and service logs are not education records.

75. To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records in relation to their child's special education identification, evaluation, educational placement and receipt of a FAPE. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) Each participating agency must permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the agency under this part. (34 C.F.R. §300.613(a).) The

agency must comply with a request without unnecessary delay. (*Ibid.*) Federal regulations require that educational records be provided within 45 days of request, while California law affords parents the right to receive copies of all school records within five business days of the request. (*Ibid.*; Ed. Code, § 56504, subd. (n), 56504.) The right to inspect and review education records includes the right to receive an explanation and interpretation of the records; the right to receive copies of the records if failure to provide copies would effectively prevent the parent from exercising the right to inspect and review the records; and the right to have a representative inspect and review the records. (34 C.F.R. §300.613(b).)

76. The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611(b).) In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3 & 300.611(b); *Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities*, 64 Fed. Reg. 12406-01, 12641 (Mar. 12, 1999).)

77. The United States Supreme Court defined the word "maintained" in this context by its ordinary meaning of "preserve" or "retain." Records are maintained when the agency keeps the records in one place such as "a filing cabinet in a records room or on a permanent secure database" with a single record of access. (*Owasso Independent School Dist., No. I-011 v. Falvo*, (2002) 534 U.S. 426, 433-34 [122 S.Ct. 934, 151 L.Ed.2d 896] (*Owasso*); *S.A. v. Tulare County Office of Educ.* (N.D.Cal. Sept. 24, 2009, No. CV F 08-1215 LJP GSA) 2009 WL 3126322, pp. 5-7 *affd.* *S.A. v. Tulare County Office of Educ.* (N.D. Cal. October 6, 2009) 2009 WL 3296653 [school e-mails concerning a student that were not placed in his permanent file were not educational records as they were not

maintained by the school district pursuant to *Owasso*]; accord, *SB v. San Mateo Foster City School Dist.* (June 14, 2018, No. 17-15841) [nonpub. opn.] 2018 WL 3120298, p.2.)

78. Similarly, education records do not include “records of instructional, supervisory, and administrative personnel ...which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.” (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).) Federal regulations further clarify that for a record to be excluded from the definition of an education record pursuant to the “sole possession of the maker” exclusion, that record must be used only as a personal memory aid. (34 C.F.R. § 99.3(b)(1).) As clarified by the United States Department of Education,

FERPA's sole possession exception is strictly construed to mean ‘memory-jogger’ type information. For example, a memory-jogger is information that a school official may use as a reference tool and, thus, is generally maintained by the school official unbeknownst to other individuals. (64 Fed. Reg. 12406-01, 12641 (Mar. 12, 1999).)

79. The exception for “sole possession records” is not intended to exclude from the definition of education records detailed or comprehensive notes that record specific clinical, educational or other services provided to a student. (*Letter to Baker* (Office of Innovation and Improvement, Complaint No. 1251, December 28, 2005).) While this letter is not binding authority, it is persuasive, and as an opinion by the administrative agency in charge of enforcing FERPA, it is entitled to deference. (See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, (1984) 467 U.S. 837 [“We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.”].)



80. In California, records for each student shall either be maintained in a central file at the school of attendance, or when records are maintained in different locations, the educational agency shall note in the central file where such other records are located. (Cal. Code Regs., tit. 5, § 433, subd. (b); Ed. Code, § 49069 [access procedures shall include notification to the parent of the location of all pupil records if not centrally located].) As such, California specifically anticipates that pupil records will be maintained in various locations. Daily documentation of specific health care services provided at school shall be maintained on a district-approved form which shall include the signatures of the qualified designated school person(s) who performs the procedure. (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(3)(E).) Written medical prescriptions for health care services and daily documentation shall be maintained in accordance with the requirements of confidentiality of pupil records, and are considered mandatory interim pupil records. (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(3)(E)(2).)

81. Test protocols such as test questions, student answers, evaluator calculation or scoring sheets, and administration instructions, to the extent these are personally identifiable to the student, are educational records that must be provided to parents if requested. (*Newport-Mesa Unified School Dist. v. State of Cal. Dept. of Educ.* (C.D. Cal. 2005) 371 F.Supp.2d 1170 at pp. 1175, 1179 [providing parents copies of their children's test protocols constitutes a permissible "fair use" pursuant to federal copyright law].) The IDEA's provisions for full parental involvement and requirement that districts provide parents full access to their child's educational records, helps protect the interests of children in need of special education. (*Amanda J, supra*, 267 F.3d 877, 891[failure to timely disclose student's records constituted an egregious procedural violation that denied FAPE].)

#### Failure to Timely Provide Requested Education Records

82. Pittsburg's first response to Student's March 2018 records request was

timely, but incomplete. Pittsburg failed to timely provide full attendance records, health plans, nursing logs, or special education records including IEP's, all assessments, and occupational therapy service logs. Foster Parents were denied access to Student's IEP's and assessments until May 2018, after they had filed for a due process hearing. Student's health needs are at the heart of this case; yet Pittsburg withheld copies of her health plans, Maxim nursing invoices and time sheets, and Ro Health nursing logs until five days prior to hearing when it disclosed its evidence binder. As of the time of hearing, Pittsburg failed to provide the daily documentation of Student's catheterizations performed by Maxim nurses despite the status of these records as mandatory interim pupil records.

83. Student was placed with Foster Parents on January 23, 2018. Prior to this, Foster Parents had no involvement with Student. As of the time of hearing, they had never attended an IEP team meeting for Student. Aside from informal meetings with school and district staff, their only knowledge of Student's educational history and programming was through her education file. Access to Student's full education records was critical to the ability of Foster Parents to be full participants in her educational programming; to determine if they should assert their right as educational rights holders to file for due process; and to prepare for and fully participate in the hearing process. Foster Parents required timely access to Student's education records to protect Student's educational interests and be active and informed participants. In addition, Foster Parents have the right to monitor Pittsburg's compliance with delivering and implementing Student's IEP services. Occupational therapy service logs detailing services provided to Student pursuant to her IEP constitute education records even though they are maintained by the service provider. Any emails specific to Student and maintained in her education file(s) also constitute education records.

84. Student proved that Pittsburg's failure to timely produce copies of her

requested education records significantly impeded Foster Parents' rights to participate in the IEP development process, enforcement process, and hearing process. As such, this violation denied Student a FAPE. Pittsburg will be required to provide Student any education records not previously disclosed, including copies of her nursing logs prepared by Maxim, occupational therapy service logs, any emails maintained in Student's education file(s), and assessment protocols.

#### ISSUE 6: PRIOR WRITTEN NOTICE

85. Student asserts that Pittsburg was required to provide prior written notice of its decisions to terminate occupational therapy consultation services in September 2017, and the services of Student's one-to-one aide in September 2016, and that its failure to do so denied her a FAPE. Pittsburg contends that it did not terminate Student's one-to-one aide services so no notice was required. Pittsburg also asserts that the consultation services were terminated during the IEP team process with Parents' consent, and that it was not required to provide prior written notice.

86. A school district must provide written notice to the parents of a student with exceptional needs whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must contain: 1) a description of the action proposed or refused by the agency; 2) an explanation for the action or refusal, along with a description of each assessment or report the agency used as a basis for the action or refusal; 3) a statement that the parents are entitled to procedural safeguards and how they can obtain a copy; 4) sources of assistance for parents to contact; 5) a description of other options that the IEP team considered, with the reasons those options were rejected; and 6) a description of the factors relevant to the agency's action or refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd.

(b.) A district's failure to provide adequate prior written notice is a procedural violation of the IDEA.

87. The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) When a violation of such procedures does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

#### No Prior Written Notice Violation

88. Student's assertions notwithstanding, the procedural requirement of prior written notice does not apply to IEP team decisions made during the course of an IEP team meeting wherein the parent provides consent to the IEP offer. As such, Pittsburg was not required to provide prior written notice as to the September 2017 IEP provision that terminated Student's occupational therapy consultation services. Parents attended this meeting and consented to this service change. As to the 2016 IEP offer, while this IEP offered aide/nurse services, Student did not establish that this IEP terminated a prior offer of one-to-one aide services. No IEP prior to September 2016 was introduced into evidence. Even if this consented-to 2016 IEP ended or otherwise replaced a prior IEP provision for one-to-one aide services, the same analysis would apply. To require prior written notice of the IEP offer is contrary to the prohibition under the IDEA against school officials and staff predetermining the outcome of the IEP. Student did not meet her burden to show that prior written notice requirements were triggered with regard to these IEP service offers, nor that any alleged notice violation resulted in a substantive FAPE denial.

## ISSUE 7: REQUIRED IEP TEAM MEMBERS

89. Student maintains that Pittsburg was required to have a nurse and an occupational therapist in attendance at her September 19, 2017 IEP team meeting, and that its failure to ensure their attendance denied her a FAPE. Pittsburg asserts that Parent agreed in writing to excuse the attendance of the occupational therapist, who had provided written input to the IEP team and Parent prior to the meeting, such that her attendance was not required. Pittsburg contends that a nurse is not a required IEP team member, and since Parents did not request the attendance of a nurse, there was no violation.

90. An IEP is developed by an IEP team. The IEP team must include: (1) one or both of a student's parents; (2) no less than one general education teacher; (3) no less than one special education teacher or, if appropriate, a special education provider of the student; (4) a representative of the district who is qualified to provide or supervise specially designed instruction, and is knowledgeable about the general education curriculum and the availability of district resources; (5) an individual who can interpret the instructional implication of assessment results; (6) at the discretion of the parent(s) or district, any other individual who has knowledge or special expertise regarding the student, including related services personnel, as appropriate; and (7) whenever appropriate, the student with exceptional needs. (20 U.S.C. § 1414(d)(1)(B); 34 C.C.R. § 300.321(a); Ed. Code, § 56341, subd. (b).)

91. A team member shall not be required to attend an IEP meeting if the parent and school district agree in writing that the excused member's area of service is not being modified or discussed at the meeting. (20 U.S.C. § 1414(d)(1)(C)(i); 34 C.F.R. § 300.321(e)(1); Ed. Code § 56341, subd. (f).) A team member whose area of service is subject to discussion may be excused if the parent, in writing, and the district consent to the excusal after conferring with the member, and the excused member provides written

input into the development of the IEP to the parent and IEP team prior to the meeting. (20 U.S.C. § 1414(d)(1)(C)(ii); 34 C.F.R. § 300.321(e)(2); Ed. Code, § 56341, subd. (g).)

92. The Comments to the IDEA Amendments note that several commentators recommended that the IEP team include individuals with specific professional knowledge or qualifications. This proposal was rejected, and the Department of Education noted, "It would be inappropriate to require that individuals with specific professional knowledge or qualifications attend all IEP Team meetings." (71 Fed. Reg. 46540-01, 46669 (Aug. 14, 2006).) Rather, the IDEA allows the parent or local educational agency to invite other individuals with knowledge or special expertise regarding the child, including related services personnel as appropriate, to be included as a team member. (*Ibid.*)

#### No Violation Regarding Mandatory IEP Team Members

93. Related service providers, such as a nurse or an occupational therapist, are not identified under the law as required IEP team members. While a nurse, given her professional knowledge, would have been able to provide valuable information to the IEP team as to Student's health care needs, this does not mean that such an individual is a mandatory team member. Further, there was no evidence that Parents requested the attendance of a nurse at the September 2017 IEP team meeting.

94. Occupational therapy services were at issue during the September 2017 IEP team meeting. Despite this fact, the occupational therapist was not a mandatory team member. Even so, Pittsburg and Parent agreed in writing to excuse her appearance. Ms. J's written input regarding Student's IEP is found in the present levels of performance section of the September 2017 IEP. Student did not establish that this input was not provided in writing to Parent and the IEP team prior to the meeting, or that Parent did not confer with her prior to executing the excusal form. Student did not meet her burden of proof as to this issue.

## REMEDIES

1. In summary, Student seeks various independent educational evaluations; compensatory education services; copies of her complete educational record; a one-to-one paraprofessional or nurse's aide, experienced in working with students with disabilities such as Student's, to assist with providing academic and behavioral support to Student in the classroom; and training for Pittsburg's special education staff regarding the IDEA.

2. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of Burlington v. Department of Educ.* (1985) 471 U.S. 359 at pp. 370, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d 1489, 1497.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Id.* at 1497.)

3. An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*; *R.P. v. Prescott Unified School District* (9th Cir. 2011) 631 F.3d 1117, 1125.) An independent educational evaluation at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-23.)

4. The IDEA does not require compensatory education services to be awarded directly to a student, so staff training is an appropriate remedy. (*Park, supra*, 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific student involved, or to remedy procedural violations that may benefit other students. (*Ibid.*)

5. Because of Pittsburg's failure to conduct an individual health assessment, Student is entitled to an independent educational evaluation in the area of health, by a qualified nurse or licensed medical doctor of Student's choice, to determine her health and treatment needs, and the impact of her needs on her educational program. Because Student has not been offered or provided an appropriate educational program since April 25, 2016, and given her new situation of being in a specialized medical foster home with attentive and involved caretakers, it is necessary to re-evaluate her current educational needs. As such, Student is entitled to independent educational evaluations in the additional areas of psycho-educational status including academic and social-emotional functioning; occupational therapy; and assistive technology in light of her delayed fine motor skills, and concerns with body support and positioning of materials given her wheelchair use. Pittsburg shall convene an IEP team meeting(s) to consider the results of the independent evaluations and fund the presence of the assessors at the meeting(s).

6. Student did not establish the required type or amount of compensatory services that would be necessary to place her in the position she would have occupied but for Pittsburg's denials of FAPE for the past two years. Even so, she is entitled to an award of individual academic instruction by a credential special education teacher;



occupational therapy services; assistive technology services; and social skills development programs or training given her extended lack of access to her classmates and general education peers.

7. Given Student's failure to provide evidence as to an appropriate award calculation, it is determined equitable to award Student one hour of compensatory service for each day of school for the 2016-2017 and 2017-2018 school years. Although the assessment failure accrued as of September 16, 2016, an award for two academic years will equitably account for the programming failure (health plan and health care services) accruing as of April 25, 2016. This award of 360 hours (180 school days per year) will be equitably offset by the number of days Student attended school each of these two years (2016-2017: attended approximately 113 days; 2017-2018: attended approximately 120 days, for a total of 233 days) further discounted by half (117 days) given that many of these were partial attendance days, for a total compensatory award of 243 service hours (360-117). This award of 243 hours will be offset by Pittsburg's offer of 40 hours compensatory academic instruction by a credentialed special education teacher with Haynes non-public agency, including those hours already provided, for a balance of 203 hours.

8. Pittsburg will be required to contract with qualified non-public agency providers of Student's choice to provide a total amount of 203 hours of academic instruction by a credentialed special education teacher, and/or occupational therapy services, and/or social skills training, and/or assistive technology services as determined by Student. These service hours, including the 40 hours to be provided by Haynes, will be available for Student's use for a period of four years, ending with the close of the 2022 extended school year. At Student's election, Pittsburg shall arrange appropriate roundtrip transportation services for Student to attend these services; or Pittsburg shall reimburse the service providers for mileage reimbursement at the then-current Internal

Revenue Service rate and up to one hour of their hourly rate for travel time to Student's location; or Pittsburg shall reimburse Student for mileage costs. Pittsburg will be responsible for said transportation up to and including a roundtrip of 60 miles.

9. Pittsburg shall ensure that Student receives copies of all education records that have not yet been provided. Pittsburg will be required to provide Student with copies of its occupational therapy logs detailing services rendered to Student. To the extent such logs reference other students, Pittsburg shall redact the names of any other students. Pittsburg will not be ordered to produce unspecified emails in response to Student's records request, but it shall turn over emails maintained in Student's education file(s). Pittsburg shall also produce copies of Student's assessment protocols, and all nursing logs from Maxim.

10. Pittsburg will be required to provide a six-hour training to Special Education Director Ms. Watson; its staff who were previously (during the statutory period), or are currently, working with Student at her school, including related service providers and special and general education teachers; all members of Student's IEP team, including staff who served or may be required to serve as district representatives; as well as all administrative staff who were or are responsible for supervising her program regarding the legal requirements for special education health assessments; development of individual health care plans; requirements surrounding specialized health care services; and addressing disability-related absences, including special education requirements for home hospital instruction. This training shall be provided by outside special education counsel who does not represent Pittsburg.

## ORDER

1. Pittsburg shall fund an independent health evaluation of Student by a qualified nurse or licensed medical doctor of Student's choice, consistent with its up-to-date Special Education Local Plan Area criteria, if any, for health/medical assessments

completed by licensed medical practitioners, to determine her health and treatment needs and the impact of her needs on her educational program. Within five business days of this Decision, Pittsburg shall provide Student with its SELPA criteria for health/medical assessments. Student shall select an assessor who meets the specified criteria, if any, and provide Pittsburg with contact information for her selected assessor within 20 business days of this Decision. Within 10 business days of receipt of the contact information for the chosen, qualified health assessor, Pittsburg shall send the assessor a contract to perform the independent health assessment. Pittsburg shall cooperate with all reasonable requests of the assessor.

2. Pittsburg shall fund independent educational evaluations in the areas of psycho-educational status including academic and social-emotional functioning; occupational therapy; and assistive technology. To the extent Pittsburg has already funded an independent educational evaluation in any of these areas pursuant to Foster Parent's April 2018 request, it is not required to fund a second evaluation in that same area.

3. Within five business days of this Decision, Pittsburg shall provide Student with its SELPA criteria for psycho-educational evaluations including academic assessments, occupational therapy assessments, and assistive technology assessments. Student shall select assessors who meet the specified criteria and provide Pittsburg with her selections within 20 business days of this Decision. Within 10 business days of receipt of the contact information for the chosen qualified assessors, Pittsburg shall send the assessors a contract to perform the independent assessments. Pittsburg shall cooperate with all reasonable requests of the assessors.

4. Pittsburg shall convene an IEP team meeting(s) to consider the results of the independent evaluations within 30 days of submission of each written assessment report, and shall fund the presence of each assessor to attend the meeting(s) pertaining

to his/her assessment.

5. Pittsburgh shall provide a total of 40 hours of individual academic instruction by a credentialed special education teacher through Haynes-S.T.A.R. Academy, as previously offered to Student. These hours shall be made available to Student within 10 days of this Decision, and Student shall be allowed to access these hours, in conjunction with her full award of service hours, through the 2022 extended school year.

6. Pittsburgh shall contract with qualified non-public agency providers of Student's choice to provide an additional amount of 203 hours of academic instruction by a credentialed special education teacher, and/or occupational therapy services, and/or social skills training, and/or assistive technology services as determined by Student. Pittsburgh shall contact the providers chosen by Student within 10 days of being provided the contact information to initiate the service contract(s). These hours, including the 40 hours to be provided by Haynes, will be available for Student's use for a period of four years, ending with the close of the 2022 extended school year. At Student's election, Pittsburgh shall arrange suitable roundtrip transportation services for Student to attend these services; or Pittsburgh shall reimburse the service providers for mileage reimbursement at the then-current Internal Revenue Service mileage rate and up to one hour of their hourly rate for travel time to Student's location; or Pittsburgh shall reimburse Student for mileage costs at the then-current Internal Revenue Service mileage rate. Pittsburgh will be responsible for said transportation up to and including a roundtrip of 60 miles.

7. Within 20 days of this Decision, Pittsburgh shall ensure that Student receives copies of all requested education records that have not yet been provided, including occupational therapy logs detailing services rendered to Student; emails maintained in Student's education file(s); copies of Student's assessment protocols; and

all nursing logs from Maxim.

8. Within 90 business days of this Decision, Pittsburg shall provide a six-hour training to Special Education Director Ms. Watson and its staff who were previously (during the statutory period), or are currently, working with Student at her school, including related service providers, special and general education teachers, and all members of Student's IEP team including staff who served or may be required to serve as District representatives, as well as all administrative staff who were or are responsible for supervising her program regarding the legal requirements of special education health assessments; development of individual health care plans; requirements surrounding specialized health care services; and addressing disability-related absences, including special education requirements for home hospital instruction. This training shall be provided by outside special education counsel who does not represent Pittsburg. Within 10 days of completion of the training, Pittsburg shall provide Student's attorney and Foster Parents with a copy of the training agenda, curriculum vita of the trainer(s), training materials, and the roster of attendees who participated in the training.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issues 1, 2, 4, and 5. Pittsburg prevailed as to Issues 3, 6 and 7.

## RIGHT TO APPEAL

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

DATE: August 13, 2018

/s/

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THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings