

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

DUBLIN UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018010982

Consolidated with:

DUBLIN UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2017120716

DECISION

Dublin Unified School District filed a Due Process Hearing Request on December 19, 2017, with the Office of Administrative Hearings, State of California, naming Student. Student filed a Due Process Hearing Request on January 24, 2018, with OAH, naming District. On February 20, 2018, District filed an amended complaint. On March 9, 2018, OAH granted the parties' request to consolidate their due process requests and, for good cause, granted Student's request for continuance.

Administrative Law Judge Clifford H. Woosley heard this consolidated matter at

District facilities in Durbin, California, on April 10, 11, 12, 17, 18, 19, 30 and May 1, 2018.

Attorney Jan E. Tomsy represented District. Director of Special Education, Jennifer Chiarelli attended on behalf of District, except for April 18 and 19, 2018, when Assistant Director of Special Education, Tara Kyle, attended. Mother represented Student throughout the hearing.

At the parties' request, OAH granted a continuance to June 11, 2018, for the filing of written closing arguments. On June 11, 2018, the parties submitted their final written closing briefs, the record was closed, and the matter submitted for decision.

ISSUES¹

District's issues are:

1. Was District's 2017 multi-disciplinary triennial psychoeducational assessment appropriate, such that Student is not entitled to an independent educational evaluation at public expense?
2. Does Student qualify for special education under the eligibility of intellectual disability?
3. Does District's January 2018 independent education program offer Student a free appropriate public education?

Student's issues are:

1. Did District deny Student a free appropriate public education in the 2017-2018 school year by:
 - a. Failing to provide or offer appropriate supports, services and goals to meet

¹ The issues have been reorganized for purposes of analysis. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. ex rel. J.E.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442–443.)

Student's unique needs in order for Student to make meaningful progress in the January 23, 2018 IEP;

- b. Failing to offer placement in the least restrictive environment in the January 23, 2018 IEP;
- c. Making an unclear offer in the January 23, 2018 IEP, preventing Parents from meaningfully participating or enforcing the IEP;
- d. Failing to implement the IEP of January 23, 2017 by failing to have inclusion support from August 15, 2017 to October 17, 2017;
- e. Failing to develop measurable annual goals designed to meet Student's needs that result from her disability to enable her to be involved in and make progress in the general education curriculum;
- f. Failing to provide or offer appropriate supports, services and goals for extended school year, as required under the Individuals with Disabilities Education Act, to meet Student's unique needs in order for Student to make meaningful progress;
- g. Failing to offer resource specialist services and response to intervention; and
- h. Failing to provide or offer a one-to-one aide for the extended school year.

2. Did District deny Student a free appropriate public education in the 2016-2017 school year by:

- a. Failing to provide or offer appropriate supports, services and goals to meet Student's unique needs in order for Student to make meaningful progress in the January 23, 2017 IEP;
- b. Failing to offer placement in the least restrictive environment in the January 23, 2017 IEP;
- c. Making an unclear offer in the January 23, 2017 IEP, preventing Parents from meaningfully participating or enforcing the IEP;

- d. Failing to develop measurable annual goals designed to meet Student's needs that result from her disability to enable her to be involved in and make progress in the general education curriculum;
- e. Failing to provide or offer appropriate supports, services and goals for extended school year, as required under the IDEA, to meet Student's unique needs in order for Student to make meaningful progress;
- f. Failing to offer resource specialist and/or response to intervention services; and
- g. Failing to provide or offer a one-to-one aide for extended school year.

3. Did District deny Student a FAPE in the 2015-2016 school year, from January 24, 2016, through the extended school year by:

- a. Failing to offer or provide appropriate supports, services and goals as required under the IDEA to meet Student's unique needs in order for Student to make meaningful progress in the January 25, 2016 IEP;
- b. Failing to offer placement in the least restrictive environment in the January 25, 2016 IEP;
- c. Failing to develop measurable annual goals designed to meet Student's needs that result from her disability to enable her to be involved in and make progress in the general education curriculum;
- d. Failing to offer or provide appropriate supports, services and goals for extended school year, as required under the IDEA, to meet Student's unique needs in order for Student to make meaningful progress;
- e. Failing to offer resource specialist services and response to intervention; and
- f. Failing to provide or offer a one-to-one aide for extended school year.

4. Is District obligated to fund Dr. Paul Gardner's inclusion support evaluation because it failed to timely file a request for due process following Parents' March 4,

2016, notice?

5. To what, if any, remedy is Student entitled for District's failure to make a clear offer in the January 23, 2016 IEP such that it prevented Parents from meaningfully participating in the IEP process, as determined in OAH Case No. 2016080413?

SUMMARY OF DECISION

District prevailed on District Issue 1, proving that the January 2017 triennial assessment was legally appropriate. Well qualified, trained, and knowledgeable evaluators assessed in all areas of suspected disability with instruments that were administered and results reported in accordance with protocols and best practices. The assessment obtained reliable and relevant developmental, academic, and functional information that was assembled into a comprehensive report for consideration by the triennial IEP team.

District prevailed on District Issue 2, demonstrating that Student was eligible as a student with an intellectual disability. Multiple cognitive measures indicated Student's cognitive level was severely delayed when compared to her same age peers, falling in the extremely low range. Student's teachers and service providers reported significant adaptive, functional, and life skills' deficiencies, which were confirmed by observations. Student's contention that the cognitive measures were variable and unreliable was unpersuasive. The triennial assessors were experientially and professionally well-suited to garner results that reliably reflected Student's cognitive capabilities.

District prevailed on District Issue 3 and proved that the January 2018 IEP offered Student a FAPE in the least restrictive environment. District demonstrated that Student's inclusion placement, resulting from the June 2014 settlement agreement, was not helping Student progress academically, did not provide for reciprocal peer relationships, encouraged prompt dependency, and prevented functional/adaptive skills development. District persuasively established that the moderate-to-severe class was Student's

appropriate placement because it provided specialized academic instruction from a special education teacher in a class environment, enabled peer-to-peer social relationships, and developed adaptive skills and functional independence. Almost a third of Student's day would be with general education students, providing ample opportunity for peer modeling. The January 2018 IEP accurately stated Student's present levels of performance, provided appropriate modifications and accommodations, and included understandable and measurable goals that properly addressed Student's academic, behavior, and functional needs.

Student did not prove in Student Issue 1 that District failed to offer a FAPE for the 2017-2018 school year because the January 2017 triennial IEP offer and the January 2018 annual IEP offer were insufficient or the services were not implemented. For Issue 1(a), Student did not submit persuasive evidence that the January 2018 annual IEP failed to offer appropriate supports, services, and goals. On Issue 1(b), District demonstrated the January 2018 IEP offered Student a FAPE in the least restrictive environment. District prevailed on Issue 1(c) because Student presented no credible or persuasive evidence that the offer was unclear or that Parents did not understand the offer and therefore could not participate. On Issue 1(d), the evidence established that Student received all the inclusion support to which she was entitled from August 15 to October 17, 2017. On Issue 1(e), the January 2017 triennial IEP and the January 2018 IEP proposed clear and measurable goals that supported Student in a special day class placement. In Issue 1(g), Student did not prove that the addition of resource specialist or response to intervention services would have better enabled Student to access her fourth grade curriculum. In Issues 1(f) and 1(h), Student failed to prove that District did not offer appropriate supports, services, and goals for extended school year. Student's extended school year consisted of half days and District properly offered half of the services. Also, Student did not prove that she would have required a one-to-one aide during the

extended school year in a moderate-to-severe special day class with a high adult to student ratio.

Student did not prove in Student Issue 2 that District failed to offer a FAPE for the 2016-2017 school year because the January 2016 IEP offer and the January 2017 IEP offer were insufficient or the services were not implemented. For Issue 2(a), Student did not submit persuasive evidence that the January 2017 triennial IEP failed to offer appropriate supports, services, and goals. On Issue 2(b), District demonstrated the January 2017 triennial IEP offered Student a FAPE in the least restrictive environment. District prevailed on Issue 2(c) because Student presented no credible or persuasive evidence that the offer was unclear or that Parents did not understand the offer and therefore could not participate. On Issue 2(d), the January 2016 IEP and the January 2018 IEP proposed clear and measurable goals that supported Student in a special day class placement. In Issue 2(f), Student did not prove that the addition of resource specialist or response to intervention services would have better enabled Student to access her third grade curriculum. In Issues 2(e) and 2(g), Student failed to prove that District did not offer appropriate supports, services, and goals for extended school year. Student's extended school year consisted of half days and District properly offered half of the services. Also, Student did not prove that she would have required a one-to-one aide during the extended school year in a moderate-to-severe special day class with a high adult to student ratio.

Student did not prove in Student Issue 3 that District denied her a FAPE for the 2015-2016 school year beginning January 24, 2016, which was controlled by the January 2016 IEP offer. For Issue 3(a), Student did not submit persuasive evidence that the January 2016 IEP failed to offer appropriate supports, services, and goals. On Issue 3(b), Student did not prove that District's offer of a special day class failed to provide a FAPE in the least restrictive environment. On Issue 3(c), the January 2016 IEP proposed clear

and measurable goals that supported Student in a special day class placement. In Issue 3(e), Student did not prove that the addition of resource specialist or response to intervention services would have better enabled Student to access her second grade curriculum. In Issues 3(d) and 3(f), Student failed to prove that District did not offer appropriate supports, services, and goals for extended school year. Student's extended school year consisted of half days and District properly offered half of the services. Also, Student did not prove that she would have required a one-to-one aide during the extended school year in a special day class with a high adult to student ratio.

In Issue 4, Student did not meet her burden of proof that Parents should be reimbursed for Dr. Gardner's 2016 inclusion support evaluation. The evidence demonstrated Parents' March 2016 email did not trigger District's statutory obligation to either fund Dr. Gardner's report or file a due process request to show that its assessment was appropriate. For Issue 5, Student did not meet her burden of proof that she is entitled to a remedy as a result of the decision in OAH Case No. 2016080413. The offer's lack of clarity did not result in any unwanted change of services. Parents would have rejected the January 2016 offer even if clear and unambiguous.

FACTUAL FINDINGS

1. Student was 11 and a half years old and attending fourth grade at District's Amador Elementary School at the time of the hearing. She lived with Parents within District's geographical boundaries since 2013. Student received a clinical diagnosis of autism at the age of three.

BACKGROUND

2. From February to June 2009, Student attended an early education class at Los Angeles Unified School District, four hours a day, four days a week. Parents then elected to homeschool Student. She received 35 hours a week of in-home Applied

Behavioral Analysis (ABA) therapy,² provided by the nonpublic agency First Steps for Kids, clinic and school-based occupational therapy, and weekly speech and language therapy at her home school.

3. Los Angeles Unified assessed Student for her June 2011 triennial IEP. The triennial assessment found that the four-and-a-half-year-old Student was performing in the eight-to-12-month range cognitively, using the Southern California Ordinal Scales of Development, with some emerging skills in the 18-to-24-month age range. Student's adaptive behavior skills were in the low range across all areas. Though Student's limited language abilities may have impacted some results, the assessment found that Student had significantly delayed intellectual functioning and limited language ability. Parents challenged the assessment data that showed Student with signs of intellectual disability. The 2011 triennial IEP team changed Student's eligibility from developmentally delayed to autism.

4. Los Angeles Unified and Student's family entered into a January 2013 due process settlement agreement, which included full inclusion placement in a general education classroom. The agreement provided a behavior support plan, an ABA trained behavioral aide, and behavioral services from the non-public agency First Steps for Kids. Los Angeles Unified also agreed to provide physical therapy, occupational therapy, speech and language therapy, adaptive physical education services, and inclusion services provided by both Los Angeles Unified and nonpublic agencies.

5. Student returned to public education from home schooling at age six and was fully included in a general education kindergarten classroom, with the stipulated services and supports, until the end of the 2012-2013 school year. Student had difficulty

² Applied Behavior Analysis is a particular form of therapy used with children who are diagnosed with autism spectrum disorder.

focusing in the classroom, attending to group lessons without prompting, and struggled to access academic work. Much of Student's curriculum was modified. She had a significant degree of noncompliance and stereotypical behaviors, which interfered with her ability to participate in classroom activities and form peer relationships.

2013-2014: STUDENT BEGINS AT DUBLIN UNIFIED SCHOOL DISTRICT

6. Student's family moved to Dublin, California and enrolled Student in first grade with District in August 2013. Parents requested that District provide Student with the same special education services as those provided by Los Angeles Unified, including an ABA trained aide and behavior services through First Steps. Additionally, Parents requested that District place Student in kindergarten instead of first grade because she had only completed four months of kindergarten in Los Angeles.

7. District placed Student for the first 30 days in a first grade, general education classroom with the assistance of a full-time behavioral aide. On September 25, 2013, District held a 30-day IEP team meeting where the District members of the IEP team recommended that District assess Student to determine her needs. District made Student an IEP offer, which included continued placement in a general education, first grade class with a full-time behavioral aide from First Steps, speech and language services, physical therapy services, occupational therapy services, and inclusion services to modify Student's curriculum.

8. In early January 2014, Parents consented to the September 25, 2013 IEP with exceptions. They continued to disagree with Student's placement in a first-grade classroom and requested again that District place Student in kindergarten. Parents disagreed with some of the offered services and felt that additional speech and language goals were needed.

January 2014 Psychoeducational Assessment (Dr. Yabrove)

9. In late January 2014, District school psychologist Gary Yabrove, Ph.D., completed a psychoeducational assessment of Student. At the time of the assessment, Student was seven years and 10 months old. Dr. Yabrove found Student had cognitive abilities in the first percentile for her chronological age. Although he found Student had certain strengths, such as in spelling, reading decoding and word reading, Dr. Yabrove concluded that much of Student's academic curriculum required modification.

10. Dr. Yabrove reported that Student's adaptive behavior skills were low in all areas. Adaptive behavior skills were those skills a person requires for daily living. The results of the Vineland Adaptive Behavior Scale, Second Edition, which were based on information provided by Mother, showed Student's adaptive behavior skills were at the level of a three-and-a-half-year-old child. As part of his assessment, Dr. Yabrove observed Student in class. He reported that Student had "great difficulty with attention and task compliance, in both large group and [one-to-one settings]." Student could only stay on task for three to four minutes before requiring a break.

11. Dr. Yabrove found that Student exhibited a number of behaviors secondary to her autism that significantly impacted her educational functioning. Student had global developmental delays. Although Student continued to meet the eligibility criteria for autism, Dr. Yabrove concluded that Student also met the eligibility criteria for intellectual disability.

January 27, 2014 Triennial IEP

12. District convened Student's triennial IEP on January 27, 2014, and held continued team meetings on February 13, 2014, April 14, 2014, and May 8, 2014.³ The

³ IEP's are referred to by the date the IEP meeting was initially convened, even

District members of the IEP team found that Student met the eligibility criteria for intellectual disability, secondary to her primary eligibility of autism. The IEP offered Student placement in District Elementary School in a special day class for students with autism. The class was comprised of no more than 10 students with a teacher and up to five other adults.

13. Parents disagreed with District's finding that Student was eligible under intellectual disability. Mother also observed the offered special day class program and believed it was inappropriate. On May 28, 2014, Parents consented to the IEP with exceptions. Parents disagreed with special day class placement, believing that typical first graders were the appropriate peer role models for Student.

June 19, 2014 Settlement Agreement

14. On June 19, 2014, Parents and District reached a settlement agreement outside of the IEP process. The agreement provided Student with direct and individual occupational therapy and speech and language services during the 2014 extended school year. For the 2014-2015 school year, the agreement retained and placed Student in a first grade, general education class at District's Kolb Elementary School, with early release on Wednesday, Thursday, and Friday, and continued support from the First Steps aide throughout Student's school day. District agreed to provide Student with 240 minutes of weekly inclusion services, including academic support and 100 minutes a week of pull-out support. District also agreed to fund 100 minutes per week of in-home academic assistance by First Steps.

15. The agreement also changed Student's IEP so the only eligibility category listed was autism. In exchange for the items outlined in the settlement agreement,

though most IEP's had multiple meeting dates.

Parents waived any claims for injuries, damages, or losses related to Student's education, including special education, up to the first day of the 2015-2016 school year. District continued to provide services and support in accordance with the June 2014 agreement through the time of hearing.

2014-2015 SCHOOL YEAR - FIRST GRADE (RETAINED)

16. Student was placed in a first grade, general education class at Kolb Elementary School for the 2014-2015 school year. Student received the support of First Steps one-to-one aide throughout her entire school day. Inclusion specialist Kathryn E. DeMartini was assigned to provide Student with inclusion services. Ms. DeMartini also provided Student with direct instructional services. Typically, an inclusion specialist did not provide direct academic instruction outside of the classroom, but Ms. DeMartini did so as part of the settlement agreement.

17. Student exhibited some maladaptive behaviors which the First Steps nonpublic agency addressed by implementing behavior interventions. First Steps provided Student with two to three different behavioral aides, with one aide working with Student at a time. Student required constant prompting from the aides to remain attentive and to follow directions. In addition to providing Student with support, the aides collected data on Student's behavior and use of behavioral interventions.

18. Student continued to struggle academically throughout the school year, particularly with mathematics. When Student became frustrated with a difficult task, she engaged in maladaptive behaviors, such as trying to elope, leaving her desk, falling to the ground, or ignoring her aides. Student engaged in other maladaptive activities, such as inappropriate touching of her peers or adults, vocalizations, and stimulatory behaviors. Student's maladaptive behaviors at school impeded her ability to access her education. First Steps designed and implemented a behavior plan, which included a token rewards system that allowed Student to work towards a reward by displaying

compliant behaviors.

January 26, 2015 IEP

19. On January 26, 2015, District held Student's annual IEP team meeting. The June 2014 settlement agreement was still in effect until the beginning of the following school year. The IEP team elected not to discuss placement and services as those were addressed by the agreement. The written IEP continued to offer Student placement in a special day class and the same services as the prior IEP. New goals and accommodations were proposed. On February 12, 2015, Mother consented to the accommodations and goals offered by the IEP.

April 2015 Functional Behavioral Assessment and Behavior Support Plan

20. Parents consented to a District functional behavioral assessment to determine the function of Student's behaviors that interfered with her learning and the learning of the other students so that behavior strategies could be developed to address those behaviors. The assessment measured and assessed several different maladaptive behaviors of Student: Touching others, throwing items, falling to the ground, non-compliance, and elopement.

21. District behaviorist Eric Burkholder, Ph.D., BCBA-D, assessed Student, issuing an April 2015 assessment report. He observed Student and collected data on her behaviors during the school day on seven occasions. Based on his observation and collected data, he concluded that the level of educational expectations and work difficulty may have been triggering some of Student's behaviors. Dr. Burkholder did not believe that Student's behavioral needs, by themselves, required a change from placement.

22. Dr. Burkholder's proposed behavior plan expanded or modified the strategies found in First Steps' behavior plan. He recommended continuing the behavior

goals from the January 26, 2015 IEP. Dr. Burkholder did not discuss Student's academic growth and adaptive skills.

April 27, 2015 IEP Team Meeting

23. The IEP team met on April 27, 2015, to review Dr. Burkholder's functional behavioral assessment and to discuss placement and services for the following school year. Dr. Burkholder reviewed his report with the team and presented a proposed behavior support plan.

24. Despite some reduction of Student's maladaptive behaviors, Ms. DeMartini stated that Student was not accessing the curriculum. While she believed that the First Steps aides were appropriately trained behavioral aides, they were not trained in academic instruction. The aides focused on increasing compliance and reducing Student's maladaptive behaviors instead of supporting her access to the curriculum. Additionally, Ms. DeMartini disagreed with Dr. Burkholder's opinion that Student's behaviors themselves did not warrant a change in placement. Student's behaviors were "intensive" and a change in placement was warranted based on Student's behaviors.

25. The amended IEP offered Student placement in a moderate to severe special day class at Amador Elementary School for the following school year. The IEP team did not offer Student one-to-one aide support for the following school year because the special day class staffing was sufficient to meet Student's behavioral needs.

26. Parents declined the IEP offer and requested that District place Student in a general education class and continue to provide her with the support of a full-time aide and behavioral services from First Steps. Parents also requested that District increase the amount of inclusion and home-based ABA services.

27. District denied Parents' request. Student was not accessing the general education curriculum, despite the provision of "intensive" one-to-one intervention, and the classroom situation disrupted other students' learning. However, District stated it

would continue to provide Student with all the services outlined in the June 2014 settlement agreement.

2015-2016 SCHOOL YEAR - SECOND GRADE

28. For the 2015-2016 school year, Student attended second grade in a general education class at Amador Elementary School, a new campus and Student's home school. Student continued to receive aide support and behavioral services from First Steps. District provided all services and supports in accordance with the June 2014 agreement.

January 25, 2016 IEP

29. District convened Student's annual IEP on January 25, 2016, holding two additional team meetings on March 18, 2016, and May 5, 2016. At the May 5, 2016 meeting, Paula M. Gardner, PhD., presented an inclusion assessment report regarding Student. Parents retained and paid Dr. Gardner because they disagreed with District's position that Student should not be fully included in a general education classroom. Dr. Gardner recommended that Student remain in the general education setting with a one-to-one aide and with additional instructional support by District resource specialist program teacher. The IEP team modified some of the proposed goals, as suggested by Dr. Gardner. However, the District members otherwise disagreed that Student should be fully included in a general education classroom.

30. District's January 26, 2016 IEP offer addressed the remainder of the 2015-2016 school year, the 2016 extended school year, and the first half of the 2016-2017 school year. The IEP offered Student 28 goals in the areas of gross motor skills, fine motor skills, social skills, behavior, reading, written expression, mathematics, speech and language, and other needs, including Student keeping her head up and look in the direction she was walking. The goals were understandable and measurable. The offer

included substantial accommodations and modifications.

31. Student was not accessing her grade level general education curriculum and was not receiving educational benefit from inclusion in a general education placement. District offered placement for the remainder of the 2015-2016 school year in a moderate-to-severe special day class, with physical education, music, library time, grammar, spelling, science and art in a general education setting. Student's time in the special day class would increase in the following year, Student's third grade, with similar opportunities in a general education setting. A behavior intervention plan addressed Student's behaviors. Services included: individual pull-out, push-in, and monthly consultative speech and language services; occupational therapy; and collaborative and consultative inclusion services.

32. The IEP included a transition plan into the special day class, which would provide direct behavior services during the first three months and, thereafter, behavior consultation and oversight with a District aide. The IEP also offered four-weeks of extended school year for summer 2016 in the special day class, with associated support and services, including 30 minutes a week of occupational therapy and 45 minutes a week of speech and language, which was one-half the frequency provided during the regular school year.

33. Parents declined the offer. District continued to provide placement and services for the remainder of the school year, in accordance with the June 2014 settlement agreement. District planned to conduct a triennial assessment and hold Student's triennial IEP in January 2017.

34. Parents notified District by email of March 4, 2016, that it hired Dr. Paul Gardner to conduct an inclusion evaluation and report and scheduled an observation. Parents said they intended to seek reimbursement for the cost of Dr. Gardner's evaluation. Parents did not state that they disagreed with a District inclusion assessment,

or any other assessment. They did not state that they were seeking District funding as provided by statute. Therefore, District did not consider the letter to be notice to fund an independent educational evaluation because Parents disagreed with a District assessment.

2016-2017 SCHOOL YEAR - THIRD GRADE

35. Student attended third grade in a general education class at Amador Elementary School for the 2016-2017 school year. First Steps continued to provide her with aide support and behavioral services.

District's August 2016 Due Process Complaint

36. On August 8, 2016, District filed a due process complaint seeking a determination that it could transition Student's aide and behavior services from the nonpublic agency to the District (OAH Case No. 2016080413). District did not seek an order finding that its January 2016 IEP offer, declined by Parents, provided a FAPE to Student in the least restrictive environment. District was providing services and supports to Student in accordance with the June 2014 agreement. District sought an order allowing District to provide the behavior aide and services, in the general education classroom, instead of First Steps.

37. Administrative Law Judge B. Andrea Miles questioned whether OAH had jurisdiction to alter one service of Student's IEP in isolation, without determining whether the District's offer, as a whole, provided a FAPE. Therefore, at an October 17, 2016 prehearing conference, ALJ Miles directed District to respond to questions regarding the limited nature of the complaint's issue, set a briefing schedule for both parties, and continued the prehearing conference.

38. The parties filed their briefs and ALJ Miles convened the continued prehearing conference on December 2, 2016. She found OAH had jurisdiction because

District reframed the issue to reflect its relation to the January 2016 IEP. However, ALJ Miles reserved the question of whether OAH may find a portion of an IEP constituted a FAPE and/or may order a portion of an IEP implemented without parental consent, as opposed to the entire IEP offer, for decision after a full evidentiary hearing.⁴ The hearing was held December 13, 14, and 15, 2016.

February 2017 OAH Decision in OAH Case No. 2016080413

39. ALJ Miles issued her decision in OAH Case No. 2016080413 on February 15, 2017. She concluded that OAH was not empowered to determine if one portion of an IEP offer may be changed, over the objection of Parents, without finding that the District's IEP offer – as a whole – provided a FAPE. She therefore ruled that District had the burden of proving the January 2016 IEP offered a FAPE.

40. ALJ Miles determined that District failed to meet its burden of demonstrating the January 2016 IEP provided a FAPE. She based her conclusion upon the finding that District's January 2016 IEP offer was unclear as to the amount of time Student would be in special education for the remainder of Student's second grade year and unclear regarding the number of minutes of speech and language services. Therefore, Parents were unable to meaningfully participate in the IEP decision making process.

STUDENT'S JANUARY 2017 MULTIDISCIPLINARY TRIENNIAL PSYCHOEDUCATIONAL ASSESSMENT

41. District provided Parents with a proposed assessment plan dated November 16, 2016, for Student's three-year evaluation in preparation for the January 2017 triennial IEP team meeting. District proposed to assess and evaluate Student in the

⁴ ALJ Miles also denied Student's motion to dismiss the complaint.

areas of academic achievement, health, intellectual development, language and speech communication, motor development, social and emotional, and adaptive behavior.

Mother signed and agreed to the assessment plan on November 28, 2016. The evaluation's objectives were to gather information relative to Student's eligibility, present levels of performance and the past year's progress, evaluate whether Student's current educational program was in the least restrictive environment for the provision of FAPE, and make recommendations to the IEP team based on Student's assessed educational needs.

42. School psychologist Natalie Corona assessed and evaluated Student in late November and December 2017, issuing a January 23, 2017 multidisciplinary psychoeducational triennial assessment report. The report included inclusion/education specialist Ms. DeMartini's academic achievement assessment and speech therapist Michelle Dickinson's speech and language evaluation. The assessors administered and interpreted the standardized instruments in accordance with the publishers' protocols. The assessments and evaluations did not include any type of racial, cultural or sexual bias. The psychoeducational assessment met all legal requirements and was legally appropriate.

43. Due to Student's difficulty understanding a number of directions and attending to certain tasks during assessment sessions, the assessors stated the assessment instruments' results should be interpreted with caution because of possible underestimation of Student's true abilities in certain areas. However, Student's cognitive and processing skills all fell within the very low range across all instruments, which was consistent with Student's previous evaluations, the assessors' observations, and the adaptive, speech and language, and academic assessments. Student struggled with retaining information in her working memory and required constant and multiple prompting to complete a task. Student needed two to three sessions to complete an

assessment that typically took one session.

44. Ms. Corona had a bachelor's degree in psychology and a master of science in psychology, with a concentration on clinical and child school psychology and family therapy. She possessed a California Pupil Personnel Services credential, obtained a Tier 1 Administrative credential, and was a member of the National Association of School Psychologists. At the time she testified at hearing, she was a program supervisor with San Ramon Valley Unified School District's special education department. From 2010 to 2014, Ms. Corona was a District school psychologist. She was the District's lead psychologist from August 2014 to September 2017.

45. Ms. Corona worked in all of the District's 11 schools, with pupils of varying age levels, grades, and disabilities. She conducted approximately 400 assessments with the District, including initial and triennial assessments of children with autism and intellectual disability. As District's lead psychologist, Ms. Corona implemented, monitored, and supervised the provision of psychological services. She led the District's team of school psychologists, trained interns, interviewed and hired school psychologists, and consulted as a senior psychologist on numerous assessment teams. Ms. Corona's education, credentials, and experience qualified her to conduct Student's psychoeducational assessment, interpret the results of the assessment and prepare the report.

46. Ms. Corona first met Student in the 2015-2016 school year, when Student was in second grade. Ms. Corona was placed at Amador for three and a half days a week, which became four days a week the following school year. Though not a service provider, Ms. Corona saw Student almost every day. Student attended speech and language therapy in the room next to Ms. Corona's office, where Student often had direct instruction from the inclusion specialist, with Ms. Corona sitting and working in the background. Student would generally say "hi" and visit.

47. Ms. Corona was very familiar with Student's reinforcement and cueing system prior to the triennial testing. Student earned pencils, stickers, and treats as positive behavioral rewards from Ms. Corona, three to four times a week. Ms. Corona also consulted with Student's service providers and IEP team. Ms. Corona's hearing testimony demonstrated a caring and professional concern for Student's educational, adaptive, functional and social needs. She carefully and patiently detailed the basis for her conclusions and opinions. Ms. Corona was credible and persuasive.

48. Prior to assessment, Ms. Corona reviewed all available documentation related to Student, including: the 2014 triennial assessments, further District assessments and evaluations, Los Angeles Unified's assessments and IEP, all private assessments provided to District, every IEP and amendment, and Student's cumulative educational records, including grade reports and teacher comments. She summarized her document review for the report. She decided to consider Student for the special education eligibilities of autism, speech language impairment, intellectual disability, specific learning disability, and other health impairment.

Interviews

49. Ms. Corona interviewed Mother. Student lived at home with Mother, Father, Grandmother, and a younger brother (7 years old). Student had recently learned to swim, swimming once a week for 30 minutes. Student occasionally had playdates with her classmates or brother's friends. Student did not participate in any other formal extracurricular activities. First Steps provided 12 hours a week of in-home ABA therapy services.

50. Mother described Student as friendly, sweet, and well-liked by others. Student enjoyed reading words since very young and was interested in technology. Student could persevere on YouTube videos and TV show, such as Scooby Doo, Garfield, and Strawberry Short Cake. Mother believed Student's reading skills were an

area of strength, but the family was focusing on improving Student's comprehension and fluency in the home. Mother believed that Student had a "gift" for identifying patterns, such as reading Chinese characters.

51. Ms. Corona agreed that Student could spell close to grade level. However, Ms. Corona credibly explained that this ability was a splinter skill, inconsistent with Student's other skills and not meaningfully useful. Student did not generalize her rote spelling ability, which did not benefit her extremely low reading comprehension. Such splinter skills were not uncommon with autistic children.

52. Student seldom had tantrum behavior at home. Mother reported to Ms. Corona that Student's at-home behavior differed from her school behavior because there were less demands. Student recently became more rigid. For example, she insisted on turning off lights when she left a room, even when others remained. Socially, Student liked children and wanted to play with them. Student enjoyed school where Mother claimed Student had friends, some of whom came over to play. However, Mother acknowledged that Student needed to learn how to interact appropriately with her peers. Student was sometimes "overly friendly" when she hugged and touched people. Student needed to maintain appropriate social space.

53. Communication remained a major concern. Student did not talk much. She only answered questions when prompted, spoke when scripting (repeatedly saying something she heard from a video or television show), or verbalized to get a need met. Mother was concerned about Student's ability to access the general education curriculum. Mother still wanted Student exposed to third grade material although Student functioned at a lower level than her peers. Mother believed that Student had difficulty expressing what she knew and mastered, due to Student's behaviors and communication limitations. Mother wanted Student to receive additional support from a District resource specialist, who had specific strategies and supports that could benefit

Student.

54. Ms. Corona interviewed Student's ABA Supervisor, Kathryn Buchanan. Ms. Buchanan was the First Steps' supervisor assigned to Student's case. She had been managing Student's home and school behavior program for two years. She reported that Student was an excellent speller and had made a lot of progress that school year in reducing the number of motor breaks needed in a day. At that time, Student was taking a two-minute motor break every 30 minutes. Student spent a large amount of time out of her general education classroom due to walks, service time, and her reinforcement schedule. The biggest behavioral areas of concern were Student's non-compliance, elopement, and stereotype behavior. Student's behaviors differed depending on with whom she was working and was more compliant with an aide with whom she had worked for a longer time.

55. First Steps' main goals were to ensure that Student was not disruptive in the class, would do her work, and increase her independence. Student often fell behind, and it was difficult for the aides to keep her on track. The only third grade curriculum work that Student completed was spelling. Otherwise, Student was not working at a third-grade level.

56. Student had severe social deficits although she was motivated to be around people. Student did not properly connect with others and was unaware of how others viewed her. Her attempts to initiate social contact were often inappropriate. For example, Student's vocal scripting interfered with her ability to connect with her peers because the other children did not know what she was talking about. She grabbed for things or at people. These social deficits were a significant problem across all settings. Ms. Buchanan observed that Student's behavior and academics at home were consistent with what was seen in the school setting.

57. Ms. Corona interviewed Student's teacher, Jennifer Costa. Student was in

Ms. Costa's third grade general education class for her school day, with the exception of her support services and behavior reinforcements. Student had a mostly modified curriculum within Ms. Costa's general education classroom, supported by the inclusion specialist. Reading, writing, and math assignments were modified to meet Student's level and needs. Student participated in science, social studies, art, and physical education to the best of her abilities.

58. The inclusion specialist provided Student 100 minutes per week of pullout, one-to-one specialized academic instruction. The specialist also delivered at least 90 minutes per week of push-in services to support modification of the curriculum and training of Student's aides and Ms. Costa. The inclusion specialist designed alternative homework for Student each week based upon Student's IEP goals, with some accommodated work from Ms. Costa. Student also received speech, occupational therapy, adapted physical education, and behavior services. Two days a week, class ended around 2:00 pm. The other three days, Student left early pursuant to the June 2014 agreement, a loss of two to three hours of instruction each week.

59. Student's strength was spelling and she was able to complete some assignments, at her instructional level, with the assistance and prompting of her one-to-one aide. Her favorite subjects were music, physical education, and science. Student did not complete homework assignments, perform satisfactorily on tests, pay attention in class, or follow assignment directions.

60. Ms. Costa reported that Student had considerable academic deficits in her basic reading skills, reading comprehension, written language abilities, math basics, and math reasoning skills. Student's curriculum was heavily modified because Student could not access a substantial portion of the third-grade curriculum. In many instances (e.g., math and literature), Student's work completely differed from that of her third-grade peers. Behaviorally, Student had poor impulse control and a very short attention span,

requiring multiple prompts and reminders from her aide to focus or complete most tasks.

61. Ms. Costa concluded Student was not gaining meaningful educational benefit in the general education class. She opined Student needed much more support and explicit instruction at Student's own level in order to make more academic progress. Socially, Student enjoyed being around people, but she seldom approached classmates and, when she did, it was more for seeing what the classmate was doing than social interaction. When Student did initiate interaction, she would often grab at the other pupil, not maintain appropriate personal space, and struggle to engage in conversation unless assisted by her aide.

62. Ms. Costa believed that Mother's primary goal of peer modeling in the general education classroom was not being achieved due to the grave disparity in activities between Student and her classmates throughout the school day. Though the general education classmates were kind and supportive of Student, there were fewer opportunities for classroom based social interaction in the third grade compared to lower grades. Student had limited common ground to benefit from a "modeling" environment. Additionally, Student was out of the class for such long periods of time that maintaining consistency in relating to classmates was difficult.

Ms. Corona's Observations

63. Ms. Corona observed Student for 45 minutes during a classroom math lesson. Student was transitioning back to the classroom after her specialized academic instruction, when she stopped in the hallway to perseverate on paper snowflakes taped to the window. The aide verbally prompted Student multiple times but eventually had to hold her hand in front of Student's eyes to get compliance. Student entered the classroom flapping, skipping, and making unintelligible vocalizations. She initially sat in her chair after the aide's prompting, but soon jumped up and ran to the back of the

classroom, flapping her arms. After the aide's redirection, using blocking and verbal prompts, Student returned to her desk. The aide allowed Student to read a short book to help transition back to seat work. The other students mostly disregarded the commotion caused by Student's entrance.

64. Student's class had about 25 students, a classroom teacher, and Student's aide. The third-grade students were about eight years old; Student was 10 years. The pupils were clustered in small groups of two to three desks, lined up in rows. Student's desk was in the back corner of the classroom next to another pupil, who generally ignored Student unless she invaded the pupil's space. Ms. Costa was presenting a math lesson about fractions, engaging and utilizing a number of teaching strategies with the students such as call and response, pair share, and real world examples of fractions. The students were attentive, responsive to the teacher, and conversed with fellow classmates on the directed topics. Student, however, was completing a worksheet where she had to count, add, and subtract the number of dots on dice.

65. The aide communicated directions to Student with a whiteboard. Student required multiple prompts (physical and verbal) in order to stay focused and complete a task. On average, Student required four prompts from the aide before completing a task or redirecting her attention. Student was on task for an average of 47 seconds, with her shortest span being about 15 seconds. Redirecting Student back on task took approximately 20 seconds. Off task behaviors included stimming with her fingers, repeatedly adjusting her jacket, and putting her hands in the aide's face. One time, she raised her hands in the air and yelled "this is delicious," three times. The aide reminded Student to pay attention to the math signs so she knew what operation (add/subtract) she was supposed to do on her worksheet. When Student completed the worksheet, the aide gave Student a two-minute break at her desk, to read one of her books. Student was unable to keep up with the pace of the task and could not follow the teacher's

instructions. Student copied one-third of the notes before leaving class to take a walk with her aide. Student's instruction was 100 percent from her aide.

66. Student's classmates were kind and enjoyed Student but did not have peer-to-peer social interaction with her. When Student would go off on tangential behavior, like reciting lines from a show, her peers could not connect with her. When Student's classmates tried to engage, they generally could not get reciprocal feedback from Student. They would then talk to the aide or walk away.

67. Ms. Corona observed Student a second time for about 45 minutes during lunch and recess. Student sat at a lunch table with her class and aide. She independently opened her lunch containers, fed herself finger foods (pretzels, berries) and cleaned up her lunch. She did not interact with other students or staff unless explicitly prompted to do so by the aide. When prompted by her aide to ask a classmate about a lunch box character, she kept tapping on the student's arm and required multiple verbal prompts to make eye contact with the classmate and hand-over-hand prompts to stop tapping his arm. Student ate slowly and was the last student to leave the lunchroom. The aide reported that this was Student's typical behavior during lunchtime.

68. The yard duty teacher greeted Student, who needed four verbal prompts to make eye contact and respond. When Student responded, she attempted to grab the staff member's lanyard; the aide blocked her. The aide gave Student a few minutes after lunch to "do her own thing," then would try to facilitate Student playing a game with a peer to earn stars on her whiteboard. The aide acknowledged that it had become more difficult to find a third-grade peer with whom Student could play because the social gap between her and her classmates was widening. On the playground, Student played in puddles until redirected by her aide. When she ran to the tetherball court, she grabbed the ball from another student. The aide prompted Student multiple times to ask if she could play and to make eye contact, while physically blocking her from grabbing the

ball. Student spent most of the time snatching and trying to swing on the rope, while being redirected and prompted by the aide. Another pupil tried to engage Student by tossing the tetherball back to Student, but Student largely ignored her. Student did not reciprocally engage with general education students, despite the aide's facilitative attempts.

69. Ms. Corona clinically observed Student during the assessments. Student willingly went to the testing sessions. Ms. Corona asked Ms. DeMartini to accompany Student for the first two testing sessions to help with transition and compliance. Student's aides attended the subsequent testing sessions but were not needed to elicit compliance or work production. Student was friendly and in good spirits but needed a substantial amount of prompting to answer questions, follow directions, and attend to tasks on many subtests. Student's instruction comprehension was highly variable, and Ms. Corona had to repeat the directions for each test and every subtest. Student had more difficulty as the directions became more complex or vague or required a more spontaneous response. When being noncompliant, Student would be prompted with her reinforcement system. Student was most successful on tasks that were rote in nature or had visual support, like a stimulus book.

Cognitive Functioning

70. Ms. Corona administered the Wechsler Intelligence Scale for Children, 5th Edition, which was a psychometrically sound, reliable and valid measure of cognitive abilities. The test assessed Student's ability to solve problems with words and pictures and her ability to work with information mentally, gauging how quickly she processed.

71. The Wechsler tested in five different indexed areas. The verbal comprehension index measured verbal reasoning and concept formation based on previously learned information. Student scored comparatively higher on the verbal comprehension index than the other four indexes. This was primarily because of

Student's better score on the index's similarities subtest, where Student made use of her rote, spelling, and decoding skills. On the vocabulary subtest, Student did well with one-word responses to name a picture. However, Student grappled with questions requiring more complex responses, demonstrating Student's inability to generalize her vocabulary skills. Overall, Student's verbal reasoning abilities fell in the extremely low range and above two percent of her peers.

72. The visual spatial index consisted of two subtests (lock design and visual puzzles) and measured Student's general ability to reason and solve abstract, picture-oriented problems. Overall, Student's performance in this domain fell in the extremely low range and above one percent of her peers. These scores were consistent with Student's prior 2014 triennial evaluation. The fluid reasoning index measured the ability to think logically to solve problems given novel situations (independent of acquired knowledge) and used two subtests (matrix reasoning and figure weights). Student's scores fell into the extremely low range, performing better than one percent of her peers on this index. Student's index standard score of 53 was better than the 2014 triennial evaluation's standard score of 49, indicating she made some gains in her reasoning skills.

73. The working memory index consisted of two subtests (digit span and picture span) that measured Student's ability to sustain attention, concentrate, and exert mental control. Working memory was an essential component of fluid reasoning and other higher order cognitive processes, closely related to achievement and learning. Student's score fell within the extremely low range and above one tenth of a percent of her peers. In summarizing the results, Ms. Corona noted that Student had a good memory for rote facts and information, but her attention deficits make it extremely difficult for her to hold information in her short-term memory. Therefore, Ms. Corona emphasized that this index should be interpreted with caution.

74. The processing speed index represented Student's ability to process simple or routine visual material without making errors. Faster processing of information may conserve working memory resources, allowing an individual to devote more cognitive resources to higher level thinking. The composite also measured short term visual memory, attention, and visual motor coordination. The two subtests required Student to do paper-and-pencil tasks. On the coding subtest, Student used a key to copy symbols that corresponded with simple geometric shapes. Student had difficulty with the symbol search subtest, which had Student identify the presence or absence of a target symbol in a row of symbols. Ms. Corona noted that Student's performance on the symbol search subtest should be interpreted with some caution due to her difficulties with understanding directions and attention. However, the symbol search score was not significantly discrepant with her coding subtest score, where she was very attentive and understood what was being asked of her. Thus, Ms. Corona concluded that Student's overall performances on the processing speed index were an accurate measure of Student's abilities in this area. Student's processing speed index scores fell within the extremely low range, where she performed better than one tenth of a percent of her peers.

75. Ms. Corona did not report Student's Wechsler full-scale intelligence quotient. The full-scale might not have been an accurate representation of Student's overall ability because of Student's high variance of scores. Instead, Ms. Corona reported Student's Wechsler general ability index, which was an overall measure of Student's cognitive functioning without the burden of cognitive proficiency tasks, which included working memory and processing speed. The general ability index did not include testing that relied on executive functioning and cognitive proficiency, with which neurodevelopmental disabled children, like autism or attention deficit hyperactivity disorder, struggled. Therefore, these deficits might have masked Student's true abilities

if included in computing general overall cognitive ability.

76. The general ability index included verbal comprehension index, fluid reasoning index, and the visual spatial index's block design subtests. Student's general ability index was 61, classifying her general level of cognitive ability as in the extremely low range, meaning that Student scored higher than one percent of other children her age. Some of Student's test scores were impacted by poor attention and noncompliance, but Student demonstrated significant global delays in her cognitive abilities and performed at a consistently low level across all areas of assessment. Ms. Corona's administration and interpretation of Student's scoring fully complied with the Wechsler protocols. These findings were generally consistent with District's 2014 triennial evaluation of Student's cognitive abilities.⁵

77. Ms. Corona also administered the Comprehensive Test of Nonverbal Intelligence-Second Edition (CTONI-2), a norm-referenced test that used nonverbal formats to estimate the general intelligence of children and adults whose performance on traditional intelligence tests might be adversely affected by subtle or overt impairments involving language or motor skills. The test's goal was to minimize the influence of language ability on intelligence test scores. The nonverbal intelligence test produces a full-scale composite from two indexes, pictorial scale and geometric scale.

78. The pictorial scale consisted of three subtests that used pictures of objects. Student's composite score fell within the very poor range, performing below the first percentile compared to her peers. Her score on the pictorial sequencing subtest was consistent with her Wechsler matrix reasoning subtest, indicating that pattern recognition and completion was an area of comparative strength and a splinter skill for

⁵ Dr. Yabrove used the Differential Ability Scales, Second Edition, when he evaluated Student's cognitive functioning.

Student. However, her overall performance on the pictorial scale subtests indicated that Student had significant difficulty reasoning and solving problems visually.

79. The geometric scale consisted of three subtests that used images involving points, lines, angles, surfaces, and solids. Student's geometric composite index score was in the very poor range, performing below the first percentile compared to her peers. Student had significant difficulty understanding and completing geometric analogies, forming groups with common characteristics, and sequencing images using a problem-solving format.

80. Student's full-scale composite on the comprehensive test of nonverbal intelligence was in the very poor range, performing at less than the first percentile compared to her same aged peers. Though slightly lower, Student's nonverbal intelligence score is consistent with her results on the Wechsler and her 2014 triennial evaluation. Dr. Corona concluded Student's level of cognitive ability was severely delayed compared to her same age peers and that current assessment results accurately reflected Student's learning capacity.

81. In January 2016, Parents paid developmental neuropsychologist Carina M. Grandison, Ph.D., to conduct a neuropsychological assessment of Student because they disagreed with District's 2014 triennial assessment's conclusion that Student qualified for special education under the intellectual disability eligibility. Dr. Grandison was an assistant clinical professor at the University of California, San Francisco, Department of Psychiatry. Dr. Grandison held a California license to practice clinical psychology. Parents provided District with Dr. Grandison's report, prepared in February 2016. The report was reviewed by the 2016 IEP team. Dr. Grandison did not testify at the hearing.

82. Ms. Corona had significant concerns regarding Dr. Grandison's report. In the report, Dr. Grandison represented that she had administered the Comprehensive Test of Nonverbal Intelligence-Second Edition to Student, stated that Student had a

standard score of 79 for nonverbal intelligence, and concluded that Student was “clearly” not to be considered intellectually disabled. This was the only information provided regarding Student’s cognitive abilities. Dr. Grandison did not specify which index scale the score of 79 reflected and did not report Student’s scores on any subtest or the nonverbal intelligence test’s other two index scales. The report did not provide any qualitative data regarding Student’s specific testing behavior, response to patterns, attention, or level of prompting and reinforcement. Ms. Corona made multiple efforts to contact Dr. Grandison and discuss the assessment findings directly, but she could not reach Dr. Grandison. Further, Dr. Grandison had been invited to Student’s IEP team meeting to discuss the evaluation, but she did not attend.

83. Additionally, Dr. Grandison did not attempt to explain or analyze why her results markedly differed from findings regarding Student’s cognitive abilities in Los Angeles Unified’s 2011 evaluation and Dr. Yabrove’s 2014 triennial assessment. Dr. Grandison’s conclusion that Student “clearly” could not be intellectually disabled was not persuasive.

84. Ms. Corona administered the Comprehensive Test of Phonological Processing, Second Edition, to measure Student’s use of language sound structure in processing written and oral language, assessing the basic skills and abilities needed for efficient, skilled reading. Ms. Corona wanted to determine if Student had phonemic awareness. The test had three composites.

85. The phonological awareness composite measured Student’s awareness of, and access to, the sound structure of oral language. All instructions were auditory and no contextual or picture cues were provided. The test’s parameters placed a substantial load on Student’s working memory and Student had significant difficulty holding and manipulating information. On the elision subtest, Student’s ability to omit sounds and develop new words was within the very poor range. Student’s ability to identify

beginning, middle, and ending sounds in words on the phoneme isolation subtest was in the very poor range. Her ability to combine sounds to make full words on the blending words subtest was also in the very poor range, but relatively stronger compared to the other subtest. Student performed in the very poor range on phonological memory composite and the rapid naming symbolic composite.

86. Word reading and spelling were Student's areas of strength, but her performance on the phonological processing test indicated that Student's phonics skills did not translate into phonemic awareness. Phonemic awareness is the ability to hear, identify, and manipulate individual sounds in spoken words. When a child has phonemic awareness, they can take sounds and assemble them into words. Student, in contrast, remembered phonemic rules but struggled with phonological memory and could not manipulate the sounds.

87. Ms. Corona administered the Developmental Neuropsychological Assessment, Second Edition, commonly referred to as the NEPSY-II, to assess Student's functional skills in six key neuropsychological domains. The language domain assessed different components of the complex linguistic capacities that were associated with problems in speech and language, reading, spelling, and writing. On the comprehension of instructions subtest, Student scored far below the average range. She demonstrated poor attention and compliance on more difficult test items, needing multiple prompts to look at the stimulus book and listen to the examiner. Student was more attentive and compliant when the instructions were leveled to her skills, requiring less prompts for her to respond and focus. Student scored in the far below average range on the phonological processing subtest. Student's word reading skills did not enable her to break down words into sounds, sound out words, and blend words.

88. Student's scores on the neuropsychological assessment's language domain subtests were consistent with her phonological processing test performance.

Her ability to follow directions and process complex language were significant areas of need. Student demonstrated this deficit in the classroom where she struggled to attend and to respond to more complex tasks, unless spoken to directly.

89. The neuropsychological assessment also evaluated Student's functional skills. The attention and executive function domain measured learned and automatic responses, monitoring and self-regulation, selective and sustained attention, nonverbal problem solving, planning and organizing a complex response, and figural fluency. Student had significant difficulty understanding and following the auditory attention subtest directions and attending to task, scoring far below average. Ms. Corona therefore did not administer the domain's response set subtest, which was more difficult and complex.

90. The memory and learning domain measured Student's immediate memory for narrative information under free recall, cues recall, and recognition conditions, along with immediate and delayed memory for faces, names, and words. The memory for faces subtests measured Student's memory for visually presented material. Student actively attended to the images of children and appeared to enjoy making judgments as to gender. Student's overall attention was relatively suitable, though she was occasionally prompted to look at images for the requisite full five seconds. Student scored in the far below average range on both immediate and delayed recall tasks, indicating that her ability to remember visual information was deficient.

91. Student was more successful on the memory for names subtests, which measured her ability to remember and recall information presented visually and verbally. She scored in the borderline or below average range on these three subtests, indicating the Student was more successful when information was presented both visually and verbally.

92. Student's cognitive test results were very consistent. Student struggled

with most tasks and functioned in the far below average range when compared to her same age peers in language, visual spatial processing, auditory processing, attention and memory. Her overall strengths were in rote skills and pattern recognition, but Student struggled with higher order processing, complex reasoning, and more complex language.

93. Ms. Corona concluded that, as a learner, Student's rate of progress would be very slow. Student's working memory was one of Student's greatest areas of need. Working memory required a person to attend to the information, to hold the information in their memory, to manipulate the information, and then use the information. Student was able to memorize things that were of interest to her, but in a repetitive, scripted manner. She could recite episodes of her favorite cartoons. However, Student did not actually understand what the scripts meant and was unable to explain what was happening or how the characters were feeling. Student's ability to gain new skills would be laborious, requiring significant amounts of support, instructional scaffolding, and time.

Social Perception and Response

94. Student took the neuropsychological assessment's subtests in the social perception domain. This domain assessed Student's recognition of facial affect, affect in relation to contextual clues, and theory of mind. Deficits in these areas, when accompanied with poor social abilities or disinterest in social interaction, were markers of clinical disorders such as autism spectrum disorder.

95. On the affect recognition subtest, Student had significant difficulty identifying what someone was feeling based on facial expressions, scoring in the far below average range, better than one percent of her peers. She had a limited range of feeling identification and often confused angry, fearful, or neutral expressions with someone feeling sad. The theory of mind subtest assessed Student's ability to recognize

the perspective of others. Student scored in the far below average range, ranking below the second percentile. Student did not perceive that others had their own thoughts, ideas and feelings, which may differ from her own.

96. Ms. Corona utilized the Autism Spectrum Rating Scale to quantify observations of Student that were associated with autism spectrum disorder. Mother, Ms. Buchanan, Ms. DeMartini, and Ms. Costa completed questionnaires, providing ratings on various scales that indicated the extent to which Student's behavioral characteristics were like children on the autism spectrum. All four of the respondents reported observing varying degrees of elevated behaviors suggesting that Student was demonstrating a high frequency of autism related behaviors in the school setting. Mother's responses indicated that some behaviors at home were not as elevated as at school. However, Ms. Buchanan's ratings included her observations of Student in the home setting and her responses yielded more elevated scores.

97. Overall, all respondents' scores were consistent with Student's long-standing diagnosis of autism spectrum disorder. She exhibited many of the characteristics associated with autism. At home and in school, Student had difficulty using verbal and nonverbal communication for social contract, relating to children and adults, providing appropriate emotional responses to people in social situations, and tolerating changes in routine. She used language in an atypical manner and had problems with inattention and motor impulse control. She also engaged in stereotypical or unusual behaviors and overacted to certain sensory stimulation in the school setting.

Social/Emotional and Adaptive Functioning

98. The Adaptive Behavior Assessment System, Third Edition, examined Student's adaptive, social, practical, and community skills. A child's adaptive abilities were considered in determining intellectual disability eligibility. Mother and Ms. Buchanan completed rating scales based upon observations in the home environment.

Ms. DeMartini and Ms. Costa completed the scales based upon observations of Student in the school environment. Results from all four respondents generally indicated that Student had significant needs in all areas of adaptive functioning. Ms. Buchanan, Ms. DeMartini, and Ms. Costa's ratings of Student's adaptive behavior were consistent.

99. Ms. Corona spent three hours assisting Mother in completing the adaptive behavior scales. Mother's responses indicated she had a higher perception of Student's abilities than the other respondents. Mother said that she felt Student was capable of doing a number of tasks, but Student had yet to be explicitly taught. Mother's perception of the amount of prompting and support Student needed to complete daily life tasks was also significantly discrepant from the other respondents. Ms. Buchanan was supervising Student's 12-hours-per-week home ABA program. Her responses, which collectively included Student's home aides' input, placed Student's overall adaptive skills in the home setting in the extremely low range, in the less than one tenth percentile compared to same aged peers. Ms. Buchanan also rated Student's conceptual skills, social skills, and practical skills in the extremely low range (less than one then of one percentile). Student demonstrated comparative strengths in her leisure skills, but Ms. Buchanan's responses regarding Student's adaptive skills were markedly lower than Mother's ratings.

100. Mother, Ms. Buchanan, Ms. DeMartini, and Ms. Costa also completed the rating scales for the Behavior Assessment System for Children, Third Edition, providing information regarding Student's social and emotional behavior at home and school. Mother's responses contrasted with those of Ms. Buchanan, Ms. DeMartini, and Ms. Costa, suggesting that Mother's perception of Student's behavior significantly differed from other people's views. Despite the discrepancy, all expressed elevated concerns regarding Student's behaviors.

101. Ms. Buchanan reported that Student engaged in disruptive, impulsive,

uncontrolled and rule-breaking behaviors. She reported that Student generally seemed disconnected from her surroundings, had difficulty making decisions and effectively working with others, and lacked creativity. Student struggled to perform simple daily tasks in a safe and efficient manner. Student demonstrated unusually poor expressive and receptive communication skills and had significant difficulty seeking and finding information on her own. Ms. Buchanan provided clinically significant scores for developmental social disorders and executive functioning.

102. Ms. Costa and Ms. DeMartini reported that Student engaged in a high number of behaviors that were adversely affecting other children in the classroom. Student was restless, overactive, and unable to control her impulses. Student had significant difficulty comprehending and completing schoolwork, engaged in strange and odd behaviors, was typically disconnected from her surroundings, and had unusually poor expressive and receptive communication skills. Ms. Costa and Ms. DeMartini provided many clinically significant scale scores, including anger control, developmental social disorders, emotional self-control, executive functioning, and resiliency. Student had poor social skills, difficulty controlling and maintaining her behavior and mood, and difficulty overcoming stress and adversity.

103. Classroom observations conducted by the examiners, along with teacher and aide supervisor reports, confirmed that Student required substantial and continuing support, and a significant number of prompts and reminders, to complete most tasks. Overall, the adaptive behavior assessment indicated that Student functioned in the extremely low range.

Speech and Language

104. Ms. Dickinson assessed Student in the area of speech and language. She had been a speech and language pathologist with District for eight years. She had a bachelor's degree in sociology and a master of science in pathology and audiology. She

was a licensed pathologist, certified by the American Speech Language Hearing Association in clinical pathology, and credentialed to work in California public schools.

105. Ms. Dickinson testified at the hearing. She provided direct services to and assessed general education and special education students. She served students with varied disabilities, some in mild-to-moderate and moderate-to-severe special day classes, from preschool through eighth grade. She had conducted almost 60 assessments at Amador at the time of hearing. Ms. Dickinson's education, credentials, and experience qualified her to conduct Student's speech and language assessment, make findings and recommendations, and participate in preparing the report.

MS. DICKINSON'S OBSERVATIONS

106. Ms. Dickinson continually provided Student speech and language services in four 30-minute sessions a week since the 2015-2016 school year pursuant to the 2014 settlement agreement. She was well-acquainted with Student at the time of assessment, summarizing Student's conduct and capabilities during services. Student had IEP goals in the areas of receptive and expressive language, increasing speech intelligibility, and social pragmatic language. She only made eye contact when motivated and for brief periods of time. She required frequent reminders about proximity, vocal volume, and verbally responding. She answered "yes and no" questions but did not ask for help or indicate when she did not have an answer. She asked questions, but only with verbal or written prompts. She took part in structured games with adult facilitation, but had difficulty attending to another when it was their turn. She enjoyed looking at picture books and reading words. She liked role playing. Ms. Dickinson observed that Student had some pragmatic language skills in routine and structured settings, but had great deficits in the functional use of language to indicate her needs.

107. Ms. Dickinson also conducted formal observations for the triennial review. She observed Student in class, seated at her desk with Student's aide on one side and a

classmate on the other side. The class was taking a five-minute timed multiplication and division mixed math test. Student's aide used the behavior system and chart to prompt Student by writing/saying "keep going" and "what comes next" on 12 occasions during the five-minute time frame. Student completed four of the math problems with zero accuracy. Student correctly answered four addition problems. At this time, Student was given a three-minute break and left the room with her aide. Student was scratching her arm when she reentered, walked to sink, and said "band aides." The aide instructed Student to wash her hands, further prompting Student three times during the hand washing routine. Student engaged in self-talk at an inappropriately loud vocal level for the quiet class testing session. When Ms. Costa began a math lesson on fractions, Student worked on addition with her aide on a white board.

108. Ms. Dickinson also observed Student during a rainy day recess in Ms. Costa's class. When a classmate greeted Student by name, she did not respond. After looking at a twister game in the hall, Student returned to the classroom and pushed a peer and walked about with her head down, making it difficult for her to navigate between people and objects. She watched a group play Jenga on the floor, did not follow the aide's prompting to ask if she could play, wandered off, returned, and enjoyed watching the other kids take turns in the game for about five minutes, while crawling about on the floor. She grabbed a classmate's sweater and was redirected by the aide. She sat with the group, engaged in self-talk, played with her clothes, and looked at the Jenga box. She inserted her hands in front of a peer's face, she called another peer "Mrs. Costa," and touched other peers seven times in three minutes. The aide finally asked the group if Student could take a turn. Student knocked the Jenga tower down and participated in self-talk or scripted language (e.g., "delicious" and "my room") while the other children put the blocks back in the tower. The aide had to redirect Student five times to put away her snack at the end of recess.

SPEECH AND LANGUAGE ASSESSMENTS

109. Student's speech and language assessment required multiple 20-minute sessions. Student came with her aide, who supported her behavior with a token system, using breaks and reinforcers. Student was sometimes noncompliant or appeared fatigued. She was successful with assessments that required single word oral responses, but she needed frequent reminders to listen and look carefully at the pictures. The standardized assessments did not allow rephrasing or prompting to testing items and Student sometimes struggled with interpreting stimulus pictures and providing appropriate responses. For example, in the Test of Pragmatic Language, Second Edition, Student could not achieve a basal score⁶ and the test was discontinued. Student demonstrated higher skills in speech therapy sessions, with written and verbal prompts, while scaffolding her understanding and use of language. Accordingly, Ms. Dickinson cautioned that the standardized assessment scores on some subtests may be lower than her language used during structured tasks in speech therapy. Yet, Ms. Dickinson emphasized that Student had very limited expressive skills, and was unable to state more than basic needs.

110. Ms. Dickinson gave Student the Receptive One-Word Picture Vocabulary Test, Fourth Edition, to assess Student's ability to receptively identify picture vocabulary.

⁶ Basal levels were the points below which the examiner assumed the student could obtain all correct responses and, therefore, it was the point at which the examiner began testing. Standardized test protocols designated the point at which testing should begin, usually by age. Typically, if the child could not correctly answer three items in a row, the examiner would drop back a level, until the student was able to correctly answer three questions. This is the basal level. Here, Ms. Dickinson could not establish a basal level with Student on the pragmatic language test.

Student's receptive vocabulary was in the moderately low range for her chronological age, with a slightly decreased standard score from her previous 2014 testing. On the Expressive One-Word Picture Vocabulary Test, Fourth Edition, Student's ability to label one word vocabulary when shown a picture was in the low average range. This was an increase from 2014 testing; naming vocabulary was Student's area of strength.

111. Student took the Test for Auditory Comprehension of Language, Fourth Edition, to measure her receptive auditory language. The auditory comprehension composite had three subtests. In identifying picture vocabulary, Student scored in the borderline impaired/delayed range, with an age equivalent of five years, six months. In identifying grammatical morphemes⁷ subtest and the elaborated phrases and sentences subtest, Student's score had an age equivalent of five years, nine months, and was in the borderline impaired/delayed range. Student demonstrated splinter skills with her ability to receptively identify pictures for longer phrases and complex sentences, but this did not substantively affect her overall auditory comprehension index composite, which was in the second percentile and in the delayed range. Student demonstrated global deficits of understanding language.

112. The Test for Auditory Expressive Language is norm referenced evaluation of expressive language in children and consists of three subtests. On expressive picture vocabulary, Student scored in the borderline impaired/delayed range, with an age equivalent of five years, three months. For grammatical morphemes, Student was below average, with an age equivalent of six years, six months. Student scored in the impaired/delayed range on the elaborated phrases and sentences subtest, with an age

⁷ Morphemes are the smallest units of meaning in a language. They are commonly classified as either "free morphemes" (which can occur as separate words) or "bound morphemes" (which cannot stand alone as words).

equivalent of four years, nine months.

113. Ms. Dickinson collected a language sample from Student to evaluate language skills in connected speech. The sample included spontaneous language and responses to her questions. The language sample demonstrated that Student had an utterance length of approximately two words in spontaneous speech, which contrasted with her longer utterances during structured speech therapy activities. Student used simple and compound sentences of eight-10 words, but only when given prompts to extend her utterances. Student used scripted phrases to request and comment (e.g., I like, I want, I see, I do not like) and, more than half the time, defaulted to one-to-two-word responses when making a request (e.g. break, video, light off).

114. Ms. Dickinson administered the Goldman Fristoe Test of Articulation, Third Edition, to assess the sounds Student makes in making words. Student could be difficult to understand. The articulation test rated Student 80 percent intelligible by an unfamiliar listener in known contexts. Student had been using visuals (pacing to a chart) to help slow her rate of speech during structured activities; otherwise, she runs her words together. Her unintelligibility was caused more by her rate of speech than her articulation.

Academic Achievement

115. Ms. DeMartini evaluated Student's academic achievement. She worked at District for six years and had taught for 15 years. She was a District program specialist since August 2017, having previously been a District inclusion specialist for three years. Her program specialist duties included supporting IEP teams in the development of individual educational programs. She assisted and facilitated access to programs and services, while promoting quality and compliance. She had a bachelor's degree in psychology, with a minor in special education, and a master's degree in special education. She had specialized training from the University of California in autism

spectrum disorders. She possessed an Education Specialist, Level II, credential, a Multiple Subjects credential, Professional Clear, and a preliminary Administrative credential. She was trained in the administration of standardized tests and had conducted approximately 200 academic achievement tests.

116. Ms. DeMartini was trained in the writing of observable and measurable goals as part of her credentialing and had been writing IEP goals for 13 years. Two years before, Ms. DeMartini received extensive training on drafting goals for special education children (especially those on the autism spectrum) in the Common Core state standards from Mary Schillinger. Ms. Schillinger was a special education faculty member at California State University, Northridge, had published numerous professional guides on Common Core and children with disabilities, and was a presenter and consultant at state and national special education conferences.

117. Ms. DeMartini used a number of different instruments and formal observations to obtain a complete picture of Student's academic achievement. Ms. DeMartini's education, credentials, and experience qualified her to conduct Student's academic achievement assessment, make findings and recommendations, and participate in preparing the report. She testified at the hearing.

STUDENT'S INCLUSION SPECIALIST

118. Ms. DeMartini had been a resource specialist/intervention specialist for about two years after she first came to District and, previously, a resource specialist with Newark Unified School District. As a resource specialist, she supported special education students by assisting them in accessing the general education curriculum. She used both the pull-out model, where she would work with a student outside the classroom, and the push-in method of working with a student in class. The primary teaching came from the general education teacher while the resource specialist supported what the student was already learning in class. The resource model supported special education students

who were capable of accessing the class's general education curriculum.

119. As an intervention specialist, Ms. DeMartini delivered response to intervention, which provided a student with intensive academic support for a marked period of time to get a student back to grade level for a particular academic deficit. If a pupil did not respond to the intervention, assessment for special education or other interventions might be necessary. Ms. DeMartini had also been a special day class teacher for six years at Newark. A special education teacher provided the primary teaching to students with various disabilities, typically utilizing a modified curriculum, in special day classes.

120. During her three years as a District inclusion specialist, Ms. DeMartini worked with pupils who had significant disabilities and who spent most of their day in a general education classroom. She supported the general education teacher, identifying and promoting general education curriculum access by the special education student. She would also work with a student's IEP team regarding goals, accommodations, and supports, enabling the special education student's inclusion in a general education classroom. She conducted inclusion training for general education teachers who had special education students in their classroom, frontloading the teachers with inclusion skills and strategies.

121. The primary consideration for a special education student's inclusion in a general education classroom was the student's access to the general education academic curriculum, with some modifications, by participating in the general education class lessons and learning from the general education teacher. Another consideration for inclusion was whether the special education student socially benefitted by conversing with typical peers, referencing peer conduct, participating in classroom group activity, and sharing leisure time with general education pupils. A third consideration was the level of disruption to the learning environment caused by the

special education student's inclusion, for both the student and the general education classmates. The special education student's behaviors, like repeated physical goings and comings, loud and/or irrelevant vocalizations, unusual body movements, and the opening of classroom doors and cabinets, as well as regular aide chatter, could be highly disruptive to peers and teacher.

122. A successful inclusion was when the special education student participated in the general education instruction by looking at and learning from the teacher and otherwise actively engaging in the classroom teaching. The special education student should reference peers to see how to properly respond, avoid distraction by blending into the class, and minimize disruptive conduct.

123. Ms. DeMartini was familiar with California's adoption of the common core standards. These standards created different challenges for inclusion. In her experience, former state standards were linear in nature, using worksheets to build memorization and routine skills. Common core was based on collaborative learning, using basic skills for deeper knowledge levels. Common core was not as concrete or rote in nature as the prior standards and required collaborative work that developed more complex thinking. In her opinion, common core gave some special education students greater access to general education curriculum because of its collaborative, social nature. For others, like many children on the autism spectrum, common core was more challenging because its collaborative structure and group interactive learning required pragmatic social skills.

124. Ms. DeMartini first met Student when she became her inclusion specialist in August 2014, when Student was in her second year of first grade at Kolb. Student was happy and energetic, and enjoyed being at school. She was constantly touching and required substantial prompting to stay in her seat. She was not writing on her own and required the aides to highlight sentences, which Student would trace. However, Student was a remarkable speller.

125. Ms. DeMartini remained Student's assigned inclusion specialist for the next three academic years. Student's general education inclusion and services were dictated by the 2014 settlement agreement. Ms. DeMartini personally provided the requisite one-on-one specialized academic instruction, 100 minutes per week, delivered in three weekly sessions. She also provided an additional 90 minutes a week collaborating with other team members, which included the general education teacher, the nonpublic agency behavior aides, occupational therapist, pathologist, and Parents. Ms. DeMartini invested more time than required, often spending eight hours a week, on Student's inclusion needs. On average for three years, 20 percent of Ms. DeMartini's work week was servicing Student's inclusion related needs. At the time of assessment, Ms. DeMartini was better acquainted with Student than any other assessment team member.

126. Student was very prompt dependent, behaviorally, functionally, and academically. Ms. DeMartini therefore trained the nonpublic agency behavior aides in implementing instructional strategies. Training was an ongoing process because Student's curriculum was modified and Student's aide would change at least once, sometimes twice, a day. The aide transition sometimes occurred in the midst of implementing instructional strategies.

127. Student's behavior strategies included physical, partial physical, guiding (e.g., tapping on desk), holding an item, picture and text, and full verbal prompts. Student required more verbal prompts when younger. As Student grew older, prompts became more text based, with writing on a white board or paper. Student also responded to gestures and tapping. Verbal prompts were used as a last resort for compliance, with physical prompts reserved for maintaining safety, preventing eloping, or controlling the touching of other people's bodies.

128. In first grade, Student's behavior was incredibly disruptive. She ran out of classrooms many times, especially if doing math, and would frequently fall on the floor

as a form of noncompliance. Though not aggressive with peers, Student touched and grabbed, unable to recognize and maintain proper personal space. Student's behaviors improved somewhat over the years. She was able to stay in her seat without as much prompting. When given a paper, she knew she had work to do. She still eloped, but not as often. However, falling on the floor remained her "go to" behavior when she did not want to engage. Student's decoding did not improve but remained consistent. Spelling and vocabulary improved. Student's writing improved so that she could write a simple sentence, such as "Mom goes home."

MS. DEMARTINI'S OBSERVATIONS

129. Ms. DeMartini conducted two, 45-minute formal observations of Student in the classroom. The first observation took place on a Monday at 1:20 p.m. after Student returned to her classroom after a pull-out speech session. The class was at their desks, finishing an assignment where they were cutting out pictures of literature vocabulary, gluing them in their notebooks, and writing the vocabulary word and definition beside the image. The teacher was writing the definitions in a notebook that was being projected to the class on the display screen. Student sat down at her desk and the aid wrote "cut" on a small whiteboard and presented it to Student. The aide was having Student cut just five pictures. The aide twice gestured to the whiteboard before Student began cutting the pictures out. While Student cut, the aid was drawing lines in the notebook. Student stopped cutting and began to engage in stimulatory behaviors using the paper. The aide gently pushed Student's hands down and Student began to again cut. She again engaged in stimulatory behavior; the aide took and handed the scissors to Student. She cut two more pictures and then started to randomly cut into the side of the paper. The aide redirected her by rotating the paper and pointing to the correct cut lines. The aide wrote "Glue pictures on X in white journal" on the whiteboard and showed it to Student. Student got up and took paper to the trash can. She returned

independently but did not sit down. She then tried to elope out of the classroom, but the aide blocked her from leaving. The aide handed Student the pictures and her notebook, again gesturing to the whiteboard. Student required three more prompts to finish gluing the picture. Meanwhile, Student's peers had cut and glued the pictures for the entire vocabulary and copied the definitions from the display screen. They finished the assignment, cleaned their desks, took out their homework binders, and listened as teacher gave them that night's homework. The aide continued to prompt Student to glue her pictures into her notebook and then persistently prompted Student put her things away, but Student wandered away from her desk, returned and continued to resist the aide's instructions.

130. Eventually, Student fell to the floor, screaming. The aide picked Student up off the floor using a full physical prompt and Student began to cry. The aide verbally told Student to clean up and Student fell to the floor again. This sequence was repeated twice more, with the aide verbally telling Student "you need to get up" while physically picking her up under the arms. Once Student was in her chair, the aide showed Student the reinforcement card that showed Student did not earn a reinforcement credit. The aide erased the chart and Student hit the chart four times while yelling "no thank you, no thank you." Student calmed down and began to engage in visual stimulatory behavior with her fingers in front of her face. The teacher asked the class a comprehension question about the book; Student did not respond nor look at the teacher. The class laughed at an amusing part in the book but Student sat quietly engaged in stimulatory behavior. After she earned five stars, Student was allowed to watch a silent video on a cell phone, placed inside her desk. She watched the video until the bell rang, signaling the end of the day.

131. Ms. DeMartini observed Student a second time on a Tuesday after 10:30 a.m. recess, during writing time. The class was directed to log into the teacher's class

page on their Chromebooks and locate their informational writing for the day's lesson. The class had been working on writing a paper about a famous person, drafting paragraphs in their writing journals. Student was writing about Dr. Seuss. The day's class goal was to set up the paper in Google docs, compose a table of contents, and begin typing their draft. Student logged into her computer independently and got to Google classroom with minimal prompting. She was repeatedly saying "Ava, Ava," while opening her document. Thereafter, the aide provided prompts to Student for every step of typing the title and table of contents. Student never looked at her teacher, the class display screen with the example, or her classmates for reference. After about five minutes, the aide gave Student another book break.

132. Student willingly went to Ms. DeMartini's assessment sessions, with her individual aide. Student worked to the best of her ability in all testing session, receiving breaks and reinforcement after every few subtests or after approximately 10 minutes of testing. Student often required questions to be repeated and prompts to answer. Student sometimes needed sections of the assessment to be masked to help her focus on a given question or item. Student occasionally lost focus, got up from the table, and engaged in stimulatory behaviors. Ms. DeMartini's classroom and assessment observations accurately captured the behaviors and performance that Student exhibited every day. Ms. DeMartini was very acquainted with Student's behaviors and, consequently, conducted the assessments in a manner that provided reliable testing results.

READING

133. Ms. DeMartini used a number of different instruments to obtain a complete picture of Student's academic achievement. She administered the Wechsler Individual Achievement Test, Third Edition, which assessed reading, writing, mathematics, and oral language. The norm-referenced test provided standard scores to

compare Student's performance with same age peers. Ms. DeMartini included both age-based and grade-based scores for all subtests because of the discrepancy between Student's age (10 years, two months) and those of her third-grade classmates.

134. Student scored in the extremely low range on the Wechsler achievement reading fluency section. She was unable to answer any inferential questions. Student had a large discrepancy between word reading and word comprehension. This was consistent with Ms. DeMartini's experience in providing academic services to Student.

135. Student was in the extremely low range on the early reading skills subtest, which included questions regarding letter names and sounds, phonemic awareness, rhyming, and sight words.⁸ Student had poor phonemic awareness and consequently struggled to manipulate sounds, a necessary basic reading skill.

136. Ms. DeMartini administered two portions of the Brigance Comprehensive Inventory of Basic Skills II to supplement and compare with the Wechsler reading scores. On the Reading Vocabulary Comprehension Grade Level Placement test, Student scored in the poor range for her age. Similarly, Student scored in the poor range on the Comprehends Passages test. On the short passages subtest, Student could answer some questions at the lower first grade level. Student could not correctly answer any comprehension questions above the first-grade level on the long passages subtest.

137. Ms. DeMartini also gave Student informal reading assessments and inventories, which were not norm-referenced, standardized assessment instruments. Norm-referenced tests were administered identically for all students and provided comparative data. Informal reading inventories gave the assessor options to individualize the test for the student. A student's scores were interpreted only in regard

⁸ Ms. DeMartini could not provide an age-based score for early reading because of Student's age at time of assessment.

to the individual and not to any norm group.

138. On the Reading A-Z Assessment on Identifying Rhyming Words, Student was given three pictures and asked to identify which two pictures rhymed. Student was told the names for each picture. Student was correct in four of 10 opportunities, but Student was inconsistent and random in her choices.

139. The Qualitative Reading Inventory-5 examined Student's ability to answer questions regarding two narrative and expository texts, which she could read more than once and to which she could refer when asked question. Narratives involved stories while expository text was written primarily to inform, like textbooks. On the first section, Student read a 44-word narrative text at the pre-primer 2 level.⁹ Student could retell one idea out of 15 possible ideas when asked to retell the narrative. When prompted to tell more, Student began scripting, saying irrelevant phrases. When asked specific questions, she answered one out of five correctly. On the second section, Student read an expository text of 49 words at the pre-primer 2 level. Student could retell one idea out of 17 possible ideas. She answered one of five questions correctly, which was a direct question while she was looking on the page where the answer could be found.

140. The standardized instruments indicated that Student's reading comprehension was very poor. The informal reading assessments confirmed that Student struggled to acquire and use information. By third grade, students read to learn. Student's reading scores and observations indicated that she was not going to be able to read and access information, like that presented in history and science texts.

⁹ A pre-primer reader is a book written at a level suited to students in kindergarten and those entering the first grade. The qualitative inventory offered two pre-primer levels.

WRITTEN LANGUAGE

141. Ms. DeMartini did not compute a Wechsler written language composite because of a large discrepancy in Student's subtest scores. Student scored extremely low in sentence composition, low in alphabet writing fluency, and below average in essay composition. However, Student spelling score was in the average range, in both age based and grade based categories. Per the tests protocols, the variance in scores prohibited computing a written language composite. Therefore, Ms. DeMartini chose to further test Student's writing.

142. Student took the Test of Written Language, Fourth Edition, which consisted of seven subtests that represented the three components of writing (convention, linguistic, and conceptual), using two writing assessment formats (contrived and spontaneous). Contrived writing tasks focused on discrete aspects of written discourse (e.g., spelling, punctuation, word usage). Spontaneous writing tasks examined a Student's functional writing ability (i.e., quality), allowing Student to write what she likes, within certain parameters.

143. Student's contrived writing index was at the one percentile rank. Her vocabulary, punctuation, logical sentence and sentence structure subtests were poor or very poor. Her spelling was below average. Student spontaneous writing index ranked below the first percentile. Her contextual conventions and story composition subtest were in the very poor range. Her overall writing ability was measured to be below the first percentile and very poor.

144. The test confirmed Student's recognized strong splinter spelling skill, when measured in isolation. However, the other instruments accurately measured Student's writing capabilities as reflected in her class work, where Student rarely wrote anything independently. The aide provided sentence starters, blanks to fill in, or word lists from which Student could choose. Then the aide prompted Student to write, to write a word,

to remain on task, to return to writing, or to take a break. The written language test results accurately reflected Student writing abilities.

MATHEMATICS

145. Wechsler measured Student's mathematic ability to be in the extremely low range, for both age and grade categories. Student's score on the Wechsler math fluency index was also in the extremely low range. Ms. DeMartini further assessed Student's math abilities by administering several sections of the Brigance Comprehensive Inventory of Basic Skills II. Student was not able to add or subtract sums, except those with sums and differences that were less than 10. She was not able to identify how many tens and ones were in a two-digit number. Though able to correctly identify all four basic shapes (circle, triangle, square, and rectangle), she could not identify which shapes had a particular number of sides. Student was unable, given three opportunities, to measure three lines to the closest inch using a ruler.

146. Student could not compare sets of objects, such as which set had more, less, greater, fewer, or equal amounts. Student could correctly identify position and direction of objects, as "before" and "left." She could not identify whether an object was "after," "up," "right," "over," "under," "on," "inside," and "outside." Student was given multiple prompts and leading questions in this section and could correctly identify the concept in two of 11 opportunities.

147. Math was a weakness for Student. She did not demonstrate any splinter skill (strength) for math. Student's test results were consistent with Student's math performance in class and when working with Ms. DeMartini.

ORAL LANGUAGE

148. Student took the Wechsler achievement test's oral language composite section. Student scored in the extremely low range on the listening comprehension

index, which had two components. On receptive vocabulary, Student was given words and asked to identify them from a field of four pictures. On oral discourse comprehension, Student struggled to answer questions after listening to two or more sentences or when she listened to a conversation between two people.

149. Student scored in the extremely low range on the oral expression index, which had three subtests. On expressive vocabulary, Student was asked to give a word that meant the same idea as a given definition. For oral word fluency, Student was to list words within a given category. She would slowly give a few words, then would stop, look at Ms. DeMartini, and not provide other examples, despite prompting. For sentence repetition, Student was to repeat a given sentence, word for word. Student did so for a couple of short sentences but, as the sentences became longer, she would lose attention and not be able to repeat. She was unable to repeat complex sentences even when paying adequate attention.

150. The assessment results for Student's oral language were consistent with the oral language Student demonstrated in class and when working with Ms. DeMartini. The test results were reliable measures of Student's oral language abilities.

Report Summary

151. The assessment team summarized their findings for the report. Ms. Corona found that multiple cognitive measures indicated that Student's level of cognitive ability was severely delayed when compared to her same age peers, falling in the extremely low range. Student demonstrated strengths in tasks that involved pattern recognition and processing rote information, but her processing skills were consistent with her cognitive ability and significantly below her peers. Student was comparatively better at word reading and spelling, indicating she may have phonic skills, but testing established she did not grasp phonemic awareness. Though she understood certain sounds, she did not know what the sound was or would do. Student consistently

demonstrated significant deficits in understanding and following complex verbal instructions. She also had a deficient ability to remember visual information, when compared to her peers.

152. Student had elevated levels of maladaptive behavior for attention problems, atypicality, adaptive skills, social skills, leadership, and functional communication. The assessors' classroom observations, teacher report, and aide report confirmed Student demonstrated significant behaviors that impacted her social and emotional development. Student struggled with noncompliance, stereotypy, and elopement. These behavior findings were consistent with those from her prior assessments.

153. Student's behaviors were consistent with autism spectrum disorder. At home and in school, Student had difficulty using verbal and nonverbal communication for social contact, relating to children and adults, and providing appropriate emotional responses to people in social situation. She used language in an atypical manner, did not tolerate changes in routine, was inattentive, and lacked impulse control. She overreacted to certain sensory stimulation in the school, could not appropriately identify facial expression in others, lacked perspective, and was unable to understand other people might have different points of view.

154. Student had very poor reading comprehension, at the early, first grade basic comprehension level. Student did have some comparative strengths in language arts based on rote ability, such word reading, pseudo word decoding, and spelling. She had good phonic skills but lacked phonemic awareness. She could not learn new information by reading and could not be expected to read a text book or other types of books to learn information. She was unable to answer inferential comprehension questions, even at the first-grade level. Her comprehension did not increase when the material was read to her. She comprehended best at the single sentence level when the

sentence was explicit in nature. Student was far below the level of her third-grade general education peers and therefore had great difficulty accessing any grade level curriculum.

155. Student had poor written expression. Student was capable of writing one to two sentences independently but struggled to write sentences when given a topic. She did not understand the difference between writing a sentence (with a subject and predicate) and writing a fragment or phrase. She was unable to write a story or essay on a given topic, despite preparatory discussion or brainstorming. She did not independently punctuate and intermittently capitalized. She could type on a computer keyboard, using the "hunt and pick" method. Overall, Student's writing was far below the level expected of her peers.

156. In mathematics, Student was still acquiring beginning math skills, such as number sense, basic addition, and subtraction. Her basic number concepts were limited to numbers between zero and 10. Her math skills were far below that of her grade level peers. She was unable to access the math curriculum or instruction within her general education class.

157. In speech and language, Student presented with a moderate to severe mixed receptive and expressive language delay, when compared to her same age peers. Age equivalents showed a three to four-year delay for her chronological age. She was limited with her expressive language and could not provide reasons why a person was feeling a certain way. She had weaknesses with theory of mind tasks, negatively impacting her perspective taking skills. Student had severe delays when using language functionally and socially required maximal support to follow routines and during social interactions. Though her word reading was a strength, she had limited comprehension of sentences, paragraphs, and stories. Student's impacted intelligibility was benefitted by the use of a pacing chart or visual to help slow her speech rate.

158. Student had significant needs in all areas of adaptive functioning. The scale responses indicated that Mother perceived Student's functional abilities to be greater than the level of skills perceived by assessors, educators and service providers. Other responders and assessors agreed that Student never, or almost never, performed a task without multiple reminders and prompts. Student received stars for being on task and not engaging in inappropriate behaviors, and X's when she engaged in inappropriate behavior or non-compliance. She earned a video reward for having all stars and a book reward if she had only one X. This system appeared to work most of the time; however, the power of the video reinforcer was questionable given the high rate of non-compliance and eloping. Student required regularly scheduled movement breaks as well as opportunities to engage in stimulatory behaviors. She continued to need a behavior plan and the support of a board certified behavior analyst on her team.

Eligibility

159. The assessment team applied their findings to various special education eligibility categories. Student clearly met four of the five characteristics associated with the eligibility criteria for autism. Student continued to qualify under autism eligibility. The team also found that Student met the eligibility criteria for speech and language impairment because of her needs in the areas of articulation, receptive and expressive language, and social pragmatic language.

160. The team analyzed the criteria for intellectual disability eligibility. First, Student was significantly below average in general intellectual functioning, as confirmed by the assessment data. Student's intellectual capabilities fell in the extremely low range across all indexes that measured cognitive functioning. These findings were consistent with Student's last two triennial evaluations, which also indicated that Student's intellectual ability fell in the first percentile, when compared to her same aged peers. Further, Student's cognitive deficits existed concurrently with deficits in adaptive

behavior. Student's adaptive skills fell in the extremely low range across all areas. This was also consistent with her previous evaluations, which indicated that Student's adaptive abilities fell in the second percentile compared to same aged peers. Accordingly, the assessment team found Student qualified for special education under intellectual disability eligibility.

161. The team considered other health impairment eligibility. They noted Student's significant difficulty focusing her attention, following directions, maintaining her self-control, and regulating impulsive behaviors. However, these deficits were also consistent with students who were eligible under intellectual disability and autism categories. The team therefore did not find Student eligible under other health impairment.

162. The assessment team found that Student did not meet the criteria for specific learning disability eligibility. Student's academic achievement was largely commensurate with her cognitive abilities. Though she had unusual splinter skills in spelling and decoding, these were rote in nature, not uncommon with autistic children, and did not represent her cognitive capabilities or academic ability.

163. All three of the assessors agreed that Student should no longer be fully included in the general education classroom. Student was unable to practice language, cultivate social skills, and develop adaptive skills in a general education classroom. A special day class would provide Student with direct instruction from a special education teacher, with specialized academic instruction suitable for Student's academic level, while providing a class environment where Student could form peer-to-peer social relationships.

OTHER EVALUATIONS FOR JANUARY 2017 TRIENNIAL IEP

Functional Behavioral Assessment

164. Dr. Burkholder conducted a functional behavior assessment for Student's triennial evaluation, preparing a January 23, 2017 report. Dr. Burkholder worked for District as a behavior specialist for 13 years and testified at the hearing. He earned a bachelor's degree in psychology, a master's degree in experimental psychology, and a doctorate in psychology, behavior analysis program. The Behavior Analysts Certification Board had certified and designated Dr. Burkholder as a Board Certified Behavior Analyst – Doctoral. He held clear health services and clinical psychologist credentials and was certified as a crisis prevention and intervention instructor.

165. Dr. Burkholder was one of four District board certified behavior analysts. As a behavior consultant, he used principals of applied behavior analysis, applied verbal behavior, discrete trial training, video modeling, and other derived methodologies as an internal consultant to special day classes and for special needs children. His duties included supporting children in inclusion settings, conducting assessments (almost 200), and developing behavior intervention plans for students throughout the District. He had trained teachers, paraprofessionals, nonpublic agencies, parents, and administrators on attention deficit hyperactivity disorder, inclusion crisis prevention and intervention, play groups, and social skills training. Dr. Burkholder's education, credentials, and experience qualified him to conduct Student's functional behavior assessment, make findings and recommendations, and participate in formulating Student's educational program.

166. Dr. Burkholder first met Student when he conducted a 2015 functional behavior assessment. He developed a behavior intervention plan, which was never implemented because First Steps was managing Student's behavior services in her general education classroom. He had since followed Student, using the daily data gathered by First Steps, and drafting, calculating, and graphing the data every couple of

weeks.

167. Dr. Burkholder reviewed Student's cumulative file, disciplinary record, attendance record, historical assessments, and behaviorally related IEP goals and objectives. He interviewed Ms. DeMartini and Ms. Buchanan regarding Student's noncompliance, stereotypy, eloping and dropping to the floor, behavior reinforcement procedures, and increasing touching and violations of personal space.

168. Dr. Burkholder conducted six observations of Student, taking detailed notes. Student's observed behaviors were strikingly similar to those observed by Ms. Corona, Ms. DeMartini, and Ms. Dickinson. He provided a detailed narrative of a December 21, 2016 observation in his report. Student consistently tried to wander about the room, had serious limitations in attending and following directions in general, flopped to the ground when the aide blocked Student, and ignored a peer's repeated attempts at communicating even when prompted to respond.

169. The class had a holiday party consisting of pizza time. The aid used text based directions on the white board to provide social prompts to encourage social conversation with Student's nearby peers. The first time, the aid was unable to get Student to comply and read the script from the board; the peer walked away. A second time, the aide was able to get Student to read the script from the white board and engage a peer, but it required five or six prompts and an offer of two stars as a compliance reward. After reading the questions on the board, Student turned away from her peer, who walked away when Student ignored the peer's answer. Student followed the whiteboard directions to have social conversation with a third student. A movie was put on for the class to watch while eating, Student spontaneously got up, went to Dr. Burkholder, said "Christmas," "gifts, Christmas," "stocking," and "I like chips." Student did not respond to his question of what kind of chips she liked. Instead, she engaged in visual stereotypy, which he blocked. The aide then stopped Student when she tried to

leave the area.

170. Dr. Burkholder charted and analyzed data on the frequency of the behavior plan's targeted behaviors, which First Steps gathered daily. Student's violations of the personal space of others had steadily risen since his 2015 behavior assessment, from .75 times per hour to 1.87 per hour. Some days, especially following a holiday breaks, the violations exceeded four per hour.

171. The frequency of Student's attempts to leave the classroom had decreased since 2015 from about once every two hours to once every three and a half hours. The rate of Student falling to ground trended downward, with frequency spikes of once an hour following holiday breaks. Finally, the percentage of non-compliance in the classroom had improved, to about 20 percent by January 2016.

172. Though some of Student's target behaviors improved, Dr. Burkholder was deeply disturbed by Student's heavy reliance on constant prompting, lack of independence, and deficient functional and adaptive skills. For example, he observed the aide asked Student to wash her hands because she had been scratching her behind, on and off, for about 10 minutes. The aide then had to prompt Student through the hand washing routine, gesturing to turn the water on, repeatedly prompting to use the soap, and modeling to rub her hands together and rinse.

173. Dr. Burkholder opined that Student needed a balance between prompting and independence. Student did not function independently, even for simple tasks like walking to another room without an aide or washing her hands. The lack of independence was strikingly deficient for a 10-year-old child. He emphasized the utility of Student learning to do simple tasks and acquiring life skills. He recommended that the IEP team discuss the value of independence in planning program for Student, who he found to be nearly 100 percent reliant on aide support.

174. Dr. Burkholder proposed an updated behavior support plan to address the

targeted behavior. He identified intervention for antecedent behaviors, including functionally equivalent replacement behaviors and reactive strategies. He proposed interventions for the increasing target behavior of touching others and reinforcement suggestions for the token reward system. He proposed two additional behavior goals related to Student's violation of personal space and falling to the ground/elopement.

175. Dr. Burkholder recommended that Student's behavior services be transitioned from the nonpublic agency First Steps to District behavior personnel. Two of the District's four board certified behaviorists also held doctorates, all of whom were qualified to design and monitor Student's behavior intervention plan, gathering data through ABA trained District aides. District behavior personnel have the advantage of working with other District staff, participated in consistent training, and had more communicative opportunity. In this regard, he proposed a transition plan from First Steps to District behavior services.

176. Though behavior alone may not have required Student's removal from a general education classroom, Dr. Burkholder emphasized the need to consider other equally significant factors in determining placement. He noted a need to consider if Student was able to access general education curriculum. He also questioned whether Student could obtain functional independence in a general education classroom where she required constant prompting.

177. Student's IEP would identify Student's functional needs and a special day class would practice functional independence skills daily. Though some functional skills might be acquired in another setting, like home, District was obligated to address Student adaptive and life skills in the educational environment. If Student were able to naturally acquire such skills like washing her hands, she would have already done so. Student required specific functional skill training and, in Dr. Burkholder's opinion, such a need alone would be sufficient reason to move Student to a special day class setting,

with separate opportunities to interact with typically developing peers.

Adapted Physical Education

178. Student's adapted physical education teacher, Haris Demidzic evaluated Student for her January 2017 triennial IEP and testified at the hearing. He worked for District for six years and had credentials for single subject teaching and adapted physical education. He used standardized instruments and observations for his evaluation.

179. Mr. Demidzic had worked with Student for two and a half years and gave Student 15 minutes of one-to-one adaptive physical education each week. He also provided 60 minutes of consultation, including with the general education physical education teacher. Student also had 45 minutes weekly in general physical education class. Student lacked overall strength. She had difficulty following multistep activities so Mr. Demidzic would break down the activity into accessible simple skills. His sessions with Student did not typically involve others. Student's aide would be present, writing data on a clipboard but, on occasion, he would get Student's aide to participate in an activity. Sometime, another child would join for a few minutes, but Student had difficulty maintaining personal space.

180. Mr. Demidzic provided present levels of performance, noting that Student had made some progress on her IEP goals. He found that Student continued to qualify for adapted physical education because she exhibited delays in gross motor skills.

Occupational Therapy

181. District occupational therapist Gina Wilburn performed an occupational therapy assessment of Student for the January 2017 triennial IEP. She recorded the results in a written report. She had been providing Student with two 30-minute occupational therapy sessions for fine motor skills associated with her handwriting. Ms.

Wilburn concluded in her assessment report that Student no longer needed direct occupational therapy, should use assistive technology to support her written work, and receive consultation support for the classroom.

JANUARY 2017 TRIENNIAL IEP

182. District convened Student's triennial IEP team meeting on January 2, 2017, holding five additional team meetings on February 1, 2017, February 6, 2017, March 8, 2017, April 19, 2017, and November 14, 2017. If an IEP team member could not attend or needed to leave a meeting early, District obtained written consent from Mother. The necessary IEP team members attended and participated in all six meetings. District provided Parents with copies of all reports before the meetings.

183. Program specialist and school psychologist Kathryn Stevenson attended all of Student's IEP team meetings since January 2016 as the District representative. As a program specialist, Ms. Stevenson supported special education services for District's elementary school students. She assured that assessments were thorough and that IEP teams fully considered the appropriateness of FAPE offers. She attended higher profile IEP team meetings, which involved findings of ineligibility, changes of services, nonpublic agencies, and unsigned IEP's. She assured quality control throughout the assessment and IEP process. Ms. Stevenson testified at the hearing. She had a bachelor's degree in psychology, and master's degrees in educational psychology and educational counseling. She held credentials for school psychology (and related fields like program specialist) and school counseling. She worked at District as a school psychologist for seven years and had been a program specialist for four years.

184. Ms. Stevenson became involved with Student and Parents during her first year as a program specialist because Student's IEP's were unsigned, a settlement agreement dictated placement and services, and a nonpublic agency provided behavior aides and programming. She reviewed all of Student's District and private assessments

and evaluations and participated as an IEP team member, including goal drafting and the formation of District's offers of FAPE. Ms. Stevenson's education, credentials, and experience qualified her to participate in formulating Student's educational program.

185. Ms. Stevenson frequently observed Student and agreed with District IEP team members that Student did not have meaningful social relationships in her general education classroom inclusion placement. Mother strongly disagreed with District's view that Student lacked meaningful social relationships. Mother asserted that Student benefited from the social and behavioral modeling of her general education peers. Mother referred to notes from Student's peers as evidence of social relationships, but these primarily dealt with a weekly class assignment of writing positive notes to the class member who made a presentation about themselves. Mother also cited kind and supportive emails from classmates' parents. These evidenced that Student's classmates and their parents were kind and caring but did not represent peer-to-peer reciprocal social relationships.

186. Student's IEP team had multiple meetings. Mother was very thorough, questioning District assessors and often challenging their findings. Mother regularly cited to her own observations of Student in the classroom or at home as more indicative of Student's behavior, social interaction, and academic performance. Sometimes, Parents retained outside evaluations between meetings to counter District's findings. Parents never agreed to a District IEP. They had on occasion agreed to goals, but only after six months or more following the initial meeting, allowing only a few months to implement one-year goals.

January 23, 2017: 1st Triennial IEP Team Meeting

187. Participating at the initial meeting were: Mother, Ms. Stevenson, Ms. Dickinson, Ms. Wilburn, Dr. Burkholder, Mr. Demidzic, Ms. Chiarelli, Ms. Corona, Ms. DeMartini, resource specialist Elizabeth O'Brien, Ms. Costa, and Ms. Buchanan. Ms.

Corona presented the psychoeducational report and the IEP team thoroughly discussed the findings and recommendations. Mother thought that Student's standardized scores were deflated and did not accurately reflect Student's capabilities and behaviors. She was upset that Ms. Buchanan was said to have used the term "rule breaking" instead of "noncompliance." Ms. Buchanan and other team members stated that Student did not cheat but she did engage in rule breaking. Mother said she observed Student several times over the prior year and she did not observe a lot of the behaviors that allegedly interfered with Student's learning.

188. Mother adamantly objected to the report's recommendation of intellectual disability eligibility. She said that the report described Student as very stupid and depressed, but Student was a very happy girl. Mother said the report was inaccurate and biased. The team informed Mother intellectual disability would be discussed when the team reviewed eligibility at a future meeting. Ms. Dickinson presented the speech and language section of the report and the meeting was adjourned for the day.

189. Mother's freedom and ability to question and challenge the District team members at the meeting was not in any way obstructed. The District IEP team members and Ms. Buchanan patiently and thoroughly responded to Mother's questions and accusations.

February 1, 2017: 2nd Triennial IEP Team Meeting

190. The IEP team assembled for their second meeting on February 1, 2017. Ms. DeMartini presented and reviewed Student's academic assessment. Mother generally disagreed with the findings. For example, in response to the finding that Student cannot work independently, Mother claimed that Student was able to complete tasks at home in an ABA setting. Ms. Buchanan reminded Mother that Student was not being given at home the type of work for which Student was evaluated. When Ms. DeMartini stated that Student required constant prompting to refocus, stay on task, and complete work,

Mother responded that Student could independently complete worksheets. Ms. Costa disagreed, explaining that Student needed the paper taped down, multiple reminders to look at the paper, prompting to stay focused, and prompting for each step in doing a worksheet. Ms. Buchanan agreed with Ms. Costa.

191. Dr. Burkholder noted that Student needed multiple, step-by-step prompts to complete toileting routing, washing her hands, and other functional skills. Mother responded that Student's functional skills were better than the previous year but the rest of the team disagreed. Further discussion of the psychoeducational report was reserved for a future meeting. Ms. Wilburn presented her occupational therapy report and Mr. Demidzic presented the adapted physical education report. Mother reserved her comments and questions for another meeting.

192. The IEP team listened at length to Mother's statements regarding her concerns about one and three quarter hours into the meeting. She claimed she never said that she was concerned about Student's ability to access the general education curriculum. She claimed that Student required additional supportive services and a "bridge" between her learning and the content of the general education classroom. She objected to Ms. Buchanan completing the parent edition of the rating scales and, therefore, claimed her answers were incorrect and should not be considered. Ms. Corona said that the "parent report" was also given to caregivers and was reflective of what occurred in the home setting so the team could consider multiple perspectives. Mother argued that the parent's perspective should hold more weight and again intensely disagreed with the conclusion that Student met intellectual disability eligibility criteria.

193. Mother freely challenged the assessments and the District IEP team members and Ms. Buchanan patiently and thoroughly responded to Mother's questions and accusations. The IEP team concluded the meeting and scheduled a third session.

February 6, 2017: 3rd Triennial IEP Team Meeting

194. Dr. Burkholder presented his functional behavior assessment and behavior support plan at the February 6, 2017 IEP team meeting. Mother said that when she personally observed Student at school during the prior week, Student did not have the behaviors referred to in the report. Mother said Student's behavior plan had improved Student's behavior.

195. The team discussed and agreed that Student met the special education eligibility criteria for autism and did not qualify for specific learning disability. Student met the criteria for speech language impairment and other health impaired, as a result of her autism. The District team members agreed that Student met the criteria for intellectual disability eligibility.

196. Mother disagreed with intellectual disability criteria and accused Ms. Corona of being subjective and biased. Mother said the report inaccurately portrayed her daughter and that the responses were not balanced. She felt that only the lowest ratings were reported and that her daughter was described as "very stupid and low-functioning" to the reader. Mother referred to Dr. Grandison's report, which said Student could not be intellectually disabled. Ms. Corona explained that she carefully considered Dr. Grandison's report and found that Dr. Grandison only used one measure of cognition, did not report Student's test scores, and did not address adaptive skills. When Mother claimed that Dr. Grandison used adaptive measures, Ms. Corona correctly stated such measures were not in the report. Mother thought it unfair of the IEP team to criticize Dr. Grandison's report when she was not present, but Ms. Corona said Dr. Grandison did not respond to multiple attempts to make contact. District team members concluded Student met the intellectual disability eligibility criteria.

197. The team reviewed prior goals' progress reports, which District provided Mother the prior week. Parents did not sign the January 2016 goals for implementation

until August of 2016, which meant Student had less than 6 months to work on her goals, a likely factor on whether Student met her goals. Student made progress on all her prior goals but only met one out of 28 goals.

198. Dr. Burkholder, Ms. Dickinson, and Ms. DeMartini presented proposed goals. Mother asked about adding a goal about writing topic sentences. Ms. DeMartini explained such a goal would require a higher skill level than where Student was working. Ms. Costa said determining Student's skill level was challenging because Student's behavior program rewards were based on compliance and completion, not correct completion. Mother requested, and the team drafted, a goal in the area of retelling. The goals would be further discussed at the next session. The meeting concluded.

March 8, 2017: 4th Triennial IEP Team Meeting and Dr. Gardner's Report

199. Mother emailed a copy of Dr. Gardner's new, undated, 22-page report a half hour before the scheduled commencement of the March 8, 2017 IEP meeting. The report was a review of progress on the 2016-2017 IEP goals and objectives and a review of the proposed 2017 and 2018 goals and objectives. Upon Mother's arrival, the team agreed to allow some time to read and consider Dr. Gardner's report before opening discussion.

200. Dr. Gardner testified at the hearing. Dr. Gardner was a well-known inclusion proponent and professor at California State University, Sacramento. She had taught and published on the subject of inclusion for decades. She believed that Student should continue to be fully included in a general education classroom, with supports. Dr. Gardner reviewed the goals as if Student would continue to be fully included in a general education classroom. However, the proposed goals were drafted for the 2017-2018 IEP's offered special day class placement. She agreed that the IEP team needed to make decisions based upon data and assessments, using a multidisciplinary approach regarding Student's program. Dr. Gardner did not administer any testing instruments for

her goal review.

201. Dr. Gardner prefaced her review with two lists of "IDEA: Characteristics" one for annual goals and the other for short term objective benchmarks. She could not specify where the IDEA identified her listed characteristics, indicating the lists were based on her view of IDEA's best practices.

202. At hearing, Dr. Gardner said that she applied the "stranger test" to each goal, which meant that anyone looking at the goal would understand the goal's purpose, what was observable, and how the goal was measurable. Mother told the IEP team that Dr. Gardner had copies of all the triennial assessments and the entire IEP but Dr. Gardner, at hearing, did not indicate that she reviewed any assessments or the entire IEP document. Dr. Gardner acknowledged that those people implementing the goals should be familiar with Student's IEP.

203. Dr. Gardner's report included copies of each 2017-2018 IEP's proposed goal, followed by some questions and comments. Dr. Gardner listed questions regarding the goal's baseline description (qualitative and quantitative). Many questions sought definitional or descriptive detail. For example, a questions asked for an example of an "unfamiliar listener" or what was a "mixed set" of addition and subtraction problems. Many of these questions were answered elsewhere in the IEP document or were terms of art, whose meaning was clear to the speech pathologist or special educator implementing the goal and as described to Mother. Some of Dr. Gardner's other questions disclosed an unfamiliarity with Student's assessments, such as asking what methodology was used when Student was assessed regarding her ability to independently retell the beginning, middle, and end of a story.

204. The IEP team addressed some of Dr. Gardner's observations, such as misspellings or differing forms of measurement in the baseline and the objectives and goals (e.g., percentage in one while frequency in the other). For example, Dr. Burkholder

said he would correct some typos, add some short-term objectives, and clarify “per day” vs. “per week.” Similarly, Ms. Dickinson would correct identified typos in the proposed speech and language goals, with which Dr. Gardner appeared to agree. Most of Dr. Gardner’s comments were questions, which were answered in the triennial evaluation. Ms. DeMartini said she would define reading levels in specialized academic instruction goal and correct typos and add clarifications to the times goal, money goal, and a math goal and review four other goals. Mr. Demicsk would look into the use of a playground ball in the adapted physical education goal and would add a “gripping forward” goal. The report ended with a table of the 2016-2017 IEP goals, the District’s finding of whether the goals were met, with short notes (often just six words), with some comments by Dr. Gardner.

205. Mother requested that old goals be moved forward. Dr. Burkholder explained he reduced the number of Student’s behavior goals, because Student had not met some older goals that had been continued for many years. Ms. DeMartini said Student would benefit from having fewer goals, so the goals can be targeted, and Student could receive more in-depth instruction. Some of the older goals were properly discontinued due to a lack of progress by Student for two to three years. Other goals were properly suspended in order to focus on building Student’s foundational skills, which were needed before continuing the other goals on which she had not made progress.

206. The meeting continued with a discussion of Student’s ability to access the curriculum in the general education classroom. All general education teachers and staff were trained in Universal Design for Learning. Universal design was a set of principles aimed at designing learning practices that provided students of varied abilities, skills, and interests, to access the grade level curriculum. By designing practices that teach “to the edges,” not just to the “average,” instruction captured all capable students. Universal

learning practices included the design of “access points,” enabling students who otherwise would not learn to engage with the teaching.

207. Ms. Costa explained that Student was not able to sufficiently use her significantly modified access points to gain educational benefit from her general education third-grade environment. Ms. Costa and DeMartini modified all of Student’s work in every content area. Student’s strength in decoding and spelling did not enable her to work the curricular vocabulary; she was unable to correctly write the vocabulary words in a sentence. She was unable to correctly spell the vocabulary words on a test in isolation. At the time, Student was working on five second grade vocabulary words, all nouns, with which she was able to write simple sentences.

208. Student could not access any of the third-grade math curriculum. Student had been working on first grade math curriculum for two years but did not make progress. She required substantial support to complete a kindergarten level worksheet. Student required significantly modified and individualized math worksheets at her level, so she could do math at the same time as her third-grade peers. Kindergarten level math was Student’s challenge level. Student currently took two days to complete a worksheet, working with her one-to-one aide. Ms. Costa took time away from her classroom to create additional work and to plan and devise an entirely modified curriculum for Student.

209. Student was reading at the primer level and was not participating in any core literature lessons with the other students in the classroom. Student worked on modified books and often needed to step outside the room to do her reading. The third graders were writing and citing textual evidence from their core literature lessons. Student could not access these assignments. She could not track the chapter book because there were no pictures. Student was in the room for science lessons, but she was unable to do any of the same activities as her peers. Student was usually absent for

history, which usually occurred between 2:00 and 3:00 p.m. and Student left each day at 2:00 p.m. Ms. Costa emphasized that Student did not do any work at the third-grade level in any subject, at any time of day.

210. The IEP team then addressed Student's service options, beginning with Student's inclusion placement in a general education classroom. Mother told the IEP team that Student benefited socially and educationally from having access to typical peers. The District team members disagreed, stating that the general education placement did not provide Student with enough academic benefit because she required a higher level of specialized academic instruction. In order to benefit from the general education inclusion, a student needed to be able to attend and participate at some level to group instruction and discussion, from the general education teacher. Student did not access instruction from the classroom teacher at all. Also, Student was extremely prompt dependent in every aspect of her inclusion environment – academically, behaviorally, and socially -- for any task. Finally, Student's third-grade peers were not providing reciprocal social interaction that was benefitting Student and Student was not peer referencing her classmates academically or socially.

211. A special day class built additional supports into its programs, for behavior, language and social skills. A mild-to-moderate special day class had a smaller educational setting, more classroom adult support, and access to more specialized academic instruction. Positive peer models were socially accessible. The mild-to-moderate provided a blended program with some embedded services, like occupational therapy or speech and language. However, a mild-to-moderate special day class would not be able to address Student's continuing need for small group learning. She acquired new skills in a one-to-one setting and was not able to work independently. Further, a mild-to-moderate program did not work on functional life skills and had an academic level that was higher than Student's ability to access.

212. A moderate-to-severe special day class would be able to address all of Student's individual needs at her own pace and level. Student would work on daily functional skills and adaptive living skills. The class could focus on increasing Student's independence and, while keeping her safe and focused, slowly fade her dependence on adults. Student would be able to meaningfully participate in the classroom setting for a long duration of her day. The intent of placement in a moderate-to-severe special day program was to give Student an opportunity to access curriculum and activities at her level. Though Student would have less percentage of time with typical peers when compared to the general education placement, Student would have substantial opportunity to meaningfully engage socially with typical peers. Parent had observed the moderate-to-severe class, which she found to be very noisy and which included students with negative behaviors, like shouting. Ms. Stevenson explained that special day classes have a wide variety of student capabilities and, for Student, some classmates will perform higher and some lower.

213. Mother wanted school to focus on academics and not functional skills. She did not believe the moderate-to-severe class was appropriate for Student. She wanted further supports for Student in the general education class by way of adding resource specialist services. Ms. O'Brien explained that a resource specialist worked with children who demonstrated near grade level skills. Student's specialized academic instruction needs could not be addressed by resource services.

214. District IEP team members reviewed District's proposed service offer, which was based upon Student attending a full day of school. The District team members added intellectual disability as an eligibility. The IEP team offered placement in a moderate-to-severe special day class, with intensive specialized academic instruction, for 1,120 minutes per week. Student would be in general education for 575 minutes per week, consisting of 75 minutes of recess, 200 minutes for lunch, 40 minutes for music,

40 minutes for physical education, 30 minutes of library, 40 minutes for additional physical education or game day; and 150 minutes in general education classroom during “no new” instruction time, so Student could participate with peers in the general education classroom environment.¹⁰

215. The IEP team offered speech services three times per week, for 30 minutes a session. For two sessions, Student would be pulled out for individual service; the third session would be pushed into the class to assist Student in practicing her language skill with her peers. The IEP team also offered behavior services, one hour per week for four hours of consultation services per month. Adapted physical education was 60 minutes per month of individual service and 60 minutes consultative.

216. District offered a District one-to-one aide for 1800 minutes per week in all settings. The IEP included a proposed transition plan from the nonpublic agency to the District aide. The inclusion specialist would support Student in the general education environment, by providing four hours a month for training of aides and consultation with general education teachers. District would provide 30 minute a month of assistive technology consultative services. Occupational therapy services would be 30 minutes of consultation per month. Mother disagreed with stopping direct occupational therapy to Student. The meeting was adjourned to a yet-to-be-scheduled fifth session.

April 19, 2017 Triennial IEP Team Meeting

217. The IEP team met again on April 19, 2017. They discussed the IEP’s proposed accommodations and modifications. Accommodations changed *how* a

¹⁰ “No new instruction” time was when the general education teacher was not teaching, and the pupils were working independently on a skill or packet. Student would then be with general education peers in a classroom setting.

student learned the material. A modification changed *what* a student was taught or expected to learn. Student was currently receiving modifications for all content areas throughout the school day. Student was receiving most of the accommodations. Other proposed accommodations were embedded in the recommended moderate-to-severe special day class placement.

218. Student would participate for the first time in state testing as a third grader late in the school year. Student could take one of two state tests -- the Smarter Balanced Assessment Consortium assessment or the California Alternate Assessment -- because she was included in the general education classroom. The District IEP team members strongly recommended that Student take the alternate assessment because the smarter balanced assessment would not permit Student to access the same level of support she used in the classroom. Parents agreed to independently research the tests and available accommodations before making a decision.

219. The team agreed that Student showed regression across all areas over summer breaks and, therefore, found Student eligible for extended school year. District members recommended Student attend extended school year for summer 2017 in the moderate-to-severe special day class, with 45 minutes a week of speech services. Transportation would be provided since the summer classes were not being offered at Student's home school.

220. District IEP team members recommended that Student begin attending an entire school day. Student was currently missing two to three hours of school per week because every day, she arrived late and left early at 2:00 p.m. Mother said she did not think the additional time in school was important at that time.

221. The team reviewed any adjustment to goals based upon Dr. Gardner's review. Changes were made the speech and language goals, aligning baseline language to match goal language, adjusting mastery and baseline target percentages, identifying

use of a pacing chart for rate of speech, and identifying the setting in which the goal would be worked upon. Six specialized academic instruction goals were adjusted by aligning baseline and goal language, identifying verbal responses, clarifying reading level, adjusted hourly markings, and adding information about visual supports. The team added information regarding accuracy level and number of required prompts to independence goal number one. The team added independence goal number two, which replaced a safety sign goal with a hand raising goal to gain attention. For adapted physical education, the team continued the previous year's throwing goal, discontinued the visual tracking goal and replaced it with a catching goal.

222. Mother wanted more goals. Mother felt Student would benefit from working on more skills, even though Student did not achieve her previous goals. Mother believed District was underestimating Student's independence based on Mother's observation where Student opened a container, ate independently, and closed the container. She reiterated her disagreement with the intellectual disability eligibility and with the placement offer. Ms. Stevenson said that the IEP team would send the IEP document home for Parents to review.

2017-2018 SCHOOL YEAR - FOURTH GRADE

223. Student attended fourth grade in general education teacher Sarah Phillips' class at Amador for the 2017-2018 school year. Parents did not agree to any portion of the January 2017 IEP. District provided services and supports in accordance with the June 2014 agreement. Student continued to receive aide support and behavioral services from First Steps.

224. Ms. Phillips had a master's in education and held a multiple subject credential, kindergarten through eighth grade. She taught for 17 years, including six years for the District and three years at Amador. Ms. Phillips was a leadership teacher and a liaison between grade level teachers and District administration. She supported

incoming teachers, served on English language art committees, and was the science lead teacher. She taught fourth grade for three consecutive years, nine years total. She testified at the hearing.

225. Ms. Phillips explained at hearing how fourth grade academics differed from prior school years. Common core standards required group effort in all subjects. Pupils worked together, sharing their strengths, personally engaging and expanding views of seeing problems, and seeking solutions in different ways. Fourth grade English language arts were less about meeting standards and more about inferencing, problem solving, identifying characters' points of view, and opinion, informational, and narrative writing, which often included research. Third grade students read to develop phonics; fourth grade students were expected to read for comprehension. Third grade students were still learning to read; in fourth grade, students were reading to learn. Fourth grade math included simplifying and manipulating fractions, measuring angles, and engaging geometric shapes. Reading was foundational in common core math. Narrative math problems did not merely seek numerical answers but also explanations of how the answers were formulated, often in a real-world context, with more nuanced solutions.

226. Ms. Phillips had 29 pupils in her fourth-grade class. Ms. Phillips averaged having two students with IEP's in her class each year. She believed that pupils with IEP's could benefit from general education inclusion. A fully included child should be able to participate in most of the curriculum, with modifications for accessing as a bridge. The included child should be able to have reciprocal social interactions, ask questions about the curriculum, and receive instruction from the general education teacher. She had great success with pupils with IEP's and, the prior year, had an autistic pupil who grew socially and academically.

227. Ms. Phillips first met Student at the beginning of the 2017-2018 school year. She was familiar with Student's IEP and goals. Ms. Phillips did not believe that

Student's inclusion was successful. Student was not able to access any of the fourth-grade curriculum and did not academically or socially connect with the other fourth grade students. Ms. Phillips closely worked with the inclusion specialist, communicating regularly, modifying Student's curriculum and strategies. Student was, at best, working on first grade math and language arts, causing Ms. Phillips to seek assistance from first grade teachers in modifying Student's material. Student's workbook resembled her classmates' workbooks, but hers contained first grade materials. Student did not access any instruction from Ms. Phillips.

228. Mother had Ms. Phillips review at hearing a number of vocabulary quizzes by Student, which proved to be only partially representative of Student's vocabulary work. Ms. Phillips testified that Student's average for the year on the class vocabulary quizzes was 37 percent. Mother provided some grammar worksheets completed by Student, which had been modified by the inclusion specialist and which Mother cited as an indication of Student's ability to perform. However, the worksheets demonstrated that Student was performing at a marginalized level on highly modified work. At Mother's request, Ms. Phillips reviewed other assignments done by Student. None were at curricular level and the writing was done with the aide's prompting and direction.

229. Student's classmates were supportive but were unable to engage in peer-to-peer dialogue. They would talk to Student's aide or leave. Student was included in some group work, in which the aide persistently interacted, guided and prompted. Student often did not participate. Student's group classmates were typically kind, offering redirection, assistance, or encouragement. However, the other class groups would soon make progress on the problem or project, ahead of Student's group, which was investing time and energy in trying to engage Student.

230. Student's presence was disruptive to the fourth-grade class. Though Student was not falling to the ground as often, she was vocalizing more. Student would

suddenly call out another pupil's name, for no apparent reason, causing confusion. Student would start crying or uttering. Student took frequent breaks and left the classroom through the door near her desk, every five to 10 minutes, and would then return a few minutes later. Student's aide supported and interacted with her throughout the day, constantly providing vocal, physical, and written prompts. Student had two or three aides a day, sometimes overlapping as they changed shifts. The aides' supervisor would also come to the class on occasion, talking and training. Ms. Phillips regularly encouraged the class to practice ignoring the daily distractions, redirecting them to their own studies.

231. Ms. Phillips frequently interacted with Mother, through email and in person. Since the beginning of the school year, Mother had come into the classroom for seven to eight scheduled observations, with a school administrator, which would last an hour. Mother came to the classroom unannounced a number of times, which was distracting because she had to be asked to leave. Mother's presence was disquieting to Student, who wanted to talk to Mother. Mother had taken pictures in the classroom, which disturbed the class; the school vice-principal formally informed Mother she could not photograph in the class.

232. The First Steps' aide provided Mother with a "Daily Log" which summarized Student's workday. The log form asked for information on the math, language arts, and spelling words Student had worked, with a place for special notes regarding behavior and what Student could work on at home. These log sheets provided encouraging observations and, generally, were upbeat narratives about Student's day, unless there were unusually difficult behaviors. Mother requested and designed the logs. Ms. Buchanan emphasized that the log sheets were not used by First Steps in providing, revising, or strategizing behavior services but were for Mother only. The log sheets were not part of Student's behavior plan and were not reliable sources of

information regarding Student's academic performance, behaviors, or prompt dependence.

233. Ms. DeMartini became a District program specialist in August 2017. Therefore, Student's one-to-one specialized academic instruction was provided by resource specialist Elizabeth O'Brian. Ms. DeMartini continued providing inclusion specialist services for Student until Ms. Shellhammer started as the new elementary inclusion specialist a few weeks into the school year. Ms. DeMartini then supervised Ms. Shellhammer for two months. Thereafter, Ms. Shellhammer and Ms. O'Brien provided the inclusion services and specialized academic instruction. District had informed Mother of the transition plan for the services. District provided all inclusion services and specialized academic instruction as required by the 2014 settlement agreement, during and after the changeover from Ms. DeMartini.

November 14, 2017 Triennial/Amendment IEP Team Meeting

234. The IEP team convened a meeting on November 14, 2017, at Mother's request. Mother called the meeting to discuss the goals. Parents had not allowed implementation of any portion of the January 2017 triennial IEP offer.

235. Mother requested a report on Student's progress on her goals in adapted physical education, speech and language, occupational therapy, and specialized academic instruction. Mr. Demizdic, Ms. Dickinson, occupational therapist Taryn Clough, Ms. O'Brien, and Ms. Shellhammer provided updates. However, Parents had never approved the January 2017 triennial IEP goals and, as a consequence, they could not be fully implemented. Further, Mother demanded that the team review and explain the behavior goals. She also wanted to add behavior goals. Yet, the IEP's proposed behavior goals were for a special day class placement. Since Parents did not agree to the placement and Student remained in the general education classroom, the nonpublic agency needed to address the behavior goals. Also, if Mother wanted the pathologist to

support Student's goals, Parents needed to agree to the proposed speech services, due to the social and interactive nature of the goals. District members informed Mother that present levels of performance and goal progress would be presented at the January 2018 IEP.

Parents' Request for Independent Educational Evaluation

236. Parents' challenged the appropriateness of the January 2017 triennial multidisciplinary psychoeducational assessment and requested that District fund an independent psychoeducational evaluation. On January 22, 2018, Ms. Chiarelli wrote Parents, stating that District declined their request and would be filing a due process request to have the January 2017 assessment deemed legally appropriate.

JANUARY 2018 ANNUAL IEP

237. District convened Student's annual IEP team meeting on January 23, 2018. The following team members attended: Mother; Ms. Dickinson; occupational therapist, Taryn Clough; Dr. Burkholder; Mr. Demidzic; Ms. Chiarelli; Ms. Stevenson; Ms. Shellhammer; Ms. O'Brien; Ms. Phillips; Ms. Buchanan. All requisite IEP team members attended and participated.

Present Levels of Performance

238. The team updated Student's present levels of performance, which were similar to those identified following her 2017 triennial reassessment. Parent reported Student had no health issues at that time. Student was a verbal communicator who enjoyed dancing and imaginative play. For communication development, Student was able to follow two-step directions in the speech therapy setting, but could not generalized and follow directions in the classroom, which was adjudged more a consequence of her noncompliant behavior than understanding directions. She had

strengths with decoding words, so written prompts were useful. Receptively, she can answer basic why and how questions following short paragraph that are read aloud, but her accuracy decreased when question became more complex. Though she can produce sentences from five to eight words, she typically answers using one or two words, requiring prompting to use more words. She used script to request, comment, and exchange greetings, which required prompting. Though having received individual speech therapy four times a week for three years, Student's generalization of her skills was poor across various environments and with her peers. Socially, Student must be prompted to maintain appropriate proximity with others, often touching or grabbing others. During activities, Student requires aide support with behavior and reinforcement charts to keep engaged. Student's speech was difficult to understand, primarily due to her fast speaking rate, which can be slowed by visual cues. She continued to have articulation needs. However, articulation therapy and oral motor exercises produced inconsistent results due to Student unwillingness to repeat sounds accurately and accept oral cues.

239. Student was independent in many fine motor skills, like manipulating fasteners such as buttons, snaps and zippers. She could cut with scissors. She continued to require prompting to complete handwriting on assignments. When asked to copy and write one letter at a time, she had fair to good sizing, spacing, and overall legibility. When writing multiple sentences, Student rushed to finish quickly and legibility decreased. Student demonstrated basic gross motor skills. She was in the beginning stages for kicking and catching. Her throwing was at the "hurling" stage (slight trunk rotation, slight back swing, shoulder supplied force, no follow-through). Student recently started to step forward with the opposite foot when throwing, producing more power. She made improvements on both of the adapted physical education goals.

240. Student's noncompliance was at a rate of approximately 1.6 times per

hour, with an increase to 2.75 times per hour following holiday breaks. Elopement behavior varied, having initially increased at the beginning of the school year. Her rate of falling to the ground increased since the beginning of the year. She continued to engage in personal space violations with the aide and others, more so after holiday. At hearing, Ms. Buchanan reviewed First Steps' data-based report of Student's behaviors from August 2017 through March 2018, which showed that maladaptive behavior improved but noncompliance remained the same. Ms. Buchanan noted that Mother had misinterpreted First Steps' data graphs, which demonstrated that Student's behaviors persisted.

241. Student required prompting and reinforcement throughout her day to complete academic and functional tasks. She was unable to complete work independently. Student had significant needs in all areas of adaptive functioning. The assessments indicated that her overall adaptive skills fell at or below the first percentile. The rating scales had Student's adaptive skills composite in the clinically significant range, with elevated findings on social skills, study skills, functional communication, and leadership scales. Student was able to complete the morning and afternoon routines, use school materials without injuring others, drink liquids without spilling, and had clean hair and fingernails. Classroom observations by examiners, teacher, and aid supervisor confirm that Student required substantial support, with significant numbers of prompts and reminders, to complete most tasks. Student's maladaptive behaviors interfered with her learning in the classroom as well as with her accessing social reinforcement from peers and adults.

Progress on Prior Goals

242. The team reported progress on goals. Parents did not approve the January 2017 goals for implementation until December 13, 2017.

243. Mr. Demidzic explained that Student did not meet her adapted physical

education goals, but made progress on both. Ms. Clough reported Student did not meet her occupational therapy writing goal, noting that Student's legibility was primarily affected by her behavior and noncompliance and that Student did not present with a fine motor deficit. Ms. Buchanan reported progress on two short term objectives for her two behavior goals. Ms. Dickinson noted that Student met two speech goals, and that one of the articulation goals should be discontinued. Student made some progress on the remaining speech goals. Ms. Shellhammer reported that Student did not meet any of her academic goals and neither of her two independence goals. Student met three of her 20 goals.

Review of IEP's Proposed Goals

244. The team reviewed the IEP's 20 proposed goals for the following year. Ms. Buchanan discussed the three continuing behavioral goals (Behavior 1, 2, and 4) and a new proposed behavior goal regarding Student's stereotypy (Behavior 3). Team discussed the two independence goals (Independence 1 and 2) of following directions and gaining teacher's attention, with the strategy of fading prompting. Ms. Dickinson discussed the continuing speech goals (including social pragmatics) and a new goal regarding rate of speech (Speech 1, 2, 3, and 4). Mother stated that Student initiated and reciprocally played with peers at recess. Ms. Buchanan and Ms. Phillips clarified for Mother that Student was not playing reciprocally at recess. Both Ms. Buchanan and Ms. Dickinson said that Student would benefit from working with peers during speech sessions.

245. Ms. Shellhammer went over the six specialized academic instruction goals. The first English language arts goal (SAI 1) was for writing and basically the same as the prior year. The goal was trellised down from a fourth grade standard portion to a first grade level. The next goal (SAI 2) was a goal for reading comprehension of an early second grade level text, which was measured by five multiple choice comprehension

questions and similar to the prior goal on which Student made some progress. The third English language arts goal (SAI 3) was for reading comprehension of early first grade level text, with reference pictures, measured by Student's retelling of the passage's central ideas.

246. The first mathematics goal (SAI 4) was a first-grade level time goal, measured by Student telling and writing the time to the nearest quarter, half, and full hours, using an analog clock. The second mathematics goal (SAI 5) was a money goal, measured by Student identifying coin values and accurately stating the value of at least two different coins combined. Though referenced as a second grade standard, this skill was considered to be at the kindergarten-to-first-grade level. The third math goal was (SAI 6) to have Student identify two and three-digit numbers, measured by having her assign value for each place of a three-digit number, using pictures, place value charts, and/or place value manipulatives. This was a second grade standard. Mother requested that a math regrouping skill goal be added. However, the team explained that Student needed to first master foundation math skill before progressing to regrouping

247. Ms. Clough reviewed the continuing fine motor occupational therapy goal (OT 2), measured by Student's writing of sentences with proper sizing, spacing, and line orientation of letters and words. She also presented a new goal (OT 1) in keyboarding, encouraging Student to use more than just her two index fingers when typing. Mr. Demidzic changed the baseline for the two applied physical education goals in object manipulation (APE 1) measured by catching a chest pass and in eye hand coordination (APE 2), measured by throwing a tennis ball to a partner, while stepping forward with the opposite foot.

248. Dr. Gardner prepared a written report regarding the 2018-2019 goals for hearing, which she reviewed in her testimony. She again applied the "stranger test," as if a person responsible for implementing and supporting a goal was unfamiliar with

Student and her IEP. She did not read the entire IEP nor the assessments to which present levels of performance and goal baselines referred. Much of her commentary referred to ambiguities that were addressed elsewhere in the IEP and assessments or were understandable to the professionals responsible for implementing the goal.

249. Dr. Gardner again advocated for Student's continued inclusion in a general education classroom, in her report and at hearing. She stated that her review was to assure the goals were written to enable Student to be involved in and make progress in general education. However, she was reviewing goals that were part of an IEP offer that included placement in a special day class. Dr. Gardner's review of the proposed goals was not persuasive.

250. The proposed goals were for January 2019, when Student would be 12 years old and in fifth grade. The IEP's present levels of performance were properly and sufficiently updated by District and nonpublic agency providers, with appropriate reference to formal assessments. The goals' baselines were sufficiently accurate and clear. All proposed IEP goals and their associated short-term objectives were observable and measurable.

251. Four behavior goals were drafted to address personal space violations, falling to the ground, visual stereotypy, and speaking with appropriate volume. First Steps proposed the goals and Dr. Burkholder agreed the goals were appropriate and suggested maintaining First Steps behavior intervention plan.

252. Dr. Burkholder discussed the proposed transition plan from First Steps behavior services to District behavior support. As in the 2017 triennial IEP, he suggested initial adoption of First Steps' behavior plan to facilitate the transition, as well as a plan that provided for overlap between the District and First Step aides for three weeks, with the First Steps' aides' participation fading over time. The transition plan included additional behavior consultation time, from First Steps for one month and 20 additional

hours from District over three months. Thereafter, behavior consultation for aide oversight and consultation would be four hours a month, as the continuing related service.

253. Ms. Shellhammer reviewed the accommodations and modifications for both general education and special day class environments. The team again offered assistive technology support for Student, which she had not been receiving because Parents did not previously agree to the services. The District team members again recommended that Student take the California Alternate Assessment instead of the Smarter Balanced Assessment Consortium assessment for statewide assessments.

254. Ms. Shellhammer discussed the continuum of services, from full inclusion to moderate-to-severe special day class, and the District team members' recommendations for Student. Mother asked what "RTI" meant, which she saw on the resource specialist's schedule. Ms. O'Brian explained response to intervention services. The team recommended extended school year.

255. The team discussed Student attending the moderate-to-severe special day class program as opposed to continuing inclusion in the general education classroom. Ms. O'Brien stated that the nature of peer relationships was changing in general education and she believed that Student would have more meaningful peer relationships in the special day class program. Student would benefit from increased specialized academic instruction on her IEP goals throughout the day. Notably, the general education environment made it difficult for Student to increase her independence because she did not access the class instruction. However, when working at her level within the special day class program, Student would be able to more independently function for parts of her day.

256. The District IEP team members agreed that Student met the criteria for intellectual disability eligibility, in addition to autism. Mother disagreed.

257. The District IEP offer was based upon Student attending a full day of school and included the following placement and services:

- Placement in a moderate-to-severe special day class, with intensive specialized academic instruction, for 1,120 minutes per week.
- Student would be in general education for 575 minutes per week, consisting of 75 minutes of recess, 200 minutes for lunch, 40 minutes for music, 40 minutes for physical education, 30 minutes of library, 40 minutes for additional physical education or game day; and 150 minutes in general education classroom during “no new” instruction time, so Student could participate with peers in the general education classroom environment.
- One-to-one District aide of 1800 minutes per week in all settings.
- A behavior intervention plan with a transition plan from First Steps to District behavior support, which included additional behavior services to support the transition.
- Behavior services of one hour per week/four hours per month for consultation.
- Speech services of three 30-minute sessions per week. Student would be pulled out for two individual sessions; the third session would be pushed into the class to assist Student in practicing her language skill with her peers.
- Inclusion specialist, four hours a month of consultation, for training of aides and consultation with teachers in general education environment.
- Occupation therapy of 30 minutes of consultation per month.
- Assistive technology services of 30 minutes of consultation per month.
- Adapted physical education of 60 minutes a month (weekly 15-minute sessions) and 60 minutes of consultation services.
- Extended school year, in a special day class, with 45 minutes a week of speech

and language services.¹¹

258. Mom commented that she thought Student made progress, especially regarding behavior with her First Steps behaviorists and aides. Mom stated that Student behaved really well in class during her observations. Mom claimed Student was making progress on her grammar and spelling. Ms. Phillips noted that the curriculum was modified; when curriculum was not modified, Student could not access the material.

259. District provided Parents with an amended IEP document dated January 26, 2018, which corrected typographical and grammar errors but was otherwise the same as the January 23, 2018 IEP document.

FURTHER HEARING TESTIMONY

260. Mother, Father, and Student's maternal Grandmother testified at hearing.¹² All demonstrated a deep affection for Student, emphasizing Student's sweet nature and accomplishments. They talked about Student's gifts of spelling and identifying patterns, how she recognized Chinese characters, and that she understood Grandmother. Mother talked about how Student loved swimming and was taking music lessons. Student started music therapy in June 2017 with music therapist Janny Choy, who was complimentary of Student's enthusiasm in participating in the one-on-one weekly sessions. The family was proud of Student and generally believed that District and others underestimated Student's capabilities and abilities.

¹¹ 2018 extended school year was from June 12 through July 6, with shortened school days from 8:30 a.m. to 12:30 a.m.

¹² Grandmother used a Mandarin interpreter and Father was away on business and testified telephonically.

Behavior, Inclusion, Dependence, Adaptive Skills, and Special Day Class

261. Mother wanted Student to remain in the general education class because Student benefited by modeling and interacting with the general education children. She said that peers were very friendly to Student and repeatedly stated that she observed Student having reciprocal social relationships with general education children. She observed the proposed special day class, which she found to be loud and noisy and which had children with more serious behaviors than Student. She feared that if Student left the general education classroom inclusion program, the general education students would stop trying to include her. Parents did not believe Student would benefit by such an environment.

262. Mother recognized at hearing that Student could not access most of the curriculum of her general education peers but was convinced Student had been making academic progress. She distrusted the District's assessments and findings, pointing to worksheets and quiz results that she contended demonstrated Student was improving and performing academically. Mother believed that Student had a different learning style and that she was listening, even though she was not looking at the board or the teacher. Mother claimed that when Student appeared not to be attending, she was actually learning. Mother stated that Student could make even better progress if she remained included in the general education classroom, but received additional academic support like the resource or response to intervention programs.

263. Mother was not as concerned as District regarding Student's functional adaptive skills and independence. She claimed Student could learn her life skills at home, while District should concentrate on academics. Mother also referred to her own observations of Student completing tasks on her own, contrary to what the District observers reported. She cited Dr. Burkholder's functional behavior assessment as indicating improvement of Student's behaviors in the present inclusion program with

First Steps. She referred to Dr. Gardner's 2016 evaluation, 2017 and 2018 review of goals, and Dr. Gardner's recent observation.

264. Dr. Gardner testified that she observed Student in her general education classroom in March 2018 during language arts. She observed Student sitting quietly at her desk, paired with another student, while the general education teacher asked question about the book, predictions about the story, and comprehension questions. Dr. Gardner said the very interactive lesson provided a lot of opportunity for Student to converse with her peer partner, with prompting from her aide or a peer. Student twice raised her hand, once was prompted to share, and was asked a yes/no question.

265. Ms. Stevenson accompanied Dr. Gardner to the March 2018 Student's classroom. She also observed that Student during the group reading, teaching, and story dissection. Student had a modified worksheet during the group teaching. During the partner sharing, the aid kept prompting Student to read something while her two partners waited. Student did not say anything, so aide wrote a word on the whiteboard for Student to say out loud. No reciprocal conversation actually took place.

266. Special education teacher Kristen Drews taught the moderate-to-severe special day class referred to in District's January 2018 placement offer. Ms. Drews had a 2005 master's degree in special education, held special education credentials and had been with District since 2006. She taught in Minnesota from 1995 to 2005, where she realized her professional calling to teach special education. Since coming to District, she taught language and social skills to autistic children, and was a resource teacher. She's been the moderate-to-severe special day class teacher for eight years, six years at Amador.

267. Her moderate-to-severe class has nine students, with five aides, three of which were directly assigned to students; six adults to nine children. The pupils span the moderate-to-severe spectrum and include children with autism, traumatic brain injury,

and intellectual disability. Two of her students are severe, four are moderate to severe, and three are moderate, working on independent skills. The classroom was typically arranged, with desks in a row, computers against the wall, and places for backpacks. Five pupils had personal iPads, primarily for communication.

268. The special day class curriculum was common core standard based but was presented as specialized academic instruction. The class used TeachTown for Social Skills, an evidence-based program grounded in applied behavior analysis. It targets receptive language by introducing vocabulary, complex language skills, questions and verbal directions. One TeachTown component was a daily video-based, interpersonal skill practice. The other was an online, discrete trial system, assessable on the iPads and computers, teaching and assessing a pupil in adaptive behavior, cognitive skills, and language. The program processed each child's data, offering suggestions and altering the program to meet a student's emerging needs. The class was a language rich environment, communicating verbally, with pictures, whiteboards, and scaffolding. Students were challenged throughout the day to ask and seek, practicing their communication exchange.

269. A typical day began with morning meetings that looked at the day's activities, using paper and whiteboard, and working on attending to teacher. Then, the class had TeachTown social skills, followed by whole group instruction on various academic needs, as part of the unique learning system. The students then had a snack and went to recess with general education students to work on social skills. The general education pupils knew her special education students, some of whom go on general education field trips and camp. After general education students left, Ms. Drews' students remained to have their own, unstructured playtime. Returning to the classroom, Ms. Drews did a read aloud activity where students worked on comprehension.

270. The class would then split, one half working on their TeachTown computer program and the other half working on the individual IEP goals with Ms. Drews or a classroom aide, who were trained in the pupils' goals. The one-on-one time addressed academics, behaviors, and adaptive skills, depending on a student's goals and needs. Then the class did an art activity, which worked on fine motor skills and required the students to attend to an adult in front of the classroom, providing instruction. Lunch and recess followed.

271. After recess, the students would break into groups according to similar academic goals and capabilities, receiving direct instruction, until the end of the school day. On long days,¹³ students could do a science activity or be in a cooking group, where they had to follow instructions, working on adaptive skills and executive functioning. Individual services, push in or pull out, depended upon the individual IEP's. A couple of the students participated in general education classes for math, physical education or library.

272. Ms. Drews had seen Student on campus but never met Mother, though Mother did come to observe the classroom. She reviewed Student's IEP, present levels of performance, and goals. She found Student's goals to be clear and measurable and could be implemented within her moderate-to-severe special day class. She estimated that Student would place in about the middle of the class's capabilities and abilities.

Intellectual Disability Eligibility

273. Mother, Father and Grandmother uniformly rejected District's finding that Student qualified for special education under intellectual disability eligibility. Mother believed that intellectual disability eligibility would label Student as stupid, affecting her

¹³ Long school days went beyond 2:00 p.m.

placement and services. She regularly cited her own observations and evaluation of Student's schoolwork as evidence of Student's cognitive capabilities.

274. Jennifer Bews worked for First Steps, had seven years of ABA intervention experience, and had been Student's aide since the end of first grade, more than two years. She had a bachelor's in psychology and possessed a Registered Behavior Technician certificate. She had no advanced degrees or credentials. She had spent more time with Student than any other provider; she testified at the hearing.

275. Ms. Bews demonstrated a caring and professional relationship with Student. She had been providing services to Student both at school and at home but stopped working at Student's home in fall 2017. Ms. Bews and her supervisor, Ms. Buchanan, agreed that working just in the school environment enabled Ms. Bews to have a more professional relationship with Mother. She worked about 16 hours a week with Student at school. Typically, two other aides provided services but only one other aide was involved at the time of hearing.

276. Mother had Ms. Bews review various vocabulary tests and other assignments from the last couple of school years. Ms. Bews also testified regarding Student's involvement in social studies and science activities and the use of Student's positive behavior system. Ms. Bews testimony did not support Mother's view that Student was performing academically and socially. Ms. Bews testimony generally conformed with that of Ms. Costa, Ms. DeMartini, Ms. Buchanan, Ms. Corona, and Ms. Phillips regarding Student's inability to access the general education curriculum of her peers, heavy prompt reliance throughout the day, lack of independence, noncompliant behaviors, and little meaningful reciprocal social interaction.

277. Betty Jo Freeman, Ph.D., telephonically testified at Mother's request. Dr. Freeman was an Emerita Professor, having been an assistant professor, associate professor, and professor in residence from 1973 through 2003, at the University of

California Los Angeles, School of Medicine, Department of Psychiatry and Biobehavioral Sciences. Her long and distinguished career spanned decades of research, diagnostic methods, and behavior intervention (including the genesis of applied behavior analysis) of autism spectrum disorder. She extensively lectured, published papers and articles and written books. She consulted with multiple school districts around the country and sat on numerous professional advisory boards. She had not taught public school children.

278. Dr. Freeman initially met Student after she retired and when Student was three and a half years old. Dr. Freeman diagnosed Student with autism and stated Student had an unusual profile, which she had only seen with autistic children. She thereafter saw Student annually three times but had not seen Student for six years, since 2012. She cautioned that children with autism and intellectual disability score differently on cognitive and standardized test. In the earlier years of diagnosis, around 70 percent of autistic children were found to be intellectually disabled; this percentage had since dropped to around 30 percent. Emphasis cannot be on overall scores.

279. Dr. Freeman reviewed District's January 2017 triennial multidisciplinary report, noting that Student's behavior affected how she performed. She believed the testing included a lot of assumptions regarding Student's ability to perform on the standardized tests, like her fine motor skills. Also, behavior issues elevated with the timed tests. Dr. Freeman was emphatic that Student's cognitive evaluation cannot rely on assessment scores alone. She disagreed with Ms. Corona's statement that the test scores needed to be interpreted with caution but were an overall indication of Student's cognitive abilities. She did not talk to any of the District assessors.

280. She noted the variability in the Wechsler and Comprehensive Test of Nonverbal Intelligence scores, which she attributed to Student's autistic behaviors. Student's autism manifested itself in everything she did. She therefore opined that the scores could not support a conclusion that Student was intellectually disabled or that

intellectual disability should be Student's primary eligibility. She acknowledged Student had not scored in the average range on any of the instruments' subtests. She knew that Student had many maladaptive behaviors and adaptive skill issues, saying that everything needed to be considered. Generally, Dr. Freeman thought the District report was thorough, but she disagreed with the finding of intellectual disability eligibility.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹⁴

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)¹⁵ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

¹⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹⁵ All subsequent references to the Code of Federal Regulations are to the 2006 version.

§ 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. § 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) In a recent unanimous decision, the United States Supreme Court declined to interpret the FAPE provision in a manner that was at odds with the *Rowley*

court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test.'" (*Endrew F. v. Douglas School Dist. RE-1* (2017) 580 U.S.____ [137 S.Ct. 988, 1000] (*Endrew F.*.) The Supreme Court in *Endrew F.* stated that school districts must "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Id.* at p. 1002.)

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

5. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, District carries the burden of proof as to its issues and Student carries the burden of proof as to her issues.

DISTRICT ISSUE 1: JANUARY 2017 MULTIDISCIPLINARY PSYCHOEDUCATIONAL TRIENNIAL ASSESSMENT

6. District asserts that its January 2017 Multidisciplinary Psychoeducational Triennial Assessment is legally appropriate, having comprehensively evaluated Student

for her triennial IEP, utilizing numerous standardized assessments and multiple observations by qualified assessors, all of whom were acquainted with Student's behavioral needs. Therefore, District contends Student is not entitled to an independent educational evaluation at public expense. Student asserts that District's assessment of Student is not in compliance with the instrument protocols, incorrectly utilizes assessment outcomes, inaccurately reports observations and interviews, misrepresents Mother's statements, under evaluates Student's abilities and capabilities, improperly concludes Student qualifies for intellectual disability eligibility, and wrongly recommends removing Student from her general education inclusion placement.

Applicable Law

7. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

8. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) The assessment must use technically sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Assessment materials must

be used for purposes for which they are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(iii)); 34 C.F.R. § 300.304(c)(1)(iii); Ed. Code, § 56320, subd. (b)(2).)

9. Assessments must be administered by trained and knowledgeable personnel and in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv), (v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §§ 56320, subd. (b)(3) [tests of intellectual or emotional functioning must be administered by a credentialed school psychologist], 56322 [assessment shall be conducted by persons competent to perform the assessment, as determined by the school district, county office, or special education local plan area]; 56324 [a psychological assessment shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed].) Persons knowledgeable of the student's disability shall conduct assessments. (Ed. Code, § 56320, subd. (g).)

10. The assessments used must be: (1) selected and administered so as not to be discriminatory on a racial or cultural basis; (2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (3) used for purposes for which the assessments are valid and reliable; (4) administered by trained and knowledgeable personnel; and (5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

11. If the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of the school district. Once selected, the instrument must be administered in accordance with the instructions provided by the producer, including use of composite scores if called for by the instructions. (Off. of Special Education Programs (OSEP) interpretative letter, *Letter to*

Anonymous (September 17, 1993), 20 IDELR 542; cited approvingly in *Parent v. Manteca Unified School Dist.* (2013) Cal.Ofc.Admin.Hrgs. Case No. 2011060184.) The personnel who assess the student must prepare a written report of the results of each assessment, and provide a copy of the report to the parent. (Ed. Code, §§ 56327 and 56329.)

12. A school district's failure to conduct appropriate assessment or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) A procedural violation results in liability for denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) (*Target Range*.)

13. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) A district must also convene an IEP team meeting when a parent requests a meeting to develop, review, or revise the IEP. (Ed. Code, § 56343, subd. (c).)

14. The personnel who assess the student shall prepare a written report that shall include the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally

relevant health, development and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

Analysis of District's Issue 1

15. District met its burden of proving that the January 2017 triennial assessment was legally appropriate. The evaluation assessed in all areas of suspected disability; the contributing assessors were well qualified, trained, and knowledgeable; all instruments were administered and reported in accordance with protocols and best practices; and observations and interviews were accurately stated and reasonably interpreted. The assessors employed a variety of assessment tools and strategies to garner relevant developmental, academic, and functional information, which were properly assembled into a comprehensive report for consideration by the triennial IEP team.

16. Ms. Corona carefully reviewed Student's academic and evaluation history. She read Student's cumulative file and all available assessments and IEP's, going back to Student's assessment by, and kindergarten attendance at, Los Angeles Unified. She evaluated Student for eligibilities of autism, speech language impairment, intellectual disability, specific learning disability, and other health impairment.

17. Ms. Corona interviewed Mother, Ms. Buchanan, and Ms. Costa. The assessors observed Student on multiple occasions in different settings, doing different tasks. Student claims that the triennial's interviews and observations are inaccurate and misleading, by indicating Student did not have meaningful reciprocal relationships, did

not participate in class activities and academics, lacked independence, continued to demonstrate targeted and distracting behaviors, and was prompt dependent for all activities. Mother regularly cited her own observations as evidence that Student's behaviors have improved and, further, that Student often performed independently, participated in class academic activities, was not distracting to other pupils, and had meaningful social interactions.

18. Mother's observations and conclusions were not supported by other providers who worked with Student in the school environment. The triennial assessment observations conformed with those of Student's third-grade teacher Ms. Costa and, later, her fourth-grade teacher Ms. Phillips. First Steps' Ms. Buchanan and Ms. Bews, and Dr. Burkholder, all reported that some of Student's targeted behaviors have improved (decreased frequency), but the behaviors persist, and some have increased. Everyone who worked with and observed Student (except Dr. Gardner) reported Student's disquieting dependence on prompting from adults for almost every academic and functional activity.

19. Mother insisted that Student was benefitting from the academic and social modeling of the general education pupils. However, the evidence did not support Mother's point of view. Student participated in some group class activities, but the evidence demonstrated that she was not participating on the class curricular level and only with persistent prompting from her aide. Those who worked with Student in the school environment did not report Student was academically or socially referencing her typically developing peers. None reported Student had meaningful, reciprocal relationships with her general education classmates.

20. Ms. Costa believed that Mother's primary goal of peer modeling in the general education classroom was not achieved due to the grave disparity in activities between Student and her classmates throughout the school day. First Steps' aide spoke

of the increasing difficulty of finding general education pupils who could play with Student because the other pupils were socially maturing and leaving Student farther behind. Third grade offered fewer opportunities for classroom based social interaction compared to lower grades.

21. The evidence demonstrated that Student was prompt dependent for almost all academic and functional activities. Prompt dependence differs from Student's targeted behaviors. Student's behavior intervention plan focused on targeting noncompliant behaviors, using positive reinforcement. A targeted behavior's frequency improvement did not translate into decreased prompt dependency. In many ways, Student's behavior plan maintained and encouraged Student's prompt dependency in a general education classroom. For example, Student's aide facilitated her social and class interactions with the general education students, often with scripts, where Student was told – verbally or on the whiteboard – what to say or how to respond. Student had no peers on her social level with whom to interact. Also, the general education class did not provide functional skills training, meaning Student had to be prompted – step-by-step – to wash her hands or prompted and accompanied to go to another room. The behavior plan was to encourage Student's compliance in the general education environment, not decrease Student' prompt dependence on an adult.

22. District demonstrated that the triennial's interviews and observations were accurate and reliable. The accuracy of the triennial observations was consistent – based upon internal data and historical information. Though providing separate accounts of different classroom and clinical observations, the assessors reported the same or strikingly similar behaviors, interactions, prompting, prompt dependency, and isolation from class teaching and participation. The observations during the triennial assessments were similar to those from prior assessments and reports.

23. The assessors possessed significant professional experience and

knowledge of Student's behaviors. Student contends that the assessors did not properly account for Student's autistic behaviors and, therefore, obtained inaccurate assessment scores. However, the evidence persuasively demonstrated that the assessors carefully considered and accommodated – as far as testing protocols permitted – Student's well-documented behaviors. Ms. Corona knew Student for two years, interacted with her almost on a daily basis, and was involved in Student's reinforcement behavior plan. Ms. DiMartini provided services to Student for more than two years, including direct one-to-one instruction, modification of Student's curriculum with the general education teacher, and training Student's aides for academic instruction. Until August 2017, 20 percent of Ms. DeMartini's professional time was devoted to serving Student's academic and inclusion needs. Similarly, Ms. Dickinson provided one-on-one speech services to Student since second grade.

24. Ms. DeMartini accompanied Student for the first few testing sessions with Ms. Corona. Otherwise, Student's First Steps' aides were present at every assessment. Student took tests with trained personnel who were aware of her noncompliance, lack of attention, stereotypy, prompting dependence, need for regular breaks, and behavior reinforcement. They candidly noted when they believed results were not reliable. Assessors broke some testing into multiple sessions to assure maximum engagement by Student. When protocols permitted, Student was prompted to answer or continue. She was promised breaks and rewards in accordance with her behavior reinforcement plan. The assessors' unique knowledge of Student's behaviors enabled them to assist Student to test at a level representative of her capabilities and abilities.

25. Student asserts that the standardized assessments' results were improperly reported and utilized. However, the evidence established that the assessors conformed to all the instruments' protocols. For example, on the Wechsler intelligence assessment, Ms. Corona properly followed the protocols and did not report the full-scale intelligence

quotient because it may not have been an accurate representation of Student's overall ability due to variability in Student's scores. Ms. Corona reported Student's Wechsler general ability index, which was an overall measure of Student's cognitive functioning without the burden of cognitive proficiency tasks, which included working memory and processing speed. Ms. Dickinson could not establish a basal level with Student and therefore discontinued the pragmatic language test. Ms. DeMartini did not compute a Wechsler achievement written language composite because of a large discrepancy in Student's subtest scores. She therefore gave Student the Test of Written Language to better evaluate Student writing abilities. The evidence validated that the assessors patiently and conscientiously tested Student, following and abiding by each instrument's protocols.

26. Ms. Corona found that multiple cognitive measures indicated Student's cognitive level was severely delayed when compared to her same age peers, falling in the extremely low range. Though Student's variability prohibited reporting the Wechsler full-scale intelligent quotient, the Wechsler subtests provided useful information. For example, Student performed better on those tests where she could use her splinter gift of spelling, decoding, and pattern recognition. However, Student could not perform above the very low or extremely low range in almost every subtest when the testing became more complex and Student could not merely rely on her rote skills.

27. The Wechsler general ability index was an overall measure of Student's cognitive functioning without the burden of cognitive proficiency tasks, including working memory and processing speed, which are two areas where neurodevelopmental disabled children, like those with autism, struggled. Therefore, the general ability index was a more reliable indicator of Student's capabilities. Student's score classified her general level of cognitive ability as in the extremely low range, scoring higher than one percent of other children her age.

28. Ms. Corona also administered the comprehensive test of nonverbal intelligence, which used a nonverbal format to estimate general intelligence of children whose performance on other intelligence tests might be adversely affected by impairments involving language or motor skills. Ms. Corona compared the comprehensive nonverbal test with the Wechsler to assess both tests' consistency in estimating Student's cognitive functioning. Student's full-scale composite on the comprehensive test of nonverbal intelligence was in the very poor range, performing at less than the first percentile compared to her same aged peers. Though slightly lower, Student's nonverbal intelligence score was consistent with the Wechsler and her 2014 triennial evaluation.

29. Ms. Corona's testing and evaluation of Student's cognition recognized the challenges in evaluating a child with Student's profile, yet garnered reliable information through thoughtful, professional, and balanced testing and interpretation. Though Student demonstrated strengths in tasks involving pattern recognition and processing rote information, her processing skills were consistent with her cognitive ability and significantly below her peers. She understood certain sounds but did not know what the sound was or would do. Student consistently demonstrated significant deficits in understanding and following complex verbal instructions and remembering visual information.

30. Student had elevated levels of maladaptive behavior for attention problems, atypicality, adaptive skills, social skills, leadership, and functional communication. The assessors' classroom observations, teacher report, and aide report confirmed Student demonstrated significant behaviors that impacted her social and emotional development. Student struggled with noncompliance, stereotypy, and elopement. These behavior findings were consistent with those from her prior assessments.

31. The autism spectrum rating scales, and the affect recognitions subtest

scores, were consistent with Student's long-standing diagnosis of autism spectrum disorder.

32. Student had substantial needs in all areas of adaptive functioning, as measured by the adaptive behavior assessment scale and the behavior assessment system scores. The scores also confirmed the observations of assessors, teachers, and other providers, as well as teacher reports in Student's academic file. Though Mother's scale responses viewed Student's functional skills at a higher level than the other respondents, the testing and observations properly evaluated Student's significant adaptive, functional, and life skills' deficiencies.

33. Ms. DeMartini conducted a comprehensive evaluation of Student's academic achievement, utilizing multiple instruments and formal observations. She properly administered the standardized tests, within protocols and insightfully observed Student in school and during testing. She knew Student well, working up to eight hours a week as her inclusion specialist and specialized academic instruction provider. She skillfully and carefully managed Student's behaviors during testing to obtain a reliable understanding of Student's academic capabilities.

34. On the Wechsler achievement test, Student was in the extremely low range for reading fluency and was unable to answer any inferential questions. Student did better on word reading, which was discrepant from her very low word comprehension. This was consistent with Ms. DeMartini's experience when providing academic services. Student was also in the extremely low range on the Wechsler reading skills subtest, demonstrating poor phonemic awareness and therefore struggled to manipulate sounds, a necessary basic reading skill.

35. Ms. DeMartini chose to supplement and compare Student's Wechsler reading scores. She administered administering two portions of the Brigance comprehensive inventory – reading vocabulary comprehension test and comprehends

passages subtest. Student scored in the poor range on both and was unable to correctly answer any comprehension questions above the first-grade level on long passages subtest. She also administered two reading inventories. On the A-Z assessment identifying rhyming words, Student scored poorly and was inconsistent and random in her choices. The qualitative reading inventory also confirmed Student's struggle to acquire and use information.

36. Student's reading comprehension was very poor. By third grade, students were increasingly reading to learn. Student's reading scores and observations correctly found that Student was not going to be able to read and access information, like that presented in textbooks.

37. Student's written language subtest scores were discrepant, so Ms. DeMartini did not report the composite. Student spelling's score was in the average range, which is consistent with her rote splinter skill. However, the scores were below average to extremely low on sentence composition, alphabet writing, and essay composition. Student could not generalize her spelling skill. Ms. DeMartini chose to further examine Student's writing and administered the test of written language instrument, which measured Student's overall writing ability to be very poor.

38. The written language test results accurately reflected Student's writing ability. The scores confirmed Student's recognized strong splinter spelling skill, when measured in isolation. However, the scores also confirmed Student's very poor writing skills, as reflected in her class work, where Student rarely wrote anything independently. She required sentence starters, blanks to fill in, word lists from which to choose, and continual prompting to write a word, remain on task and to return to writing after a break. Ms. DeMartini's evaluation correctly determined that Student's writing ability to be very poor, below the first percentile.

39. Student's mathematics performance on the Wechsler and Brigance were in

the extremely low range. For example, Student was unable to add or subtract sums, except those with sums and difference less than 10. Math is a weakness for Student. Student's Wechsler oral composite section was in the extremely low range for listening comprehensions and oral expression. Student's test results for math and oral language were consistent with Student's performance in class and when working with Ms. DeMartini.

40. Student contends that the academic assessments did not provide an accurate evaluation of her academic skills and abilities. Mother referred to multiple school assignments and tests, which she claimed evidenced Student's performance at a much higher level than Ms. DeMartini's report. Mother also testified as to her own observations of Student's academic performance, referring to her science or social studies group activities and performance of class assignments on her Chromebook. The evidence did not support Mother's viewpoint but, instead, substantively and credibly established that Student's academic abilities were very low. The assignments to which Mother referred did not indicate that Student was performing at a grade or age level higher than the formal assessment; these tests and assignments were highly modified or written with step-by-step prompting from her aides. Student was 10 years old, in a third-grade class, at the time of assessment but her academic performance was mostly at the primer to first grade level, with the exception of her splinter rote skills. Student's evidence and argument in this regard was unpersuasive.

41. Ms. Dickinson evaluated speech and language, finding Student to have moderate to severe mixed receptive and expressive language delay, when compared to her same age peers. Student had severe delays using language functionally and socially, requiring maximum support to follow routines and during social interactions. Though her word reading was a strength, she had limited comprehension of sentences, paragraphs, and stories. Student's impacted intelligibility was primarily the consequence

of her talking too fast and was benefitted by the use of a pacing chart or visual to help slow her speech rate. Student has not challenged the speech assessment portion of the triennial evaluation.

42. The team summarized their findings in the assessment report. They applied their findings to five eligibility categories. Student met the criteria for speech language impairment and autism. Student did not meet the criteria for other health impairment eligibility because her deficits were consistent with students who were eligible under autism and intellectual disability. Student also did not meet the discrepancy criteria for specific learning disability because Student's academic achievement was commensurate with her cognitive abilities.

43. The report analyzed the criteria for intellectual disability eligibility. The assessors thoughtfully applied their assessment's findings to the properly cited criteria. They concluded that Student's extremely low intellectual capabilities and seriously deficient adaptive skills met the criteria for intellectual disability eligibility.

44. All three assessors recommended that Student's placement be changed from inclusion in the general education classroom, to a special day class. There, Student would receive direct specialized academic instruction from a special education teacher, suitable for Student's academic level, within a class environment where Student could form peer-to-peer social relationships and develop functional skills.

45. District's January 2017 triennial multidisciplinary and psychoeducational evaluation used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether Student was eligible for special education services. The assessment used technically sound instruments that assessed the relative contribution of cognitive, behavioral, physical, and developmental factors. The assessments were administered by trained and knowledgeable personnel who were knowledgeable of Student's disability, in

accordance with the instructions provided by the authors of the assessment tools. The assessments were not discriminatory on a racial or cultural basis, provided in a language and form most likely to yield accurate information on what Student knew and could do academically, developmentally, and functionally, and used for purposes for which the assessments are valid and reliable. Observations and interviews were accurately stated and reasonably interpreted. The assessors properly assembled their findings and recommendations into a comprehensive report, which was timely provided to Parents for consideration at the triennial IEP team. The January 2017 triennial assessment was legally appropriate, and District was not obligated to fund Student's requested independent educational evaluation. District prevailed on Issue 1.

DISTRICT ISSUES 2 AND 3: INTELLECTUAL DISABILITY ELIGIBILITY AND JANUARY 2018 IEP

46. District contends that the January 2018 IEP offered a free and appropriate public education in the least restrictive environment and the District IEP team members correctly concluded that Student was also eligible for special education under the category of intellectual disability. The assessments and present levels of performance indicated that Student's cognitive capabilities were extremely low, her academic performance was primer to kindergarten, and her adaptive/functional skills were clinically deficient. Further, Student's continued inclusion in a general education classroom denied Student the opportunity to receive specialized academic instruction from a special education teacher in a class environment, prevented her from developing social relationships with similar peers, maintained her prompt dependence on adults, and precluded her from developing independence and functional life skills. Student contends that intellectual disability was not an appropriate eligibility and the IEP failed to offer a FAPE; Parents do not disagree with the other eligibility findings. The moderate-to-severe special day class placement would hamper Student's academic

progress and deny her the needed modeling of typical peers for social and academic development. Student asserts that her placement should continue to be inclusion in a general education classroom, with behavioral services from nonpublic agency First Steps, and additional resource specialist and response to intervention services.

Applicable Law

47. An IEP is a written document describing a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subd. (a)(1), (2); 34 C.F.R. § 300.320(a) (2006).) The IEP must also contain: (i) a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3) (2006)); (ii) a statement of the special education and related services and supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4) (2006)); (iii) an explanation of the extent, if any, that the pupil will not participate with nondisabled pupils in the regular class or activities (Ed. Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5) (2006)); and (iv) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and district-wide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)

48. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP

when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

49. A required member of an IEP team includes the individual who can interpret evaluation or assessments result. (34 C.F.R. § 300.321(a)(5).) Typically, this is the person who conducted the assessment. A parent has the discretion to invite and include other individuals, who have knowledge or expertise regarding the child, including service providers, to the IEP team meeting. (34 C.F.R. § 300.321(a)(6).) A required member of the IEP team may be excused from attending an IEP team meeting if the parent, in writing, and the school district consent to the excusal and the excused IEP team member submits, in writing to the parent and the IEP team, its input into the IEP development prior to the meeting. (34 C.F.R. § 300.321(e)(2).)

50. A pupil shall not "be determined to be an individual with exceptional needs" if they do not meet the eligibility criteria under federal and California law. (Ed. Code, § 56329, subd. (a)(2).) The law defines an individual with exceptional needs as one who, because of a disability, "requires instruction and services which cannot be provided with modification of the regular school program" in order to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd. (b).) Thus, "a child is not considered a 'child with a disability' if it is determined that a child only needs a 'related service' and not special education." (*W.H. v. Clovis Unified School Dist.* (E.D. Cal. 2009) 2009 WL 1605356, at p. 21 (*Clovis*), citing 34 C.F.R. § 300.8(a)(2)(i) (2006).)

51. IDEA does not require children to be classified by their disabilities (20 U.S.C. § 1412(a)(3)(B)). As long as a child remains eligible for special education and

related services, the IDEA does not require that the child be placed in the most accurate disability category. (20 U.S.C. § 1412(a)(3)(B).)

52. *In Sacramento City Unified Sch. Dist. v. Rachel H*, (9th Cir. 1994), 14 F.3d 1398, the Ninth Circuit Court of Appeal set forth four factors that must be evaluated and balanced in determining whether a placement is in the least restrictive environment: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Id.*, 14 F.3d at p. 1404.)

53. California Code of Regulations, title 5, section 3030, subdivision (b)(1), describes the criteria for determining whether a child qualifies for special education under the category of autism. Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The federal definition is the same (34 C.F.R. § 300.8(c)(1)(i)).

54. California Code of Regulations, title 5, section 3030, subdivision (b)(6), describes the criteria for determining whether a child qualifies for special education under the category of intellectual disability. Intellectual disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance. The federal definition is the same (34 C.F.R. § 300.8(c)(6)).

55. Amendments to an existing IEP can be made without convening the whole

IEP team, and without redrafting the entire document. (20 U.S.C. § 1414(d)(3)(D) & (F); 34 C.F.R. § 300.324(a)(4)(i) & (a)(6); Ed. Code, § 56380.1.)

Analysis of District Issues 2 and 3

56. District met its burden of proving by the preponderance of evidence that the January 2018 IEP offers Student a FAPE in the least restrictive environment and that Student is also eligible for special education under the intellectual disability category. Student asserts that she was not eligible under intellectual disability, that inclusion in a general education classroom was the appropriate placement, that District should have provided more services to Student in the inclusion program, that the offer was unclear, that the goals did not meet Student's needs in the general education environment, and that there were not appropriate supports and services for Student in extended school year, including a one-to-one aide.

57. District complied with all procedural requirements in scheduling and convening the January 23, 2018 team meeting. All requisite members of the IEP team attended. The annual IEP team reviewed Student's progress on her goals and updated the present levels of performance. The team discussed accommodations, modifications, state testing, placement, supports and services, with Mother's full participation. The team reviewed all proposed goals, discussed possible additional goals, and finalized drafting goals and objectives, which were observable and measurable. The team discussed Student's placement options. District properly offered to move Student from general education class inclusion to a moderate-to-severe special day class, fully explaining the basis for the offered change in placement

INTELLECTUAL DISABILITY

58. As discussed above in Issue 1, the triennial assessment team found that multiple cognitive measures indicated Student's cognitive level was severely delayed

when compared to her same age peers, falling in the extremely low range. Ms. Corona also assessed and found Student to have significant adaptive, functional, and life skills' deficiencies, as measured by the adaptive behavior assessment scale and the behavior assessment system scores. The January 2018 IEP's updated present levels of performance affirm Student's continuing cognitive delays and adaptive functioning deficits.

59. Student asserts that she was not eligible under intellectual disability. Student claims that Ms. Corona's cognitive testing and conclusions were misguided and wrong. Student relied on her paid expert, Dr. Grandison, and her early 2016 neuropsychological assessment of Student where Dr. Grandison allegedly administered the same comprehensive test of nonverbal intelligence. However, Dr. Grandison's report would not have been legally appropriate if it was a district assessment. The report stated that Student had a standard score of 79 for nonverbal intelligence but did not specify which index scale score was reported and did not report Student's scores on any subtest or the intelligence test's other two index scales. Dr. Grandison did not provide any qualitative data on Student's testing behavior, response to patterns, attention, or level of prompting and reinforcement, which are requisite components of an assessment involving a child with neurodevelopmental disabilities, like autism. Further, the report did not address why her testing conflicted with Dr. Yabrove's 2014 testing, which used the same instrument. District's attempts to contact Dr. Grandison to discuss the report proved fruitless. Dr. Grandison's report was not persuasive.

60. Student also cites Dr. Freeman's testimony that the variability in Student's cognitive scores meant they should not have been reported and relied upon and, therefore, Student cannot be found to meet the criteria of intellectual disability eligibility. Dr. Freeman provided a valuable perspective, but she was not persuasive in her assertion that Student could did not meet the intellectual disability eligibility criteria.

She stated that Student's autism affects everything Student does, including Student's performance on the testing, as evidenced by the variability in her scores. However, though the Wechsler protocols did not permit the reporting of a full scale intelligence quotient, the testing did provide valuable information regarding Student's cognitive capabilities. Student's general cognitive functioning was also confirmed by the comprehensive test of nonverbal intelligence, test of phonological processing, and developmental neuropsychological assessment. Student's cognitive functioning was demonstrated in her very poor academic achievement evaluation. The findings were consistent with Student's last two triennial evaluations, which also indicated that Student's intellectual ability fell in the first percentile, when compared to her same aged peers. Despite the variability referred to by Dr. Freeman, Student's cognitive test results have been consistent.

61. Dr. Freeman noted that a significant percentage of autistic children are also diagnosed with intellectual disability. Therefore, an autistic child's behaviors do not necessarily prevent an informed evaluation of a child's cognitive functioning. Here, Dr. Freeman had not seen Student for six years. Ms. Corona had known Student for two years, daily supported Student's behavior strategies, and regularly observed Student's behaviors during one-on-one instruction. Ms. DiMartini had devoted 20 percent of her professional time to Student's direct one-to-one specialized academic instruction and inclusion support since first grade. The assessors carefully monitored Student's behaviors, enabling Student's performance.

62. Dr. Freeman said that Student's behaviors would cause the test results to underestimate Student's cognitive ability because her autism affects everything Student does. Yet, Student's behaviors might also be triggered by her cognitive challenges, as noted by Dr. Burkholder in his first functional behavior assessment. Student's behavior plan primarily targeted noncompliant behaviors, such as going off topic, refusing to pay

attention, vocalizing, and stereotypy. Classroom observations and behavior data indicated that, when faced with an academic task which was more challenging than Student's abilities, Student was likely to become noncompliant. Clinical observations of the triennial testing confirmed that, when faced with more complex tasks or questions, Student became noncompliant. Therefore, Student's noncompliant behaviors may have been triggered when Student was faced with a task at the edges of her cognitive capability, as opposed to her behaviors merely causing her not to perform.

63. Intellectual disability eligibility criteria requires that significantly subaverage general intellectual functioning concurrently exist with deficits in adaptive behavior. Here, Student's cognitive deficits existed concurrently with deficits in adaptive behavior, which fall in the extremely low range across all areas, as measured by the adaptive behavior assessment scale and the behavior assessment system scores. The scores were confirmed by observations of assessors, teachers, and other providers, as well as teacher reports in Student's academic file. In updating the January 2018 IEP present levels of performance, Student's continuing serious adaptive skill deficits were noted. Dr. Freeman acknowledged that adaptive behavior must be included in intellectual disability consideration but she had no current input because she had not seen Student for many years.

64. The District members of the January 2018 IEP team, as did the triennial assessors and the January 2017 IEP team, carefully and thoughtfully considered if Student qualified for special education services under the intellectual disability eligibility criteria. Mother, however, has consistently and vocally rejected any notion that Student is intellectually disabled. She has told the IEP teams that she believes the District was categorizing her daughter as "stupid," contending that such a label would follow her throughout her life and prevent her from receiving support she might otherwise obtain. However, District properly concluded Student qualified as a student with an intellectual

disability because acknowledging Student's cognitive and adaptive skills was necessary in ensuring that District meets its legal obligation of providing an IEP that was reasonably calculated to enable Student to make progress in light of her circumstances.

65. District has met its burden of proof. Student qualified for special education under intellectual disability eligibility. District prevails on Issue 2.

INCLUSION IN GENERAL EDUCATION CLASSROOM

66. The January 2018 IEP District team members offered Student placement in a moderate-to-severe special day class, as they did in the January 2017 IEP following the triennial assessments. Student's placement had been full inclusion in a general education classroom, with substantial supports and a one-to-one behavior aide, throughout her attendance at District. Student disagrees with the placement offer, insisting that inclusion in the general education class enabled her to academically progress and provided needed academic and social modeling from typically developing peers.

67. District has met its burden of proof that Student's inclusion placement was inappropriate. Her general education inclusion environment was not helping her progress academically, did not provide opportunity to form or participate in reciprocal relationships with peers, encouraged an alarming prompt dependency, and prevented her from developing functional/adaptive skills.

69. In *Rachel H. supra*, 14 F.3d 1398, 1404, the Ninth Circuit affirmed a four-factor test to determine whether a special education classroom placement was more appropriate than a general education, or "mainstream," classroom. The *Rachel H.* analysis is a balancing test considering (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits, such as social interaction, of such placement; (3) the effect of the student's presence upon the teacher and children in the regular class; and (4) the costs of mainstreaming the student.

70. The first *Rachel H.* factor concerns the educational benefits available to a disabled student in a regular classroom with any supplemental aids and services. The Ninth Circuit held that academic needs weigh most heavily in the *Rachel H.* analysis, so when mainstreaming provides no educational benefit, "that finding can be dispositive of the entire LRE [least restrictive environment] analysis, even if the other three factors weigh in favor of mainstreaming." (*Katherine G. ex rel. Cynthia G. v. Kentfield School Dist.* (2003) 261 F. Supp. 2d 1159, 1173-74 (citing *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 836-37); *see also, Baquerizo v. Garden Grove Unified School Dist.* (9th Cir. 2016) 826 F.3d 1179, 1188_(when the student would not have gained benefit in a typical classroom and "[the student's] academic needs weigh most heavily against a mainstream environment," a small classroom is FAPE); *Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500-01_(student was unable to derive any meaningful educational benefit from general education, where student's educational progress was deteriorating), *abrogated in part on other grounds.*)

71. Here, Student was not accessing any portion of the fourth grade general education curriculum. She spelled some of the spelling words, but this splinter rote skill was not generalized. Student had very poor reading comprehension, around the first grade basic level, which meant she could not learn new information by reading. She had poor written expression, incapable of independently writing sentences and unable to write a story or essay, despite preparatory discussion or brainstorming. She could not independently punctuate and only intermittently capitalized. Ms. Phillips, Student's fourth grade teacher, reported that Student was at best working on first grade math and language arts. She was far below her fourth-grade general education peers

72. A primary consideration for a special education student's inclusion in a general education classroom is whether the student can access the general education academic curriculum, with some modifications, by participating in the general education

class lessons and learning from the general education teacher. Here, Ms. Shellhammer and Ms. Phillips modified Student's entire curriculum in fourth grade. Similarly, Ms. DiMartini and Ms. Costa modified Student's third-grade curriculum. Student did not learn from the general education teacher and, as confirmed in the many observations, she typically ignored the teacher's lessons.

73. As Ms. Phillips and Ms. Costa pointed out, Student learned from her aides. They persistently and constantly prompted her to work on her modified curriculum. Though District's inclusion specialist trained the First Steps' aides regarding the modified curriculum, the aides were behavior support. Their primary responsibility was monitoring and directing Student's behaviors, using data driven strategies for targeted behavior, especially noncompliance. So, for example, the aides gave Student reward stars on her behavior chart when she complied, not when she got the right answer on one of her worksheets. This further compromised Student's ability to gain academic benefit from the general education environment.

74. Student argues that she would be making better academic progress if she received additional support, such as resource or response to intervention programs. However, both of these programs were designed for students who were able to access grade level curriculum. For example, in the resource program, the resource specialist supported special education students by assisting them in accessing aspects of their general education curriculum. Here, Student worked on her own unique curriculum, modified to her first grade level. The resource program services were not going to help Student better access the fourth-grade curriculum in the classroom. Similarly, response to intervention provided intensive academic support for a marked period of time to get a student back to grade level for a particular academic deficit. The program did not and could not address global curricular deficits. Therefore, the evidence demonstrated that neither the resource program nor the response to intervention services would have

better enabled Student to access her fourth grade curriculum. And similarly, such services would not have benefitted Student in accessing her third grade curriculum. Student did not learn or perform at grade level.

75. Mother referred to quizzes, tests, class assignments, and her own observations to bolster her assertion that Student was doing some grade-level work and was academically benefitting. She cited how Student participated in some class group activities, interacting with her classmates. Yet, the aide facilitated the interactions and Student was not doing anything near fourth or third grade curriculum. Student submitted no credible or persuasive evidence indicating she academically benefited by being included in the general education classroom.

76. Student's dependence on constant and persistent prompting from her behavior aides was further evidence of Student's inability to make meaningful educational progress in the general education classroom. All providers and teachers agreed that she could not independently function academically, regardless of Mother's assertions that she saw Student work on her own; Student required constant step-by-step prompting. Therefore, District correctly determined that the general education classroom environment was not academically benefiting Student. The first *Rachel H.* factor analysis supports changing Student's placement from full inclusion in a general education classroom to a smaller special education setting.

77. The second *Rachel H.* factor is what non-academic benefits a student receives from the general education classroom inclusion; this typically involves social benefits. Student argues that she benefited from the social modeling and social interaction with the typical peers. Mother testified to seeing Student have friends at school and that Student played and interacted with general education pupils. However, the weight of the evidence indicated Student did not have reciprocal relationships with her general education peers. Student's classmates were kind and supportive but they

were unable to engage Student in peer-to-peer dialogue. For example, the First Steps' aide reported it was becoming increasingly difficult to find pupils to play with Student because the maturity gap kept growing. Student also did not reference her peers in class, to see how to respond or act in the classroom setting. The general education inclusion placement did not afford Student the opportunity to form peer-to-peer social relationships.

78. The third *Rachel H.* factor is the effect of the student's presence upon the teacher and children in the regular class. Here, the evidence demonstrated that Student's presence in the classroom was disruptive to classmates and the teacher. Student's teachers disagreed with Mother's belief that Student was not a distraction. Ms. Buchanan reported in her behavior scale responses that Student engaged in disruptive, impulsive, uncontrolled behaviors. In her fourth grade class, Student was vocalizing, calling out names, and uttering. Every five to 10 minutes, Student took a break and left the classroom through the door with her aide. The teacher and pupils could not ignore the commotion of when Student acted out by trying to elope or falling to the ground. The aides' constant prompting of Student was not conducive to the other students' doing their work, especially during quiet time. Also, when Student did join her classmates in a group activity, the group often found itself falling behind the other groups because Student could not participate on the same academic level and her inclusion with her aide required their attention. Student's general education classroom inclusion was similarly disruptive to classmates and teacher in third grade.

79. District submitted no evidence regarding the fourth *Rachel H.* factor – cost of Student's general education classroom inclusion. Further, none of the assessments, IEP's, or witness testimony ever mentioned cost as a consideration in District's evaluation of the appropriate placement for Student. District's personnel have consistently discussed placement in the context of where Student would achieve

meaningful educational benefit under her unique circumstances.

80. The *Rachel H.* four-factor analysis indicates that full inclusion in a general education classroom was not an appropriate placement for Student. The first factor alone is sufficient reason, given that Student was not obtaining educational benefit from the general education inclusion. Student also did not otherwise benefit from the inclusion; she did not model her general education peers and did not form reciprocal relationships. In fact, the general education inclusion prevented Student from forming peer-to-peer relationships with similar students, encouraged her prompt dependence, and had not afforded her opportunity to develop adaptive, functional life skills. District correctly concluded that inclusion of Student in a general education classroom was not an appropriate placement for Student, who required a smaller special education setting.

MODERATE-TO-SEVERE SPECIAL DAY CLASS

81. District offered placement in a moderate-to-severe special day class at Amador, her home school. District offered similar special day class placement in the January 2017 IEP. Mother toured the classes, both in 2017 and 2018. Mother did not feel the class met Student's needs, citing the classroom's noise, the range of behaviors, and the lack of typical developing peers. However, District demonstrated the moderate-to-severe class was the appropriate placement.

82. District considered the full spectrum of possible placements, including the mild-to-moderate special day class. Mother participated in these discussions since at least the January 2017 IEP through the January 2018 IEP. Though the mild-to-moderate special day class offered a smaller educational setting and more classroom adult support than general education, it could not address Student's continuing need for small group learning. The mild-to-moderate class had an academic level that was higher than Student's ability to access and did not work on functional life skills.

83. The Amador moderate-to-severe special day class offered an opportunity

for Student to make meaningful academic practice, in accordance with her unique circumstances. The moderate-to-severe special day class had nine students with six adults, three of whom were directly assigned to students. The students spanned a spectrum of disabilities, including autism, traumatic brain injury, and intellectual disability. As noted by special education teacher Ms. Drews, Student would fit in the middle of the special day class's behavioral and academic profiles.

84. In her present placement, Student received her modified curriculum from behavior aides or during pull-out sessions with the resource teacher, not from the class teacher. The special day class featured class instruction where Student would learn and participate with her peers, slowly diminishing the prompt dependence and providing her increasing independence. Student would also be able to develop her pragmatic social skills. The special day class employed the evidence-based TeachTown for Social Skills program, which was grounded in applied behavior analysis, Mother's preferred behavior intervention. Every day Student would have an interpersonal skill practice and, also, work online as TeachTown used a discrete trial system in teaching and assessing Student's adaptive behavior, cognitive skills, and language. Significantly, Student and her classmates would daily practice their interpersonal skills with general education students.

85. Dr. Gardner opined that the moderate-to-severe special day class would not be appropriate for Student because it lacked modeling of typical developing peers. Yet, as District demonstrated, general education inclusion was not providing the social and academic modeling that Mother desired. Also, District's offer of placement provided Student with substantial opportunities to intermingle socially and in class with general education students; 32 percent of Student's school time would be in general education extracurricular, nonacademic, and class activities. Student would be in general education for 575 minutes per week, consisting of 75 minutes of recess, 200 minutes for lunch, 40

minutes for music, 40 minutes for physical education, 30 minutes of library, 40 minutes for additional physical education or game day; and 150 minutes in general education classroom during “no new” instruction time, so Student could participate with peers in the general education classroom environment. Therefore, despite Dr. Gardner’s and Mother’s concerns, almost a third of Student’s school day would be with general education students, affording substantive modelling opportunity.

86. The moderate-to-severe special day class would provide Student with direct instruction from a special education teacher within a class environment, deliver specialized academic instruction suitable for Student’s academic level, enable Student to form peer-to-peer social relationships, including social pragmatic instruction and development in each day’s curricular activities, and develop and practice adaptive skills and functional independence. District’s IEP offer of placement in a moderate-to-severe special day class was appropriate.

LEVELS OF PERFORMANCE AND GOALS AND OBJECTIVES

87. The IEP team reviewed the accommodations and modifications for Student, within the offered special day class placement. The team updated Student’s present levels of performance, as reported by her District and First Steps’ providers. They reviewed current behavior data. Following the 2017 triennial assessment and during the five team meetings for the 2017 triennial IEP, the IEP developed 20 goals with short-term objectives in the areas of academics, speech, language, social skills, behavior, independence, and adapted education. The 2018 annual IEP team reviewed Student’s progress on her goals, finding she met three goals, though Parents had not given permission to implement the goals until December 13, 2017. Two of the three goals Student met were in articulation, an area where Student would be expected to improve as she physically matured.

88. Four behavior goals were drafted to address personal space violations,

falling to the ground, visual stereotypy, and speaking with appropriate volume. First Steps proposed the goals and Dr. Burkholder agreed the goals were appropriate and suggested maintaining First Steps behavior intervention plan. Dr. Burkholder also discussed the transition plan for moving Student's behavior services (aide support and supervision) from the nonpublic agency First Steps to District. Dr. Burkholder's transition plan included First Steps and District collaborating as District personnel replaced First Steps aides. Dr. Burkholder's credentials and qualifications enabled him, as well as the District's other certified behaviorists, to properly supervise Student's behavior intervention plan and the trained District adult aides. The evidence established that District's behaviorists and aides were professionally qualified to provide Student's behavior services, thereby obviating any legal requirement that Student receive her behavior services from a nonpublic agency.

89. Ms. Dickinson drafted and the team reviewed four speech goals in the areas of intelligibility, social skills, social communication, and giving multiple step directions. The goals properly addressed Student's communication needs and included short-term objectives that enabled the team to monitor Student's progress. Mr. Demidzic drafted and the team reviewed two adapted physical education goals, which properly addressed and identified Student's service needs. Ms. Clough drafted and the team reviewed two fine motor skill occupational therapy goals. One was to encourage Student to use more than two fingers when keyboarding with both hands; the other was to increase her sizing and spacing of letters and words when writing. The occupational therapy goals were supported by the occupational therapist in consultation with Student's teacher. Mother disagrees with discontinuing direct occupational services to Student, but the triennial occupational therapy assessment and Student's occupational therapists properly concluded that Student needed to pursue these goals within the class setting and that one-to-one direct service was not helpful or needed.

90. The team reviewed six academic and two independence goals. Student's former inclusion specialist Ms. DeMartini originally drafted these goals following her assessment for the January 2017 triennial IEP. Ms. Shellhammer updated the goals for the January 2018 IEP goals and reviewed them with Ms. DeMartini, because she had extensively worked with Student over three years. Ms. DeMartini carefully reviewed the goals in her testimony, demonstrating thoughtful consideration of Student's capabilities, assuring measurable achievable goals with short-term objectives. The six academic goals were designed to meet Student at her level of performance and set measurable, achievable goals, in writing, reading comprehension, mathematics. The team also reviewed the two independence goals for following directions and training in getting teacher's attention.

91. The IEP team fully reviewed the goals, with Mother's attentive participation. For example, Mother asked to add a math regrouping skill goal but the team explained Student first needed to master foundational skills before progressing to regrouping. Dr. Gardner comments regarding the January 2018 goals and objectives were not persuasive.

92. The District established by the weight of the evidence that the Student's proposed accommodations and modifications appropriately supported Student, the updated present levels of performance and progress toward the prior year's goals were accurate and complete, and the goals and objectives properly addressed Student's occupational therapy, adapted physical education, speech and language, behavior, independence, and academic needs. Each goal included an accurate and understandable baseline, provided proper means of measuring progress, and were internally consistent.

2018 ANNUAL IEP FAPE OFFER

93. District's 2018 annual IEP offer was: placement in a moderate-to-severe special day class, with intensive specialized academic instruction, for 1,120 minutes per

week; general education for 575 minutes per week; one-to-one District aide for 1800 minutes per week in all settings; a behavior intervention plan with a transition plan from First Steps to District behavior support; behavior services of one hour per week/four hours per month for consultation; speech services of three 30-minute sessions per week; inclusion specialist, four hours a month of consultation; occupation therapy of 30 minutes of consultation per month; assistive technology services of 30 minutes of consultation per month; adapted physical education of 60 minutes a month (weekly 15-minute sessions) and 60 minutes of consultation services; and, extended school year, in a special day class, with 45 minutes a week of speech and language services. The team explained and provided Mother with ample opportunity to discuss the offer. The District's offer of FAPE in the January 2018 IEP was clear and unambiguous.

94. District's 2018 annual IEP offer of FAPE exhibited the thoughtful consideration of District educators and providers, who demonstrated a sincere desire for Student to receive meaningful educational benefit. During the hearing, Student's teachers and service providers (including First Steps) demonstrated genuine concern for Student's academic future. District established by a preponderance of the evidence that its January 2018 annual IEP offer was reasonably calculated to enable Student to make progress appropriate in light of her circumstances and, therefore, provided a FAPE.

95. District prevailed on District Issues 2 and 3.

STUDENT'S ISSUE 1: 2017-2018 SCHOOL YEAR

96. Student contends that District denied her a FAPE for the 2017-2018 school year. Since Student's annual IEP is every January, school years are subject to two IEP's. Here, the first half of the school year was under the January 2017 IEP offer and the second half is controlled by the January 2018 IEP offer. Student did not meet her burden of proof on Student Issue 1.

97. In Issue 1(a), Student contends that District's January 2018 annual IEP did

not offer appropriate supports, services, and goals. However, District met its burden of proof that the January 2018 annual IEP offered Student a FAPE. The IEP's supports, services, and goals were appropriate to meet Student's unique needs and designed for Student to make meaningful progress in her educational setting. Student's evidence and contentions to the contrary were considered and addressed in the context of District's Issue 3, and were not persuasive. District prevailed on Student's Issue 1(a).

98. In Issue 1(b), Student contends that the January 2018 annual IEP did not offer placement in the least restrictive environment. Student argues that inclusion in a general education classroom continued to be the appropriate placement and that the moderate-to-severe special day class was too restrictive. District proved in Issue 3 that Student could not access the fourth grade curriculum and was not making meaningful academic progress in the general education classroom inclusion placement. Further, the moderate-to-severe special day class was reasonably calculated to enable Student to make progress appropriate in light of her circumstances. Mother participated in discussions of the placement continuum and was informed why the special day class was best suited to enable Student to progress academically, socially, and functionally. District prevailed on Student Issue 1(b).

99. In Issue 1(c). Student contends the January 23, 2018 IEP offer was unclear and prevented Parents from meaningfully participating in or enforcing the IEP. Student presented no credible or persuasive evidence that the offer was unclear or that Parents did not understand the offer and therefore could not participate. Student offered no evidence that the January 26, 2018 IEP document contained typographical errors or conflicting numerical calculations of a substantive nature that would in any reasonable manner cause confusion. Further, the 2018 IEP offer was very similar to the January 2017 triennial IEP offer. Mother attended six IEP team meetings (January through November 2017) for the 2017 IEP and another meeting for the 2018 IEP. The documentary and

testimonial evidence demonstrate Mother's active involvement in the IEP team meetings. Student failed to meet her burden of proof that the January 2018 IEP offer was unclear and prevented Parents from meaningfully participating or enforcing the IEP.

100. In Issue 1(d), Student asserts that District failed to implement the January 23, 2017 IEP by not having inclusion support from August 15 to October 17, 2017. Student's contention fails for three reasons. First, Parents never agreed to implementation of the January 2017 IEP; therefore, District cannot be faulted for not implementing. Second, if Parent agreed to implementation of the 2017 triennial IEP offer, Student would have been in a special day class and not receiving the inclusion support to which the issue is referring.

101. Finally, Student had received all the inclusion support to which she was entitled. Student had been receiving inclusion support services and one-to-one specialized academic instruction pursuant to the 2014 settlement agreement. Ms. DeMartini became a District program specialist in August 2017. Resource specialist Elizabeth O'Brien provided Student with the specialized academic instruction and Ms. DeMartini continued with the inclusion services because District had not yet retained a new inclusion specialist. Ms. Shellhammer was then retained as Student's new inclusion specialist and Ms. DeMartini supervised Ms. Shellhammer for two months. Student received all inclusion services to which she was entitled under the 2014 settlement agreement. Student did not meet her burden of proof as to Student's Issue 1(d).

102. In Issue 1(e), Student contends that District failed to develop measurable annual goals designed to meet Student's needs that result from her disability to enable her to be involved in and make progress in the general education curriculum. Student's contention fails. First, in the January 2016 annual IEP, the January 2017 triennial IEP, and the January 2018 IEP, the District has proposed goals in keeping with its offer to change Student's placement from full inclusion in a general education classroom to a special

day class. Dr. Gardner's reports also indicated that she reviewed the District's proposed goals for the purpose of supporting Student in a general education inclusion placement. District demonstrated its January 2018 offer of placement in the special day class was appropriate and that the IEP provided FAPE. As discussed below, the January 2017 triennial IEP similarly offered a FAPE. Therefore, District designed the goals for Student to make progress in her special day class setting, not the continuing general education inclusion placement that Parents seek.

103. Further, the evidence demonstrates that Mother attended all of the many IEP team meetings, where the IEP team discussed goals. The January 2016 and January 2017 IEP team meetings reflect that District adjusted some goal language based upon discussion with Mother or Dr. Gardner's inquiries. Parents consistently delayed in approving IEP goals for implementation. Parents permitted implementation of the January 2016 annual IEP goals in August 2016, and the January 2017 goals in December 2017, despite Mother's deep involvement in crafting the goals. The 2017 and 2018 IEP goals were clear and measurable. Student did not submit any persuasive or credible evidence that the 2017 and 2018 IEP goals were inappropriate or that Student required additional goals. Student did not meet her burden of proof as to Issue 1(e).

104. In Issues 1(f) and 1(h), Student contends District failed to provide or offer appropriate supports, services, and goals for extended school year, including failing to provide a one-to-one aide. The January 2018 IEP included an offer for extended school year (summer 2018) in a moderate-to-severe special day class, with 45 minutes of speech and language service per week. Extended school year was about four weeks of half days. As discussed above, District properly found that Student was not in need of direct occupational therapy, which was therefore not part of Student's related services. Also, the moderate-to-severe special day class was a language rich environment. The January 2018 offer includes 90 minutes of speech services a week. Student's extended

school year consists of half days, entitling Student to half of the speech services, which was 45 minutes a week. Student's IEP goals apply to both the regular school year and extended school year.

105. Student contends that the January 2018 IEP should also have included a full-time one-to-one aide. However, the District made the extended school year offer in January, contemplating that Student would have been attending a moderate-to-severe special day class for almost six months before attending the extended school year's half days in a moderate-to-severe class, which had a high adult to student ratio. Also, the 2014 settlement agreement provided for services during extended school year, but did not stipulate to one-to-one aides during extended school year. Student did not submit any persuasive evidence that the January 2018 annual IEP extended school year offer required a one-on-one aide. Further, Student did not demonstrate that the extended school year offers should have included additional services or were otherwise not appropriate. District prevailed as to Issues 1(f) and 1(h).

106. In Issue 1(g), Student contends that District should have provided resource specialist and/or response to intervention services for the 2017-2018 school year. This contention was discussed and analyzed in District's Issue 3, which concluded the January 2018 IEP offered a FAPE. Both of these programs are designed for students who are able to access the grade curriculum. The programs did not and could not address global curricular deficits. Therefore, the evidence demonstrated that neither the resource program nor the response to intervention services would have better enabled Student to access her fourth grade curriculum. District prevailed on Student Issue 1(g).

STUDENT'S ISSUE 2: 2016-2017 SCHOOL YEAR

107. Student contends that District denied her a FAPE for the 2016-2017 school year because the January 2016 IEP offer and the January 2017 triennial IEP offers were insufficient or the services were not implemented. Here, the first half of the school year

was under the January 2016 IEP offer and the second half was controlled by the January 2017 IEP offer. Student did not meet her burden of proof on Student Issue 2.

108. In Issue 2(a), Student contends that District's January 2017 triennial IEP did not offer appropriate supports, services, and goals. However, the evidence demonstrated that the January 2017 triennial IEP offered Student a FAPE. The January 2018 IEP offer mirrored that of the January 2017 triennial, except for updated present levels of performance, progress on goals, and some adjustment of dates. Like the January 2018 IEP, the January 2017 triennial IEP offered supports, services, and goals that were appropriate to meet Student's unique needs and designed for Student to make meaningful progress in her educational setting consistent with her circumstances. Student's evidence and contentions regarding the January 2017 triennial IEP are the same as those made regarding the January 2018 IEP offer and are not unpersuasive. Student has not submitted any evidence or additional argument to support a finding that the January 2017 triennial IEP failed to offer appropriate supports, services and goals. District prevailed on Student's Issue 2(a).

109. In Issue 2(b), Student contends that the January 2017 triennial IEP did not offer placement in the least restrictive environment. As discussed in the analysis of Student's Issue 1(b), and equally applicable to the January 2017 triennial IEP, Student could not access her third-grade curriculum and was not making meaningful academic progress in the general education classroom inclusion placement. Further, the evidence demonstrated that the moderate-to-severe special day class was reasonably calculated to enable Student to make progress appropriate in light of her circumstances. Mother participated in discussion of the placement continuum and was informed why the special day class was best suited to enable Student to progress academically, socially, and functionally. District prevailed on Student Issue 2(b).

110. In Issue 2(c). Student contends the January 2017 triennial IEP offer was

unclear and prevented Parents from meaningfully participating in or enforcing the IEP. Student has presented no credible or persuasive evidence that the offer was unclear or that Parents did not understand and therefore could not participate. The January 2017 IEP document did not contain typographical errors or conflicting numerical calculations significant enough to cause Parents any confusion regarding District's offer of FAPE. Mother attended six IEP team meetings (January through November 2017), was actively involved in each, and had ample opportunity to state she did not understand or needed clarification. Student has failed to meet her burden of proof that the January 2017 triennial IEP offer was unclear and prevented Parents from meaningfully participating or enforcing the IEP.

111. In Issue 2(d), Student contends that District failed to develop measurable annual goals designed to meet Student's needs that result from her disability to enable her to be involved in and make progress in the general education curriculum. The Student Issue 1(e) analysis equally applies here to Issue 2(d). The January 2016 IEP and January 2017 triennial IEP proposed goals for Student's placement in a special day class, not full inclusion. Dr. Gardner's reports regarding both IEPs reviewed goals for the purpose of supporting Student in a general education inclusion placement, which was not the placement offer.

112. Mother attended all of the many team meetings for both the January 2016 IEP and the January 2017 triennial IEP, where goals were discussed. The January 2016 and January 2017 IEP team meetings reflect that District adjusted some goal language based upon discussion with Mother or Dr. Gardner's inquiries. Mother had ample opportunity to discuss any further changes or additional goals. Student carried the burden of proof of demonstrating the January 2016 IEP goals and the January 2017 IEP goals were not measurable or otherwise inappropriate. The 2017 IEP goals were clear and measurable. Student did not submit any persuasive or credible evidence that the

January 2016 IEP goals were inappropriate or that Student required additional goals. Student has not met her burden of proof as to Issue 2(d).

113. In Issues 2(e) and 2(g), Student contends District failed to provide or offer appropriate supports, services, and goals for extended school year, including failing to provide a one-to-one aide. The analysis of Student Issues 1(f) and 1(h) similarly applies herein. The January 2017 triennial IEP offered extended school year (summer 2017) in a moderate-to-severe special day class, with 45 minutes of speech and language service per week. Extended school year was about four weeks of half days. District properly found that Student was not in need of direct occupational therapy, which was therefore not part of Student's related services. The January 2017 offer included 90 minutes of speech services for extended school year's half days, which was half of the speech services offered for full days. Student's IEP goals apply to both the regular school year and extended school year.

114. Student contends that the January 2017 triennial IEP should also have offered a full-time one-to-one aide. However, the District made the extended school year offer in January, contemplating that Student would have been attending a moderate-to-severe special day class for almost six months before attending the extended school year's half days in a moderate-to-severe class, which has a high adult to student ratio. Student did not submit any persuasive evidence that the January 2017 triennial IEP's extended school year offer required a one-on-one aide. Further, Student did not demonstrate that the extended school year offers should have included additional services or were otherwise not appropriate. District prevails on Issues 2(e) and 2(g).

115. In Issue 2(f), Student contends that Student should have received resource specialist and/or response to intervention services for the 2016-2017 school year. This contention was discussed and analyzed in District Issue 3 and in Student Issue 1(g),

above. Both of these programs are designed for Students who are able to access grade level curriculum. The evidence demonstrated that neither the resource program nor the response to intervention services would have better enabled Student to access her third grade curriculum within the general education inclusion placement. Student did not meet her burden of proof as to Issue 2(f).

STUDENT'S ISSUE 3: 2015-2016 SCHOOL YEAR (FROM JANUARY 24, 2016)

116. Student contends that District denied her a FAPE for the 2015-2016 school year beginning January 24, 2016, which was controlled by the January 2016 IEP offer. Student did not meet her burden of proof on Student Issue 3.

117. In Issue 3(a), Student contends that District's January 2016 annual IEP did not offer appropriate supports, services, and goals. Student's argument is based upon an inclusion placement in a general education classroom. However, the January 2016 IEP offered supports, services, and goals that were appropriate to meet Student's unique needs and designed for Student to make meaningful progress in a special day class placement. As discussed below, Student has failed to meet her burden of demonstrating the January 2016 special day class placement offer was not appropriate. Similarly, Student fails to provide persuasive evidence to support her contention that the January 2016 annual IEP did not offer appropriate supports, services, and goals. Student has failed to meet her burden of proof by a preponderance of the evidence as to Student Issue 3(a).

118. In Issues 3(b) and 3(c), Student contends that the January 2016 triennial IEP did not offer placement in the least restrictive environment and failed to develop measurable annual goals designed to meet Student's needs to enable her to be involved in and make progress in the general education environment. At the 2016 IEP, District determined that Student was not accessing her grade level curriculum and was not making meaningful academic progress in the general education classroom inclusion

placement. Student has submitted no credible, persuasive evidence indicating otherwise. Mother participated in discussion of the placement continuum and was informed why the special day class was best suited to enable Student to progress academically, socially, and functionally. Dr. Gardner attended the May 2016 IEP team meeting where she discussed her view of the proposed goals and her opinion that Student remain fully included in the general education classroom. District IEP team members adjusted some of the goals, but did not agree that Student should be fully included. The evidence demonstrated that the offered moderate-to-severe special day class was reasonably calculated to enable Student to make progress appropriate in light of her circumstances. Further, Dr. Gardner (in her report and at hearing) and Student did not submit persuasive, credible evidence that District's 2016 IEP goals were not measurable or, like the special day class placement offer, were not designed to provide meaningful educational benefits consistent with Student's unique circumstances. Student has failed to meet her burden of proof as to Student Issues 3(b) and 3(c).

119. In Issues 3(d) and 3(f), Student contends District failed to provide or offer appropriate supports, services, and goals for extended school year, including failing to provide a one-to-one aide. The analysis of Student Issues 1(f), 1(h), 2(e) and 2(g), similarly applies here. The January 2016 annual IEP offered extended school year (summer 2016) in a moderate-to-severe special day class, with speech and language therapy and occupational therapy at a half the weekly rate of that delivered during the regular school year. Student would be in extended school half the time and, accordingly, services were similarly delivered with half the frequency. Student's IEP goals applied to both the regular school year and extended school year.

120. Student contends that the January 2016 annual IEP should have also offered a full-time one-to-one aide for extended school year. However, the District made the extended school year offer in January, contemplating that Student would have

been attending a moderate-to-severe special day class for almost six months before attending the extended school year's half days in a moderate-to-severe class, which has a high adult to student ratio. Student did not submit any persuasive evidence that the January 2016 annual IEP's extended school year offer required a one-on-one aide. Further, Student did not demonstrate that the extended school year offer should have included additional services or were otherwise not appropriate. District prevails on Issues 3(d) and 2(f).

121. In Issue 3(e), Student contends that Student should have received resource specialist and/or response to intervention services for the 2015-2016 school year. This contention was discussed and analyzed in District Issue 3 and in Student Issues 1(g) and 2(f), above. Both of these programs are designed for Students who are able to access the grade level curriculum. The evidence demonstrated that neither the resource program nor the response to intervention services would have better enabled Student to access her grade level curriculum within the general education inclusion placement. Student did not meet her burden of proof as to Issue 3(e).

STUDENT'S ISSUE 4: FUNDING OF DR. GARDNER'S INCLUSION SUPPORT EVALUATION

122. Student contends that Parents are entitled to be reimbursed for Dr. Paula Gardner's 2016 inclusion support evaluation report because the District did not fund the report or file a due process request following Parents' March 4, 2016 notice. District contends that Parents' notice did not trigger the statutory "fund or file" obligation.

123. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).). When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate

or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

124. In the March 4, 2016 email to District, Mother stated that Parents had retained Dr. Gardner to perform an inclusion evaluation and prepare a report, District was aware of Dr. Gardner's observation date, and Parents intended to seek reimbursement from District. The letter did not identify a District evaluation with which the Parents disagreed and did not state Parents were going to be seeking reimbursement under the statutory independent evaluation process.

125. Mother's March 4, 2016 email did not trigger District's obligation to either fund Dr. Gardner's report or file a due process request to show that its assessment was appropriate. The evidence demonstrated that District recipients of the email properly did not view the letter as triggering its "fund or file" obligation because Parents did not identify a District assessment with which they disagreed and for which Dr. Gardner's would be conducting an independent educational evaluation. Unless Parents identified a District assessment with which they disagreed, District was unaware of what District assessment it should defend as legally appropriate in a due process request. The general statement that Parents would seek reimbursement is not sufficient under the statutory scheme. District prevails on Student Issue 4.

STUDENT'S ISSUE 5: REMEDY RELATED TO DECISION IN OAH CASE NO. 2016080413

126. In Issue 5, Student seeks a determination as to what remedy she is entitled as a result of the decision in OAH Case No. 2016080413. ALJ Miles issued a decision in OAH Case No. 2016080413 on February 15, 2017, finding that District had failed to meet its burden of proving that its January 2016 IEP offered a FAPE because District's IEP offer was unclear as to the amount of time Student would be in special education for the remainder of Student's second grade year and unclear regarding the number of minutes

of speech and language services. Therefore, Parents were unable to meaningfully participate and enforce the IEP. Student did not file and consolidate her own due process in that case and, consequently, she was not entitled to any affirmative relief in the decision.

127. ALJ Tiffany Gilmartin ruled at the prehearing conference in this case, on April 5, 2018, that Student could rely on ALJ Miles' decision, pursuant to the doctrine of collateral estoppel. However, Student's reliance on the prior decision is limited to the one issue that was sufficiently decided, specifically that the District's January 2016 IEP offer was unclear.

Applicable Law

128. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11.)

129. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Id*; *Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F. 3d 1489, 1496.) A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d at p.1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory

education need not provide a “day-for-day compensation.” (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

Analysis of Issue 5

130. Student seeks a remedy for District’s lack of clarity in the January 2016 IEP offer, because the offer was unclear as to the amount of time Student would be in special education for the remainder of Student’s second grade year and unclear regarding the number of minutes offered for speech and language services.

131. An administrative law judge has broad equitable powers in formulating a remedy, but remedies must have a reasonable nexus to the denial of FAPE and benefit the Student. Here, Student did not offer evidence that the lack of clarity in the January 2016 IEP offer denied Student her desired placement or diminished her services. Student continued with her inclusion placement in a general education classroom and received all services in accordance with the 2014 settlement.

132. Also, Parents rejected the District’s January 2016 IEP offer because District proposed changing Student’s placement from inclusion in a general education classroom to a special day class. Parents continued to oppose the change in placement and argued in this case for an order to continue inclusion placement in a general education classroom. Therefore, despite the lack of clarity, Parents would have declined the offer because of the change in placement. Student did not prove through any evidence that Parents would have accepted the January 2016 IEP offer if the IEP offer clearly and unambiguously stated the number of minutes Student would be in special education or the minutes of speech and language services.

133. Student did not meet her burden of proof that she is entitled to a remedy as a result of the decision in OAH Case No. 2016080413. Parents would have rejected the January 2016 offer even if clear and unambiguous. The offer’s lack of clarity did not

result in any unwanted change of services. District prevails on Student Issue 5

ORDER

1. District's January 23, 2017 multidisciplinary psychoeducational triennial assessment was legally appropriate and Student is not entitled to an independent education evaluation at public expense.

2. District's January 2018 individualized education program correctly determined that Student qualified for special education under the eligibility of intellectual disability.

3. District's January 23, 2018 individualized education program, as amended in the January 26, 2018 IEP document, offered Student a free appropriate public education in the least restrictive environment.

4. District may implement the January 2018 individualized education program without parental consent if Parents want District to provide special education services for Student.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on District Issues 1, 2, and 3. District prevailed on Student Issues 1, 2, 3, 4, and 5.

RIGHT TO APPEAL THIS DECISION

This was a final administrative Decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: July 3, 2018

/s/

CLIFFORD H. WOOSLEY

Administrative Law Judge

Office of Administrative Hearings