

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MENIFEE UNION SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2018041172

DECISION

Menifee Union School District filed its Due Process Complaint on April 25, 2018. Administrative Law Judge Deborah Myers-Cregar heard this matter in Menifee, California on May 22, 23, 24, 30, June 12, 13, and 14, 2018; and telephonically on June 26, 2018.

Mother represented Student and attended each day of hearing. Student did not attend.

Cynthia Vargas, Attorney at Law, represented Menifee. Jodi Curtis, Special Education Director, attended each day of hearing.

The record was held open for closing briefs and reply briefs, which were due on July 26, 2018, and August 9, 2018, respectively. Menifee and Parent timely submitted their closing briefs. Menifee timely submitted its reply brief. Parent's Motion to Strike Menifee's reply brief for being served on her at 6:01 p.m. on the due date is denied as there was no prejudice established.

On August 9, 2018, a telephonic status conference was set for August 13, due to the ALJ's medical emergency. On August 10, 2018, Menifee brought a motion

requesting a continuance of the Decision based on the ALJ's medical emergency. On August 13, 2018, the parties held a telephonic status conference, and they agreed on the record to a continuance to September 28, 2018, to allow the ALJ to recover and complete the Decision.

ISSUES

1. Whether Meniffee is entitled to conduct the following (triennial) assessments, proposed in its October 13, 2017 assessment plan, without parental consent: (1) academic achievement; (2) adaptive behavior; (3) motor development; (4) language, speech and communication; (5) intellectual (cognitive) development; (6) health; (7) social emotional; (8) assistive technology; (9) occupational therapy; and (10) physical therapy?

2. Whether Meniffee is entitled to implement the December 4, 2017 Individualized Education Program, without parental consent, because it provided Student with a free and appropriate public education?

SUMMARY OF DECISION

This Decision holds that Meniffee is entitled to conduct the following (triennial) assessments proposed in its October 13, 2017 assessment plan, without parental consent: (1) academic achievement; (2) adaptive behavior; (3) motor development; (4) language, speech and communication; (5) intellectual (cognitive) development (6) health; (7) social emotional; (8) assistive technology; (9) occupational therapy; and (10) physical therapy.

This Decision also holds that Meniffee offered Student a FAPE and may implement its December 4, 2017 IEP offer, without parental consent.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. The parties have engaged in two prior due process hearings within the past year. Parent challenged Menifee's offers of FAPE between 2011 and June 9, 2017. On September 19, 2017, after a two-day hearing, Administrative Law Judge Rommel Cruz issued a Decision in OAH Case No. 2017060872, ordering Menifee to conduct an adapted physical education assessment on Student. On March 21, 2018, after a five-day hearing, Administrative Law Judge Kara Hatfield issued a Decision in OAH Case No. 2017100838, which found Student's November 19, 2015 and November 15, 2016 IEPs to be appropriate. ALJ Hatfield made Factual Findings regarding Menifee's assistive physical education assessment but did not make Legal Conclusions regarding the assessment. The present Decision is limited to the appropriateness of the October 13, 2017 assessment plan, and the appropriateness of the December 4, 2017 IEP offer, which includes Menifee's adapted physical education assessment and its recommendations as FAPE.

2. Student was nine years old at the time of the hearing. She was born with Williams syndrome, also known as Trisomy 18. Student had global developmental delays, cerebral palsy, intellectual disability, speech impairment, complex congenital heart disease, and a compromised immune system. Student's pediatric cardiologist diagnosed her as medically fragile requiring 24 hour a day nursing care for life. Student's infectious disease physician diagnosed her with heart disease, a double outlet in her right ventricle, a hypo-plastic aortic arch, a partial anomalous venous return to the heart, a ventricular septal defect, and cerebral palsy. All of these conditions intricately affected her blood pressure and oxygenation. These conditions made her extremely susceptible to systemic inflammation which accompanies viruses and bacteria, meaning that a slight chest cold could become life threatening. Student's immune system was

gravely compromised.

3. Beginning December 15, 2011, Student qualified for special education and related services because of her multiple disabilities, orthopedic impairment, other health impairment, speech and language impairment, intellectual disabilities, and her significant needs in self-help, communication, locomotion, motoric functioning, and health and safety. She has lived with Parent, and resided within Menifee's geographical boundaries at all relevant times.

4. Student received all of her education and related services at home through home hospital instruction, which is not in dispute. She often required oxygen through a nasal cannula, and needed to be suctioned frequently as she could not swallow her own saliva. Student could not stand or walk independently, and used a gait trainer and wheelchair. She could not speak. For the past two years, Student used an augmentative alternative communication eye-gazing device. The eye gazing device was a small computer which used a language organizing system called Unity, which contained core vocabulary words, tracked Student's eye gaze as she visually selected icons representing words and sentences, and converted those selections into a verbalized output voice.

REQUESTS FOR ASSESSMENTS

5. Student's last agreed upon and implemented IEP was November 15, 2016. On September 20, 2017, in preparation for Student's triennial assessment, and in compliance with ALJ Cruz's Order, Menifee's school psychologist Hiram Lopez prepared a triennial assessment plan. Menifee mailed Parent a prior written notice of an upcoming IEP and a request to assess Student in 11 areas of identified need, which included the adapted physical education assessment that ALJ Cruz ordered. Specifically, Menifee requested assessments in the areas of academic achievement; social/adaptive/behavioral/emotional; processing; perceptual/motor development; communication development; (intellectual) cognitive development;

health/developmental; assistive technology; occupational therapy; physical therapy; and adapted physical education.

6. In that prior written notice, Meniffee stated that Student was due for her triennial assessment. Meniffee identified that the assessments would be conducted by qualified staff, using a variety of assessment tools. The information would help to assess Student's progress, her current educational needs, and the appropriateness of her program. Meniffee's stated objective was to determine how much progress Student had made over the past three years. On September 25, 2017, Parent informed Meniffee that she did not give consent to the proposed assessment plan.

7. On September 27, 2017, Meniffee sent Parent another prior written notice with a revised assessment plan which sought all of the previously request triennial assessments, and also added that medical and health information would be collected from Student's doctors. On September 28, 2017, Parent again did not give consent to the assessments. She disagreed that the IEP team needed the assessments. Parent asserted Student had been assessed the prior school year for her annual IEP, and Meniffee did not need any updated information. Parent wanted the adapted physical education assessment plan to be on a separate document.

8. On September 29, 2017, Meniffee sent Parent a prior written notice accompanied by two separate proposed assessment plans: one with only the adapted physical education assessment; and one with the remaining triennial assessments sought. On October 11, 2017, Parent signed the adapted physical education assessment plan, but not the remaining assessment plan.

9. On October 13, 2017, Meniffee sent Parent another prior written notice requesting the remaining 10 triennial assessments. This is the assessment plan at issue. Although the location of the assessment was not stated, Student received all of her services and her prior assessments conducted in her home hospital setting. There was

no indication that Parent was not aware of the location where the proposed assessments would take place. Parent did not consent to the October 13, 2017 assessment plan.

10. On October 24, 2017, Special Education Director Jodi Curtis sent Parent an e-mail clarifying the need for those assessments as Student had not been formally assessed in the prior school year. Ms. Curtis stated the IEP team members had only collected data on Student's present levels of performance. Ms. Curtis clarified that the most recent assessments were from December 2, 2014, when Student was six years old and classified as being in kindergarten. Meniffee provided Parent with additional prior written notices and requests for her to sign the assessment plan on December 4, 2017; December 6, 2017; February 6, 2018; and February 12, 2018. Parent again did not consent to the assessments.

11. At hearing, several direct providers, who were qualified by education and experience to conduct assessments, persuasively testified that an updated formal assessment would have helped them better understand Student's development and needs. Student's formal assessments were over three years old. Student had made progress in three years, especially in her recent use of her augmentative communication device. Student's specialized academic instruction teacher and her other service providers wanted these critical evaluations to address Student's current baselines and measures of progress to evaluate and develop an appropriate program. They wanted to share information with each other, as it was otherwise difficult to meet. The service providers worked at Student's home at different times, days, and in some cases came from different districts and Special Education Local Plan Areas (SELPA). These factors limited their ability to easily speak to each other, compare notes, and share information about Student's progress, successful interventions and teaching strategies. Student's speech and language pathologist did not know how the specialized academic instructor

accessed 40 visual icons with Student when, in her speech sessions, Student could only access nine icons. Student's performance varied between her providers because the providers were accessing the augmentative communication device differently.

12. At hearing, Parent acknowledged that Student had deficiencies in all areas of the requested assessments. Parent opined that new assessments were not necessary, claiming that Student's 2014 triennial assessments were adequate, that Student had not progressed very much, and that Student's providers presented sufficient information at the IEP meetings to discuss present levels of performance and develop adequate goals. Paradoxically, Parent opined that Meniffee had sufficient information to develop the IEP without the assessments, yet contended that Meniffee should not have held the triennial IEP without the assessments. Further, Parent questioned whether the triennial assessment plan was valid because the school psychologist requested it, not the entire IEP team.

IEP MEETINGS OF DECEMBER 4, 2017; FEBRUARY 2 AND 23, 2018; AND MARCH 15, 21, AND 27, 2018

13. The IEP team met on December 4, 2017, February 2, 2018, February 23, 2018, March 15, 2018, March 21, 2018 and March 27, 2018. All essential members of the IEP team were properly credentialed in their specialized areas of expertise, and present on all days, with the exception of Ms. Dianne Cheney, a nurse who left in the middle of February 23, 2018 meeting to attend to a medical emergency; and the occupational therapist and physical therapist, which Parent excused from the March 27, 2018 IEP because they were not presenting information.

14. The following IEP team members were present at the meetings and also testified at hearing: Parent, who attended all meetings on Student's behalf; Jodi Curtis, Director of Special Education, as Meniffee's authorized representative; Isabelle Robles, who attended five meetings as Meniffee's speech and language pathologist; DiAnna

Cullen, attended all meetings as Meniffee's adaptive physical education specialist; Dianne Cheney and Nancy St. Paul-Martin, Meniffee's nurses; Kellie Simpson, Meniffee's specialized academic instruction teacher assigned to Student's home hospital instruction; Judy Erkman, general education teacher; Dr. Jeanne Moore and Mary Mertz, Meniffee's physical therapists; Dr. Barbara Sorter, the SELPA's and Meniffee's orthopedic impairment specialist; Margaret Perkins, Meniffee's assistive technology and alternative augmentative communication specialist. Hiram Lopez, Meniffee's school psychologist, attended the IEP team meetings but did not testify at the hearing. Additionally, Meniffee's counsel, Cynthia Vargas, attended all six IEP meetings. Parent was not represented by counsel.

PARENTAL PARTICIPATION

15. Prior to each IEP meeting, Meniffee provided Parent with an updated draft of the ongoing IEP and an updated request for assessments. During the course of each meeting, the draft IEP document was updated to include the team attendance, changes to the draft, updates to Student's present levels of performance, goals, notes about the discussions, and Parent and provider concerns addressed at the meetings. Parent actively participated in each IEP team meeting. She made requests and comments at each meeting, and the IEP team made changes to Student's present levels of performance and goals based on her information.

16. At each of the six meetings, the IEP team discussed Student's strengths and preferences. She enjoyed vocalizing in a sing-song manner to songs from the play/movie High School Musical and to the Cheetah Girls theme music. Student was aware of when her communication partner understood her. She was highly attentive when her communication partners were animated. When Student was highly motivated, she could communicate with others. Parent reported that Student's greatest strengths were her social skills, her cheerful mood, and her ability to gaze in the direction of the

item that she wanted. She could also grab shiny colorful items and was interested in touching a variety of textures.

PRESENT LEVELS OF PERFORMANCE

17. The IEP team developed information regarding Student's present levels of performance over the course of the six IEP team meetings that occurred between December 4, 2017 and March 27, 2018. Because Parent had refused consent to the triennial assessments, Meniffee used alternative means of collecting data to develop Student's present levels of performance. They reviewed 2014 assessments, information provided by Parent, and noted the classroom-based observations made by her teachers, service providers, caseworkers and specialists. Several IEP team members expressed concern about not having recent assessments. They felt it would have given them important baseline information to share with the other providers and help them better follow her progress.

18. Student's developmental, academic, and functional skills were reported by Student's specialized academic instruction teacher and her occupational therapist. Student had shown inconsistent proficiency in identification of individual letters. Her specialized academic instruction teacher helped her to write her name with hand over hand assistance, and Student could make random strokes when given an egg-shaped crayon. Student was inconsistent in shape and number recognition, but could identify several colors with her eye-gazing augmentative communication device.

19. Student's communication development was reported by Student's speech and language pathologist, her augmentative alternative communication specialist, and her specialized academic instruction teacher. They discussed the progress on Student's goals from the November 2016 IEP. Student was a non-verbal communicator, and used vocalizations, facial expressions, and body movements to communicate. She used her augmentative communication device to gaze at and select icons and folders on the

computer screen, which the program translated into computerized voice utterances. Using this device, Student could select between one and three word choices, including verbs, nouns, prepositions, adjectives, and commands "stop" and "don't." With the device, she could ask questions, request items and information, comment, command, and protest. She recently decreased her use of the augmentative communication system and increased looking at the adult with a highly expressive facial expression to engage the adult. She could say "hello" using her augmentative communication system and smile in eight out of 10 attempts. She could interact with her communication partner with up to three successive exchanges, or turns, on a shared topic and activity that was motivating to her. It took up to 10 minutes for Student to warm up to her communication partner.

20. Student's fine and gross motor development were reported by Student's occupational therapist, her physical therapist, her adaptive physical education specialist, and her specialized academic instruction teacher. Student did not have the ability to hold or grasp writing implements. She could hold lightweight objects for up to one minute, and could use her index finger to touch an object. Student used her gait trainer, and her standing balance required minimal manual support at her elbows at all times, with an adult present and closely guarding her. Student ambulated with some independence in her gait trainer, while her harness provided support to her trunk, hip, and pelvis. She used custom knee immobilizers and knee-ankle-foot orthoses, which she wore daily to stretch her contracted hamstring muscles. Student could sit upright with a circular 'boppy pillow' around her hips. She could trap a medium sized ball when rolled to her, and push it back towards her play partner. When Student was in her gait trainer, she could trap a medium sized light weight ball against her chest and toss it two-three inches away from her. When she was in her gait trainer and a ball was placed on the ground, she could lift either leg and kick it so that it rolled more than five feet forward.

21. Student's social, emotional and behavioral skills were reported by her augmentative communication specialist, and her specialized academic instruction teacher, based on their personal interactions with Student. Student could respond to a familiar individual's greeting using her augmentative communication device to communicate "hello," "hi," or "goodbye." Student was especially attentive when her communication partner was animated. She exhibited the ability to make some of her own choices, thus distinguishing herself as an individual by declining to participate in her non-preferred activities.

22. Student's health information was provided to Parent and the IEP team through letters from her team of Kaiser doctors. They diagnosed her with Trisomy 18 (Edward's syndrome), cerebral palsy, and heart disease. Student's cardiac issues were also associated with pulmonary blood pressure and oxygenation. Additionally, her body weight was under normal limits and her immune system was compromised. Student was susceptible to systematic inflammation that accompanies even benign viruses and bacteria. A slight "chest cold" could turn into a life-threatening infection. Student required precautionary measures so that she would not be exposed to communicable infectious illnesses.

23. Student's vocational skills were reported by her occupational therapist and her physical therapist. Student could pick up light items, touch items of interest, and required hand over hand guidance for items above her head. Student would spontaneously communicate with others with her augmentative communication device. If offered incentives, Student could complete academic tasks using her communication device.

24. Student's adaptive skills and daily living skills were reported by Parent and Student's home nurse assistant. Student received help from Parent or a nurse in all daily activities. She required full adult assistance when feeding.

14 GOALS DEVELOPED

25. Over the course of the six IEP team meetings from December 4, 2017 to March 27, 2018, the IEP team reviewed Student's progress on achieving her past goals, and developed 14 goals to address her areas of academic need, including new goals for adapted physical education. Goals number one and eight addressed Student's fine motor needs and Student's need for increased visual motor coordination skills. The goals were designed to increase Student's bilateral upper extremities' range of motion by reaching toward a preferred object for more than five seconds. The goal would be measured by Student transferring a preferred object from her right hand to her left hand and back to her right hand without dropping the item, in eight out of 10 attempts.

26. Goals number two and four addressed Student's math needs. Goal number two was designed for Student to identify shapes referencing three-dimensional objects using her augmentative communication device, in three out of five attempts with 70 percent accuracy. Goal number four was designed for Student to demonstrate an understanding of the numbers one, two and three by matching the number to the correct number of objects, either by touching them or by using her augmentative communication eye-gaze device, with 70 percent accuracy.

27. Goal number three addressed Student's reading. Student would identify the uppercase letters of her first name with letter objects with 80 percent accuracy with her augmentative communication device, and with tactile letters.

28. Goal number five addressed Student's communication needs. Student's updated goals in expressive language, pragmatics, and social skills were designed so that she would engage in social conversation skills by using her augmentative communication eye-gaze device, selecting one to two word social phrases and greetings with familiar people, using minimal prompts, in four out of five days.

29. Goals number six, nine, 10, 13, and 14 were designed to address Student's

gross motor needs. She would transition from sitting to standing with verbal cues and contact guard assistance, in three out of four attempts. Student would sit on a platform swing and maintain her core balance while being swung more than two feet from the center, in all directions, three out of four days. Supported by her gait trainer, she would kick a ball with her preferred foot, with verbal prompts, in four out of five attempts. Student would ambulate in her gait trainer using her knee ankle foot orthosis, with knee function locked at 30 degrees, for more than 10 feet with only verbal cues and standby assistance, two out of three days. Student would hold a paddle or wand with assistance and strike a ball suspended in front of her, in four out of five attempts.

30. Goal number seven addressed Student's writing needs. She would demonstrate pre-writing strokes such as "/", "\", "+", and/or "x" on paper or a whiteboard, in four out of five attempts with four to six verbal or gestural prompts.

31. Goals number 11 and 12 addressed Student's communication needs. Student would spontaneously create three 'utterances' with her eye-gaze device when communicating with her partner, requesting items, actions, commenting, needing assistance, commanding, and questioning, in eight out of 10 attempts. Student would use her eye-gazing device, and take turns engaging with her communication partner with objects such as books and toys, and with activities such as singing and dancing, for at least two consecutive exchanges or turns, in eight out of 10 attempts.

SPECIAL FACTORS

32. In developing Student's IEP for the 2017-2018 school year, the IEP team considered special factors, such as whether Student required assistive technology, benefitted from an augmentative communication device, or required other equipment and services. The IEP team determined Student's limited speech prevented her from reaching her maximum potential. Her prognosis for developing functional speech was poor. The team determined that, to communicate, Student needed constant access to a

touch screen assistive technology device such as an iPad that allowed her to directly select and touch items on the screen. Student was using a table top stand, which meant she did not have constant access to it when she was using her gait trainer or her activity chair. To address this concern, the IEP team noted that the Student's SELPA orthopedic impairment specialist, her assistive technology specialist, and her augmentative assistive communication specialist recommended a mounting kit for the proposed augmentative communication device to easily place her device on her gait trainer. Student had different seating systems, so it was difficult to find one with an 18" to 22" inch distance from her body. They considered a clamp to mount her augmentative communication device on her gait trainer and/or activity chair, and a rolling mount with wheels which could attach to the activity chair. They began researching the model which would be best for Student's access and not cause Student's trainer or chair to tip over. However, the device was not procured because Parent did not consent to the IEP services and supports. Parent later decided she wanted the mounting kit, but did not want to consent to any part of the IEP.

33. The IEP team concluded Student required "low incidence services and equipment" to meet her goals due to her orthopedic impairment. Student required a pull-up bar, an adaptive tricycle with a rear steering bar, and a safe swing and a peanut ball, in addition to the mounting device for her communication device.

ADAPTED PHYSICAL EDUCATION ASSESSMENTS

Meniffee's Assessment

34. DiAnna Cullen, Meniffee's adaptive physical education specialist, assessed Student and prepared a written report dated October 26, 2017. ALJ Kara Hatfield's March 21, 2018 Decision, in OAH Case No. 2017100838, references Ms. Cullen's written assessment and testimony supporting Ms. Cullen's results, in Factual Findings 169 to

190, which are adopted by reference in their entirety. ALJ Hatfield did not make any Legal Conclusions as the adequacy of the assessment, eligibility, and offer of services was not in issue in that proceeding.

35. At the present hearing, Ms. Cullen testified in support of her October 26, 2017 written report, results and findings. Ms. Cullen earned a bachelor's degree in kinesiology, and a master's degree in special education. Ms. Cullen held a mild/moderate education specialist credential in Utah. She held a California clear single-subject credential in physical education, and a specialization credential in adapted physical education. She had worked as an adapted physical education specialist for 20 years, and for Menifee for nine years. Ms. Cullen had assessed numerous students for delays in gross motor skills over the past 15 years, and worked with numerous IEP teams to develop appropriate gross motor goals and activities for disabled students. She had worked with students with developmental delays and orthopedic impairments.

36. Ms. Cullen persuasively testified about her methods of assessing Student and calculating and interpreting her scores. Ms. Cullen used a variety of methods to conduct her assessment including observation, a review of records, an interview with Student's physical therapist, a parent interview and two formal gross motor evaluations. Ms. Cullen formally assessed Student with the Curriculum, Assessment, Resources, and Evaluation- Revised 2 test (CARE-R2.), and the Functional Motor Assessment (FMA), which measured Student's ability in the areas of mobility, standing, sitting, object control skills and play skills.

37. As part of this assessment, Ms. Cullen interviewed Student's physical therapist, Ms. Mertz, who was present during the assessment. While Ms. Mertz reported Student could move across a mat to pull herself into an army crawl, Student was not able to do so during Ms. Cullen's observations. Ms. Mertz explained Student could move with a gait trainer, reach for objects, and was working on grasping objects. She could

engage in certain aspects of physical education, such as kicking an object with her feet or striking an object with her hands while using her gait trainer. Student could sit on the ground with standby support. Ms. Mertz believed that Student was ready to work on physical education related activities. At the time of Ms. Cullen's assessment, Parent did not have any specific goals for the Student, other than for her to reach her full potential.

38. Ms. Cullen used the results of Student's CARE-R2 assessment to determine Student's level of gross motor skills and object control at a basic level as a generalized baseline. Ms. Cullen believed the CARE-R2 was an appropriate tool because it easily demonstrated what the Student could do currently. In the area of gross motor skills, Student performed at the 10-13 month-old level. In the area of object control, Student displayed skills at the two-year-old level independently.

39. Ms. Cullen conducted the FMA, which tested gross motor skills and object control skills. The results showed that Student could move independently around her house while in her gait trainer. She required full assistance during transitions. Student could stand with full support on her legs with two of her hands held for support. The FMA results also revealed limitations in her sitting abilities as she could sit with her legs crossed, but could not sit with her legs out straight. Student could participate in activities while maintaining balance with her gait trainer. Student needed assistance when moving from a lying to a sitting position. She could sit on a low bench and maintain her balance with standby assistance.

40. Ms. Cullen chose to conduct the FMA because it assessed a wide variety of skills that would be included in a typical physical education program, such as throwing, catching, and kicking. She believed it was an appropriate assessment tool because it showed Student's present abilities. The assessment does not give age equivalence but gives a picture of what a student can do. The FMA demonstrated Student's gross motor skills were well below average for her age. The FMA showed that in the area of object

control skills, Student could stand in her gait trainer, reach for a ball using both hands, and push the ball forward. She had difficulty gripping objects, which she was working on with her occupational therapist. Student could stop a ball when rolled to her lap when seated on the ground with her legs crossed. She could not hold an object and strike a ball that was hanging in front of her. Student could kick a ball with three prompts and lift her foot to make contact with the ball, while she was standing in her gait trainer. Parent reported that Student enjoyed recreational activities, such as riding her adapted tricycle, swinging, and floating in the pool with full adult assistance.

41. Ms. Cullen's written report documented her evaluations and observations of Student, which demonstrated a significant delay in gross motor skills. Ms. Cullen concluded that Student's qualified for adapted physical education services because her scores on the gross motor assessment were at least 30 percent below her chronological age, at the 10-13-month-old range, and the one to two-year-old range. In her written report, Ms. Cullen did not recommend a time or frequency for those sessions.

42. Over two IEP meetings, Ms. Cullen and Ms. Mertz reviewed, presented and discussed Ms. Cullen's assessment. She and Ms. Mertz discussed and created goals six, nine, 10, 13, and 14 (the goals pertaining to motor skill development), which they believed were appropriate and measurable goals, based on Student's present levels of performance. The IEP team recommended Student receive adapted physical education services, twice weekly, for 30 minutes per session. Ms. Cullen believed that the low-incidence equipment referenced in the IEP was appropriate for Student to access her education.

43. At hearing, Ms. Cullen opined that her assessment was a valid and accurate reflection of Student's gross motor skills at that time. Ms. Cullen observed the process of transferring Student to her wheel chair, gait trainer, a sitting position, or the floor. She reviewed Student's records including those regarding Student's orthopedic

impairments, and past IEPs, including Student's past levels of performance of her gross motor skills, and her progress. In conducting assessments and interviews, reviewing records and observing Student, Ms. Cullen determined her eligibility for services and the level of support that Student needed.

44. Parent disagreed with the Meniffee's assessment. Meniffee agreed to fund an independent adapted physical education assessment.

Independent Adapted Physical Education Assessment

45. Christopher Smith, an Adapted Physical Education Specialist with EMH Sports, conducted Student's independent assessment in late January 2018. Mr. Smith prepared a report dated February 1, 2018, which he sent to Ms. Cullen. Mr. Smith did not testify at hearing to explain his assessment and recommendations.

46. Mr. Smith conducted the CARE-R2 assessment. Mr. Smith determined that Student had deficits in her gross motor function and object control, and her limited skills fell between the two and four-year-old level. Her gross motor skills and object control skills averaged at the two-year-old level. Mr. Smith also conducted the Test of Gross Motor Development-2 (TGMD-2). He observed Student run in her gait trainer for short distances. Her elbows did not bend and her arms did not move in opposition to her legs. She had no narrow foot placement when she landed on her heel or toe. Student's non-supporting leg was not bent at 90 degrees. She was unable to gallop, hop, leap, or slide. She could horizontally jump when in her gait trainer while she was dancing. Student could not perform object control skills. She could not strike a stationary ball, dribble a ball, throw a ball overhead or roll a ball underhand. Student could catch a ball after several tries while in her gait trainer. She could walk her gait trainer to a ball, but could not use long strides and nor place her non-kicking foot in back of the ball when she kicked the ball with the toe of her preferred foot.

47. Mr. Smith determined that Student was eligible for adapted physical

education services in her home setting. He recommended that she receive these services due to a delay in her motor development, which was greater than 30 percent of her chronological age-level. He recommended Student receive services, twice-weekly for 50 minutes per session.

48. Mr. Smith provided his February 1, 2018 report to Ms. Cullen, who presented it to the IEP team. After reviewing his report in the IEP team meeting, Ms. Cullen found some inconsistencies and recommended getting clarification. She contacted Mr. Smith, who fixed some of his errors and emailed his updated report to Parent on March 21, 2018. While he corrected one of the tables he had used twice, all other recommendations remained the same. He changed his recommendations to state the IEP team would determine eligibility. Parent provided his updated report to the following IEP meeting.

49. At hearing, Ms. Cullen persuasively testified about the critical differences between her assessment and Mr. Smith's assessment of Student. Ms. Cullen found that Mr. Smith's report contained errors in his analysis of the CARE-R2. Mr. Smith's report listed the same table of object control results twice, but did not list the table of the gross motor test results. Ms. Cullen also found clerical errors involving the dates he visited the house for the assessment. Mr. Smith also used the TGMD-2 in an invalid manner, for both gross motor and object control skills. Mr. Smith did not follow the protocol of the TGMD-2. As a norm-referenced assessment designed for students who could independently stand and balance themselves, it was designed to measure the skills of a student who can run and jump without a gait trainer. According to the testing protocols, the assessor was not supposed to change the character of the activity being assessed. Mr. Smith incorrectly used the TGMD-2 to assess the Student's running, jumping, and object control when she was in her gait trainer with a harness. Allowing Student to use a gait trainer and harness invalidated the scores. Thus, Student had

inflated raw scores of two out of eight with her gait trainer, when she should have received a score of zero out of eight because she could not jump independently.

50. Ms. Cullen and Ms. Mertz credibly testified to the appropriateness of the team recommendation that Student receive two, 30-minute sessions weekly of adapted physical therapy, compared to Mr. Smith's initial recommendation of two, 50-minute sessions weekly. Ms. Cullen opined that as a new therapy, the two 30-minute sessions were an opportunity to introduce skills to Student without fatiguing her. She had concerns about Student's initial endurance for more than 30 minutes twice a week as this was a new service for Student. Ms. Cullen observed that even the smallest movements would exhaust Student. At times, Student would become fatigued using her eye-gazing device because of the amount of concentration and energy required to hold her gaze steady.

51. At hearing, Ms. Cullen disagreed with Mr. Smith's recommendation, and Parent's desire, to start Student with two, 50-minutes weekly adapted physical education sessions. Ms. Cullen believed that adapted physical education sessions of 50 minutes, twice weekly, would be too exhausting for Student without building up her stamina first with shorter 30 minute sessions. When Student developed more endurance, Ms. Cullen would consider changing the duration of the adapted physical education sessions with an IEP amendment.

52. Parent did not agree with Meniffee's adapted physical education assessment, or their recommendation of two, 30- minute sessions weekly, and did not consent to any services. Mother was concerned the assessment was not signed, even though the assessor presented her report in person at the IEP meeting. Parent did not call Mr. Smith to testify in support of his report. Parent presented no other evidence in support of the assertion that Meniffee's adapted physical education assessment was inappropriate.

SUPPLEMENTARY AIDS, SERVICES, SUPPORTS, AND ACCOMMODATIONS- HEALTH PLAN

53. Menifee nurses Ms. Cheney, who attended two IEP meetings, and Ms. St. Paul-Martin, who attended four IEP meetings, reviewed and discussed Student's home health paperwork and health concerns. Ms. St. Paul-Martin developed a health plan for Student because of her severely compromised immune system. The health plan was necessary to advise service providers of precautions to be taken when interacting with Student. Ms. St. Paul-Martin reviewed several letters from Student's doctors. With Parent's permission, she also spoke to Dr. Levy, Student's pediatric cardiologist, and to Dr. Bradley's nurse about recommended precautions for Student. In response to her telephone call, Dr. Levy followed up with a March 21, 2018 letter which he sent to Ms. St. Paul-Martin, set forth below.

54. Dr. Levy, Student's pediatric cardiologist, prepared two letters dated March 21, 2018 and March 22, 2018, for the IEP team to review and develop Student's health plan accommodation. Dr. Levy's March 21 letter recommended that:

"To prevent unnecessary infections, the following guideline should be followed by all who provide care to [Student]:

No ill visitors (respiratory or gastrointestinal symptoms)

Handwashing or hand hygiene for all who touch [Student] or objects that will come in contact with her nose/ mouth.

Avoid close (less than 3 feet) exposures to prevent an accidental exposure from cough or sneeze.

No face to face contact should be allowed.

Please notify her parent if any of the providers or staff are ill.”

55. Dr. Levy wrote an updated letter on March 22, 2018, virtually identical but adding a final sentence of the recommendations:

“Please notify her parent before attending to [Student], if any of the providers or staff are ill or if they have been recently exposed to anyone that they suspect may have been ill.”

56. The March 22, 2018 letter raised questions for Ms. St. Paul-Martin regarding Dr. Levy’s definition of people “exposed to illness” and the most appropriate instructions for service providers who interact with people “exposed to illness” who then would need to interact with Student. Ms. St. Paul-Martin was unable to discuss the March 22, 2018 updated recommendation with Dr. Levy because Parent abruptly revoked consent for Meniffee to speak to him. Thus, she could not clarify her question as to what he meant by being “recently exposed to anyone they suspect may have been ill.” She followed Dr. Levy’s March 21, 2018 letter to develop the health plan protocols for Student’s service providers regarding their interactions with Student, in light of her compromised immune system.

57. Ms. Cheney and Ms. St. Paul-Martin developed two health accommodations. First, Student would have “no ill visitors (respiratory or gastrointestinal) systems) [sic], Hand washing or hand hygiene for all who touch [Student] or touch objects that will come into contact with her nose/mouth, Avoid close (less than [sic] 3 feet) exposures to prevent an accidental exposure from cough or sneeze, No face to face contact should be allowed.”

58. Second, service providers would “Notify parent if any of the providers or staff are ill. Service providers will arrange to make up sessions missed based on their

own illness.” This protocol followed Dr. Levy’s March 21, 2018 recommendations. Both nurses believed these universal precautions were sufficient to protect Student and meet her needs. Meniffee also offered supplementary aids, services and supports in the form of consultation time for the providers to consult with each other and Parent about protecting Student’s health.

59. Parent was concerned about how the direct providers would be screened for infection diseases before coming into close contact with Student. At an IEP team meeting, Parent presented a pamphlet from Dr. Levy’s office which recommended suggestions for children with severe immunosuppression. “All visitors should be screened for illness. They should not visit if they are sick or have recently been directly exposed to someone who was sick. In the event this cannot be avoided, the sick family member should wash their hands thoroughly before coming in direct contact with your child.” At the March 27, 2018 IEP team meeting, Parent presented Dr. Levy’s March 22, 2018 letter with the additional recommendation. Parent also submitted Meniffee’s health protocol letters modeled after the Center for Disease Control, which was on its website and would have been issued to all students in the event of a communicable and infectious disease. Meniffee had not had such an outbreak while Student was receiving special education services. While Parent believed Student caught a cold from one of Meniffee’s providers who sneezed, no supporting evidence was provided. Student was not hospitalized, and had not been hospitalized in five years.

60. At hearing, Parent presented an earlier March 24, 2015 letter from Dr. Levy, which stated Student should be in an environment which was as infection-risk free as possible, and that her caregivers should be well trained in infection control measures to minimize her risk of infection. The letter concluded that exposure to multiple uncontrolled environments, from an infectious standpoint, would be detrimental to Student’s health. Parent also referenced a March 8, 2016 letter from Dr. Bradley,

Student's infectious disease doctor, which contained virtually identical language to Dr. Levy's March 21, 2018 letter. Parent believed the additional phrasing of Dr. Levy's subsequent March 22, 2018 letter should be contained in Student's health plan, stating it had been in her prior IEP accommodation plans from 2015 and 2016. Parent relied on Student's November 15, 2016 IEP, which had noted in her health present levels of performance that "staff should not provide services if they are sick or exposed to other ill people."

MENIFEE'S INDIVIDUALIZED EDUCATION PROGRAM OFFER

61. Meniffee made an offer of specialized academic instruction and related services for Student's 2017-2018 school year. Student was offered home-hospital placement with the following designated instructional services: specialized academic instruction, 75 minutes daily, five times per week; speech and language services, 60 minutes, once weekly; specialized orthopedic services, 15 minutes, four times per year; occupational therapy, 45 minutes, once weekly; assistive technology instruction, 60 minutes, once weekly; adapted physical education, 30 minutes, twice weekly; physical therapy, 60 minutes, once weekly; and extended school year services.

62. At the end of the final meeting, Parent requested the updated final IEP document, and waited in Meniffee's office lobby for her copy. Meniffee quickly typed and incorporated the updated notes into the 40 page IEP document, and provided it to Parent that afternoon. Unfortunately, it contained clerical and typographical errors. On April 9, 2018, Parent notified Meniffee that she did not consent to the IEP. She filed a complaint with the California Department of Education because of those errors. On April 24, 2018, Meniffee sent Parent a final corrected IEP document, which included corrections to the typographical and clerical errors. None of the corrections involved a material change to the IEP offer, placement or related services.

63. At hearing, Parent stated she did not sign the IEP because it did not

contain the precautionary health language she requested which would require direct providers to contact Parent and cancel services if they knew they were exposed to someone with a contagious illness. Parent did not agree with Meniffee's adapted physical education assessment and recommended services because the IEP team did not offer 45-50 minutes, twice weekly, as the independent assessor had. Parent did not agree with the IEP because Student needed more challenging goals so she could make more progress.

64. In her testimony and her closing brief, Parent highlighted several clerical errors in the IEP document, such as a box being checked on an IEP draft that no assessments were needed. At hearing, the nurse who submitted Student's home hospital paperwork did not know that Meniffee's Pupil Services had recently been re-approved. Parent showed that one IEP draft had carried over a prior IEP date on one page. One page was incorrectly identified as the evaluation of December 4, 2017, instead of December 2, 2014. Three prior written notices, September 20 and 27, and October 13, 2017, incorrectly identified Student as being in the second grade. Several prior written notices of IEP meetings identified on the top of the form first and second attempts to provide her with notice. Parent objected to Meniffee making those requested corrections without an additional IEP meeting, and argued that the entire IEP was invalid on this basis. However, Parent did not provide any evidence that these errors and the corrections were material or prevented her from actively participating in the development of the IEP meetings. Parent did not establish that the corrections Meniffee made to the 40 page IEP document changed the IEP offer, placement, or related services in a material way.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq; 34 C.F.R. §300.1 (2006) et seq.²; 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 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. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(a); 34 C.F.R. § 300.101, Ed. Code, § 56000.) A FAPE means special education and related services that are available to the special needs pupil at no charge to the parents, that meet state educational standards, and that conform to the child's IEP. (20 U.S.C. § 1401(a)(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29); 34 C.F.R. § 300.39 ; Ed. Code, § 56031, subd. (a).) "Related services" are developmental, corrective and support services that are required to assist a special needs pupil to

¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided herein.

² All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

benefit from special education. (20 U.S.C. § 1401(a)(26); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].) Specially designed instruction also includes accommodations that address a child's unique needs and that ensure access to the general curriculum. (34 C.F.R. § 300.39(b)(3).)

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

4. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950. [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or Court in that case, "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* At p. 951, fn. 10.)

5. To meet its substantive obligation under the IDEA, a school must offer an

IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.____ [137 S.Ct. 988, 999, 1001, 1002] (*Endrew F.*) reaffirmed *Rowley*, noting "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end" (*Id.* at pp. 996 and 999 (and quoting *Rowley*.) "The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement." (*Id.* at p. 999.) Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. (*Id.* at p. 999, citing *Rowley*, 458 U.S. at pp. 206–207.) "*Rowley* had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." (*Endrew F.*, *supra*, at p. 1000.)

6. In so clarifying "some educational benefit," however, the Court stated that it would not attempt to elaborate on what appropriate progress would look like from case to case. "It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." (*Id.*, 580 U.S., 137 S. Ct. at p. 1001.) *Endrew F.* does not create a new legal standard for what constitutes a FAPE, but is a clarification of *Rowley*. (*K.M. v. Tehachapi Unified School Dist.* (E.D. Cal. Apr. 5, 2017, 1:15-cv-001835 LJO JLT) 2017 WL 1348807,**16-18.)

7. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) (*Gregory K.*) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.)

8. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) The IDEA does not contemplate that all annual goals will be achieved. It expressly provides that one of the purposes of the annual IEP review is to determine whether annual goals are being achieved and revise the IEP to address any lack of expected progress toward those goals. (34 C.F.R. § 300.324(b)(1)(ii)(A), emphasis added.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2d Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist. No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School Dist.* (S.D. Cal. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

9. To determine whether a pupil was denied a FAPE, an IEP must be examined in light of the information available to the IEP team at the time it was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 992.) "An IEP is a snapshot, not a

retrospective." (*Id.* At p.1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 93 F.2d 1031, 1041 (*Fuhrman*).) The offer of FAPE must be objectively reasonable at the time it was developed, not in hindsight. (*Ibid.*)

10. 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); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The petitioning party has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-57 [163 L.Ed.2d 387].) As this is a district filed case, Meniffee has the burden of proof to establish, by a preponderance of evidence that it complied with the IDEA and companion state law.

ISSUE 1: MENIFEE'S RIGHT TO ASSESS WITHOUT PARENTAL CONSENT

11. Meniffee contends that it had the right and obligation to assess Student when it presented its proposed assessment plan, dated October 13, 2017, to Parent, but it could not do so because Parent refused to provide written consent. Meniffee contends it is entitled to conduct the following (triennial) assessments of Student which it proposed in its October 13, 2017 assessment plan, without parental consent: (1) academic achievement; (2) adaptive behavior; (3) motor development; (4) language, speech and communication; (5) intellectual (cognitive) development (6) health; (7) social emotional; (8) assistive technology; (9) occupational therapy; and (10) physical therapy.

12. Parent contends that Meniffee is not entitled to conduct triennial assessments of Student without her consent; that Meniffee had enough data about Student's present levels of performance based on discussions at the IEP meetings; that Student was assessed in January 2017; and that Student had not changed very much in the past three years since her 2014 triennial assessment.

ASSESSMENT AND REASSESSMENT

13. If assessments are conducted prior to an IEP meeting, they must be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b)(3); 20 U.S.C. § 1414(b)(3)(A)(iv), (v).) The assessments must be conducted "by persons competent to perform the assessment, as determined by the local educational agency." (Ed. Code, § 56322.) An assessor must also be knowledgeable of the student's suspected disability. (Ed. Code, § 56320, subd. (g).) Only a school psychologist may administer tests of intellectual or emotional functioning. (Ed. Code, § 56320, subd. (b)(3).)

14. No single measure, such as a single general intelligence quotient, shall be used to determine eligibility or educational programming. (Ed. Code, § 56320, subds. (c), (e); 20 U.S.C. § 1414(b)(2)(B).) Assessments must be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d); 34 C.F.R. § 300.304(c)(3).) 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].) The assessor must use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." (20 U.S.C. § 1414(b)(3)(C).)

15. The assessor must prepare a written report that includes: 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) the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting required after the assessment. (Ed. Code, § 56329, subd. (a)(3); 20 U.S.C. § 1414(b)(4)(B).)

16. 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).)

17. A reassessment must be conducted if the local educational agency "determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment." (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

18. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) The school district must provide proper notice to the student and her parents prior to obtaining parental consent for a reassessment. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan, and a copy of parental procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP

without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (b)(4).)

19. If parents do not consent to a reassessment plan, a school district may conduct the reassessment by showing, at a due process hearing, that it needs to reassess the student and it is lawfully entitled to do so. However, the school district is not required to pursue the consent override procedures. A school district does not violate its child find obligations, its assessment and reassessment obligations, or its obligations to determine eligibility when it has made reasonable attempts to obtain consent and the parent fails to respond. A school district must document its attempts to obtain parental consent to meet the reasonable efforts requirements, by keeping copies of correspondence it sends to parent and copies of responses received, as well as records of telephone conversations with the parents. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii), (c)(iii), (2)(i), (ii), (d)(5); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

20. "Every court to consider the [Individuals with Disabilities Act's] reevaluation requirements has concluded that "'if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student . . . " (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446F.3d 1153, 1160, quoting *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir. 1995) 64 F.3d 176,178-79.) The Ninth Circuit has held that "if the parents want [their child] to receive special education services under the [IDEA], they are obliged to permit [re-assessment] testing." (*Gregory* at p. 1315.) If the parent or guardian of a child who is an individual with exceptional needs refuses all services in the IEP after having consented to those services in the past, the local educational agency shall file a request for a due process hearing. (Ed. Code, § 56346, subds. (d) & (f).)

ASSESSMENT PLAN

Validity of October 13, 2017 Triennial Assessment Plan

21. Meniffee contends that it had the right and obligation to assess Student when it presented its proposed assessment plan, dated October 13, 2017, to Parent, but it could not do so because Parent refused to provide written consent. Meniffee contends it is entitled to conduct the following (triennial) assessments of Student which it proposed in its October 13, 2017 assessment plan, without parental consent: (1) academic achievement; (2) adaptive behavior; (3) motor development; (4) language, speech and communication; (5) intellectual (cognitive) development (6) health; (7) social-emotional; (8) assistive technology; (9) occupational therapy; and (10) physical therapy.

22. Meniffee's October 13, 2017 assessment plan is valid. Meniffee gave Parent numerous prior written notices requesting the triennial assessments and identified Student's areas of need which related to the proposed assessments. It identified the credentialed, competent, and knowledgeable personnel who would conduct the assessments. Meniffee identified the several types of measures it would use to assess Student. Parent was given multiple opportunities over many months and six IEPs to consent to the triennial assessment plan, considerably more than the minimum 15 days statutorily required to consider the assessment plan. Meniffee's triennial assessment plan met all statutory requirements.

NEED FOR TRIENNIAL ASSESSMENTS

23. Parent contends that triennial assessments of Student were not necessary because Meniffee had developed sufficient data about Student during the IEP discussions to develop appropriate present levels of performance and goals. Parent asserted Student had not changed very much since her last triennial evaluation in 2014.

However, based on the convincing testimony of Meniffee's direct providers, Parent's contention was not persuasive. Student has a complex medical profile with multiple disabilities requiring her to receive academic instruction in the most restrictive setting, home hospital. Student has significant impairments and areas of need. Meniffee had no recent assessment data in its records, and the most recent triennial assessments were conducted in 2014. The IEP team lacked the ability to easily share information about Student's current skills, monitor her progress, and exchange ideas and techniques with each other. These factors highlight the importance of and justification for updated triennial assessments.

24. To optimally prepare for Student's December 4, 2017 IEP, Meniffee needed the triennial assessments for current, specific information on Student's present levels of performance. The IEP team needed accurate data to determine whether Student needed new goals and additional or different related services, supports, and accommodations. Student has complex medical and educational needs, and those assessments were of particular importance. Meniffee requested consent for the triennial assessments multiple times and Parent refused every request and actually impeded Meniffee's ability to have the best available information to develop Student's IEP. Meniffee did not waive its right to pursue the consent override procedures for the assessments when it chose to proceed with the IEP meetings without the requested assessments. While having those assessments prior to the IEP meetings would have been optimal, Meniffee was able to conduct Student's IEPs without them, and had the legal obligation to develop the IEP. (See *Doug. C. v. Hawaii Depart. of Education* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) The IDEA does not require a school district to seek to override a lack of parental consent for assessment before holding IEP meetings, as expressly stated in 34 C.F.R. § 300.300(c)(ii), (c)(iii), (2)(i), (ii), and (d)(5). Meniffee carefully documented its good faith effort to obtain parental consent. Its decision to proceed with the IEPs using alternative

assessment methods, and to file a due process complaint to override Parent's lack of consent for the triennial assessment, complied with the IDEA. When a student receives special education and related services, the student must participate in the assessment process.

25. Meniffee met its burden establishing Student's condition and development warranted new triennial assessments in the areas of academic achievement, adaptive behavior, motor development, language, speech and communication, intellectual (cognitive) development, health, social-emotional, assistive technology, occupational therapy, and physical therapy. The triennial assessments are needed to provide important educational information to the IEP team. Meniffee shall be entitled to conduct those assessments without parental consent.

ISSUE 2: MENIFEE'S RIGHT TO IMPLEMENT THE DECEMBER 4, 2017 IEP

26. Meniffee contends that it offered Student a FAPE for the 2017-2018 school year by offering Student an appropriate placement with appropriate designated instructional services following six IEP team meetings. Specifically, it contended that its IEP offer provided Student a FAPE by offering Student educational placement and delivery of services in the home-hospital setting, with the following related services: specialized academic instruction, 75 minutes daily, five times per week; speech and language services, 60 minutes, once weekly; specialized orthopedic services, 15 minutes, four times per year; occupational therapy, 45 minutes, once weekly; assistive technology, 60 minutes, once weekly; adapted physical education, 30 minutes, twice weekly; physical therapy, 60 minutes, once weekly; and extended school year services. Meniffee seeks to implement the IEP without parental consent.

27. Parent contends that Meniffee did not provide Student a FAPE because it committed numerous violations during the IEP process, including: (1) making numerous clerical and spelling errors on the draft IEPs, and making the requested corrections to

those errors without holding another IEP; (2) predetermining the IEP offer by providing a draft IEP document prior to each IEP; (3) denying meaningful participation in the IEP by failing to develop a health plan to prevent direct providers from delivering special education and related services if they have been exposed to someone with a contagious illness; (4) conducting an inadequate adapted physical education assessment which recommended 30 minutes, twice weekly of adapted physical education instead of 45 or 50 minutes, twice weekly; (5) failing to develop more challenging goals when Student was not meeting her more basic goals; (6) failing to give Student the assistive technology mounting device offered to Student by the orthopedic impairment specialist even though Parent did not consent to any part of the IEP; and (7) holding the IEP meetings without the triennial assessments for which Parent refused to provide consent.

PROCEDURAL AND SUBSTANTIVE COMPLIANCE WITH THE IDEA

28. First, a school district must prove that it has complied with the procedures set forth in special education law. (*Rowley, supra*, 458 U.S. 200-201, 203-204, 206-207.) Second, the district must prove that the IEP developed through such procedures addressed the student's unique needs and was reasonably calculated to enable the student to receive some educational benefit in the least restrictive environment. (*Id.* at p. 201; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031; *Mercer Island, supra*, 575 F.3d 1025, at 1034.)

Procedural Compliance

PARENTAL PARTICIPATION

29. To comply with the procedural requirements of the IDEA and state law in the development of the pupil's IEP, school districts must include parents in the development of the IEP. (20 U.S.C. § 1414 (d)(1)(B)(i); 34 C.F.R. § 300.322; Ed. Code, §§ 56341, subd. (b)(1), 56342.5; *Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516,

524-525 [127 S.Ct. 1994, 2000-2001; 167 L.Ed. 2d 904]; [parents must be part of any group that makes placement decisions].) Parents must be given advance notification of the meeting, including the purpose, time, location and who will be in attendance, early enough to ensure an opportunity to attend. (34 C.F.R. § 300.322; Ed. Code, § 56341.5.) Parents must be provided procedural safeguards. (Ed. Code, § 56500.1.)

30. School district IEP teams are required to include Student's representative or parent; a regular education teacher if a pupil is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about the available resources; a person who can interpret the instructional implication of assessment results; and other individuals, including the person with special needs, where appropriate. (34 C.F.R. §§ 300.321(a)(5), (6); Ed. Code, § 56341, subd. (b).)

31. The school district has a duty to conduct a meaningful IEP meeting with parents. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485 (*Target Range*); *Fuhrmann, supra*, 993 F.2d at p. 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools*. (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.)

32. A procedural violation in the development of the Student's IEP results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see, *Target Range, supra*, 960 F.3d. at p. 1484.)

33. In this case, Parent was provided with proper prior written notice of each of the six IEP team meetings that were conducted between December 4, 2017 and March 27, 2018. She attended each one for the duration. All required Menifee personnel attended the meetings. Menifee established it gave Parent the required prior written notice and procedural safeguards before each IEP meeting.

34. Additionally, Parent meaningfully participated in Student's IEP development process. Meaningful participation occurs when a parent is informed of the student's problems, attends the IEP, expresses disagreement, and requests revisions to the IEP. Here, Parent was present at all six IEP meetings, which lasted about three hours each. She was introduced to all the IEP team members, and had met most of them in her home when they provided direct or consultation services to Student. Parent was present when both adapted physical education assessments were conducted, then presented and discussed at the meetings. Parent was present when each specialist presented information and shared their professional opinion of Student's progress and recommended goals. Parent spoke at each meeting, gave input into present levels of performance, goals, staffing concerns, and provided detailed information as to Student's complex needs. Parent also asked Menifee very detailed questions, requested services and actively disagreed with some of their proposals. Parent actively participated in the discussions about Student's health plan. After each IEP meeting, Menifee provided Parent with an updated draft of Student's IEP, which included revisions to Student's present levels of performance, goals, and related services and supports. Parent meaningfully participated in the IEP process.

CORRECTIONS TO CLERICAL ERRORS

35. School districts are required to hold new IEP meetings when they make a material change to the IEP offer of placement and related services. *M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017), 858 F. 3d 1189, held that a school district

violated procedural elements of the IDEA by failing to present an accurate IEP of a teacher for visually impaired services, and unilaterally revising the error; and by incorrectly offering 240 minutes of a teacher's assistant each month instead of 240 minutes each week, and unilaterally modifying it. To ensure parental involvement, the school district should have re-opened the IEP process and made a new offer. Such a significant error, such a change to the provision of services and their duration, requires prior written notice to the parent to correct such a significant change. (*M.C.*, *supra*, at pp.1197-1199.)

36. Parent contends that Meniffee did not provide Student a FAPE because it committed procedural violations before, during and after the IEP, including making numerous clerical errors on prior written notices, draft IEPs, and the final IEP; and correcting the final IEP without parental involvement. Pursuant to *M.C. v. Antelope Valley*, *supra* at p. 1197-1199, a new IEP is required if material changes are made to the IEP offer. However, the corrections in this case, such as changing the grade level to reflect Student's current grade, or changing the page numbering, were not material. Here, Meniffee did not violate the IDEA by correcting clerical errors which did not affect the IEP offer, placement, related services, or accommodations. Student failed to establish that the identified clerical errors were significant. Those corrections did not affect Student's educational program nor interfere with Parent's active participation or decision making. The clerical corrections did not require a prior written notice to Parent or a separate IEP team meeting.

NO PREDETERMINATION OF THE IEP OFFER

37. School districts cannot predetermine a pupil's placement prior to the IEP team meeting and without parental involvement in developing the IEP. (*Target Range*, *supra*, 960 F.2d at p. 1481, 1484; *Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-859; *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross*

(7th Cir. 2007) 486 F.3d 267, 274-275.) A school district may arrive at an IEP team meeting with a pre-written offer, but may not take a “take it or leave it” position. (*J.G. v. Douglas County School Dist.*, (9th Cir. 2008) 552 F.3d 786, 801, fn. 10, citing *Ms. S v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) School district staff may meet beforehand to prepare goals and objectives and can provide a written offer before parents have agreed to it. (*Doyle v. Arlington County Sch. Bd.* (E.D. Va. 1992) 806 F.Supp.1253, 1262.) School districts do not predetermine an IEP simply by meeting to discuss a child’s programming in advance of an IEP meeting. (*Mercer Island, supra*, 575 F.3d at p.1038 citing 34 C.F.R. § 300.501(b)(3), an IEP meeting “does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed a later meeting”.)

38. Parent contends that Menifee violated Student’s rights when it arrived with a draft IEP document at the beginning of each of the six meetings. However, these drafts did not constitute a predetermined IEP document because they were a working draft and served as a meeting agenda. The IEP draft document was continually updated and revised during each meeting, and after the conclusion of each meeting to finalize the notes. The updated document was then presented to Parent once the corrections were made, and before the next IEP meeting. In this manner, these working drafts provided Parent and the other IEP team members with a meeting agenda and updated information as a current work in progress. This actually facilitated parental participation and discussions with the IEP team. Menifee did not predetermine the IEP offer. Rather, Menifee provided the IEP team with a prewritten draft offers, but did not demonstrate a “take it or leave it” attitude. Menifee provided proper written notice and did not predetermine their IEP offer simply because they met before-hand to start a draft IEP as a framework for the meeting agenda.

SUBSTANTIVE COMPLIANCE

39. An IEP is an educational package that must target all of a pupil's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, (9th Cir. 1996) 82 F.3d 1493, 1500 [citing *J.R. Rep. No. 410*, 1983 U.S.C.C.A.N. 2088, 2106].) The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.)

40. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child, and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) The IEP must include a statement of the present performance of the pupil, a statement of measurable annual goals designed to meet the pupil's needs that result from the disability, a description of the manner in which progress of the pupil towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2),(3); Ed. Code, § 56345, subds. (a)(2), (3).)

41. The IEP also must include a statement of the program modifications or supports for school personnel that will be provided to the pupil to allow the pupil to advance appropriately toward attaining the annual goals; be involved and make

progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities; and be educated and participate in activities with other children with disabilities and nondisabled children. (34 C.F.R. § 300.320(a)(4)(i), (ii), (iii); Ed. Code, § 56345, subds. (a)(4)(A), (B).) Only the information set forth in 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

42. A school must offer an IEP which is reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances. An educational program must be appropriately ambitious in light of each child's circumstances. While goals may differ, each child should have the chance to meet challenging objectives. An IEP program is adequate if it meets student's unique needs, is reasonably calculated to confer some educational benefit in the least restrictive environment, and reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances.

43. Menifee met its burden of proof to offer Student a FAPE in offering educational placement and delivery of services in the home-hospital setting: specialized academic instruction, 75 minutes daily, five times per week; speech and language services, 60 minutes, once weekly; specialized orthopedic services, 15 minutes, four times per year; occupational therapy, 45 minutes, once weekly; assistive technology, 60 minutes, once weekly; adapted physical education, 30 minutes, twice weekly; physical therapy, 60 minutes, once weekly; and extended school year services. The program options were offered for the regular school year and the extended school year. Menifee offered home-hospital instruction based on Student's low-incidence disabilities and the recommendation of her doctors.

44. The IEP targeted all of Student's unique needs. The IEP team developed

present levels of performance and goals in Student's identified areas of need involving developmental/academic/functional skills, communication development, gross and fine motor development, social/emotional/behavioral, health, vocational, and adaptive/daily living skills. Her unique needs were discussed at each of the six IEP meetings.

45. The IEP team considered Student's strengths, Parent concerns, the results of evaluations, and the academic functional and developmental needs of the child. At the six IEP team meetings, the team discussed and documented Student's strengths and Parent's concerns. The team reviewed Ms. Cullen's adapted physical education assessment, Mr. Smith's original and corrected adapted physical education assessment, triennial assessments from 2014, and Student's doctor's letters. Each of Student's providers spoke at the IEP meetings and provided updated academic, functional, and developmental information about Student's present levels of performance. The IEP team documented her present levels of performance. The IEP team developed measurable annual goals for Student, and described how progress her would be measured. The IEP team discussed the services offered with a projected start date and duration.

46. Parent contends that Meniffee did not provide Student a FAPE because it failed to develop more challenging goals when Student was not meeting her more basic goals. This argument is not supported by the evidence. Student would not achieve more challenging goals simply because they were written into the IEP, as while a goal needs to be challenging, it also needs to be achievable. Based on the information Meniffee possessed, it developed appropriate goals for Student. Further, Parent prevented the IEP team from obtaining additional information by preventing Meniffee from assessing Student, as that assessment information would have assisted Meniffee in responding to Parent's challenge to the proposed IEP.

47. The IEP team developed a statement of modifications and supports. The IEP team considered special factors, such as Student requiring assistive technology and

benefitting from an augmentative alternative communication device, equipment, and services. The IEP team noted that her orthopedic impairment specialist and her augmentative alternative communication specialist recommended mounting her device on her gait trainer and/or activity chair. Student required access to a touch screen assistive technology device such as an iPad that allows her to directly select and touch items on the screen. The IEP team identified Student as requiring low incidence services and equipment to meet her goals due to her orthopedic impairment. The IEP team determined Student's limited speech prevented her from reaching her maximum potential. Student required a pull-up bar, an adaptive tricycle with a rear steering bar, and a safe swing and peanut ball. The IEP team determined Student met the requirements for adaptive physical education and specialized physical education, as a specialized academic instruction. Student was to be educated in her home with home-hospital instruction. The IEP team had sufficient information to determine that these accommodations, modifications, and supports would meet her unique needs.

HEALTH PLAN ACCOMMODATIONS

48. Parent contends that Meniffee's failure to develop a health plan that precluded direct providers from delivering special education and related services when they have been exposed to someone with a contagious illness denied Student a FAPE. Parent wanted the health plan to specify that Parent was to be notified by staff if they were ill or if they had been recently exposed to someone that they suspect may have been ill. Parent based her request on the November 15, 2016 IEP where Student's health present level of performance stated that staff should not provide services if they are sick or are exposed to someone who is sick. Parent also relied on Dr. Levy's March 22, 2018 letter.

49. Meniffee developed two health accommodations for Student and all providers who were in contact with her. The first health accommodation specified that

there were to be “No ill visitors (respiratory or gastrointestinal) systems; Hand washing or hand hygiene for all who touch [Student] or touch objects that will come into contact with her nose/mouth; Avoid close (less than 3 feet) exposures to prevent an accidental exposure from cough or sneeze; No face to face contact should be allowed.” The second health accommodation specified that staff were to “Notify parent if any of the providers or staff are ill. Service providers will arrange to make up sessions missed based on their own illness.” These two health accommodations followed Dr. Levy’s March 21, 2018 recommendations, which Dr. Levy provided to Meniffee for the IEP team. Both Meniffee nurses believed these universal precautions were sufficient to protect Student and meet her needs. Significantly, Student had not become ill or hospitalized during the 2017-2018 school year when this health plan was followed. While Parent claimed Student caught a cold from a service provider who sneezed once the previous year, that assertion was not supported. By Parent’s own admission, Student had not been hospitalized in the past five years, including from exposure to Meniffee’s service providers.

50. In creating the health plan, it was appropriate for Meniffee to rely on Dr. Levy’s March 21, 2018 letter identifying his health precautions recommendations and adopt them into Student’s health plan. The accommodations included universal precautions, and tracked with Dr. Levy’s March 21, 2018 letter. Because Parent withdrew consent for the Meniffee’s nurses to speak with Student’s physicians and specialists from Kaiser, Ms. St. Paul-Martin was not able to have clarification about exposure to illness referenced in his March 22, 2018 letter. Nonetheless, because Meniffee followed universal health precautions and adopted Dr. Levy’s recommendations, the health plan is appropriate to offer Student a FAPE and protect her health.

THE ADAPTED PHYSICAL EDUCATION ASSESSMENTS

51. Parent contends that Meniffee did not provide Student a FAPE because it

committed numerous procedural violations at the IEP, including denying meaningful participation in the IEP by conducting an inadequate adapted physical education assessment which recommended 30 minutes, twice weekly of service instead of 45 or 50 minutes, twice weekly.

52. Meniffee's adapted physical therapy assessment was properly conducted by a competent, trained, and knowledgeable specialist. Ms. Cullen was familiar with Student's disability. She selected and administered assessments to best ensure the results accurately reflected Student's achievement level. Ms. Cullen used technically sound instruments to assess Student's cognitive, behavioral, physical, and developmental factors.

53. Ms. Cullen prepared a written report that found Student eligible for special education and related services. She explained the basis for her determination. She noted Student's behavior during her observation and noted the relationship of that behavior to Student's social and academic functioning. Ms. Cullen described the educational relevant health, development, and medical findings. She discussed Student's need for specialized services, materials, and equipment. Ms. Cullen provided her report to Parent at the IEP team meeting, when she discussed her assessment results.

54. Ms. Cullen's findings that Student was eligible for services were appropriate. Further, Ms. Cullen's recommendations for services were appropriate. At the IEP team meeting, she and the team discussed and recommended two, 30-minute sessions weekly. Ms. Cullen conducted the assessments properly, in the manner in which the tests were designed. She had legitimate concerns about Student's initial endurance for more than 30 minutes twice a week. Ms. Cullen explained that this was a new service for Student. She understood that even the smallest movements would exhaust Student. At times, Student would become fatigued using her eye-gazing device because of the amount of concentration she had to use to hold her gaze steady.

55. Ms. Cullen's recommendation for services differed from Mr. Smith's recommendation for services by 20 minutes, twice weekly. The discrepancy between her report and Mr. Smith's report can be attributed to his invalid use of the assessment tools and his lack of accuracy. Mr. Smith's report and recommendations contained flawed data because he used an assessment that was not developed and normed for gait trainers. Mr. Smith conducted the assessment and interpreted the results as if Student could independently walk and balance herself, yet she required her gait trainer to accomplish this task, which the developer of the assessment did not intend to be used. Therefore, the test results incorrectly measured her at a higher skill level, assigned her a higher age range equivalent, and Mr. Smith then recommended a longer session commensurate with these inflated, higher skills incorrectly attributed to her. Mr. Smith's report also contained other errors, including inconsistent assessment dates. As a further example of his inaccuracy, his report included duplicate tables of his raw data, from one test only, instead of including the tables of raw data for both tests.

56. Tests and assessments must be provided in the form most likely to yield accurate information about what the student can do developmentally and functionally. Additionally, assessments must be used for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subd. (b)(1), (2).) Mr. Smith's assessment did not comply with these requirements. Mr. Smith's lack of attention to detail and improper use of assessment protocols calls into question the reliability of the data, and credibility of his findings and recommendations. As a result, Mr. Smith's recommendation for two, 50-minute adapted physical education sessions weekly is not found to be persuasive or appropriate.

57. Menifee established its adapted physical education assessment was conducted appropriately, and that the IEP team's offer of adapted physical education services, 30 minutes twice weekly was appropriate.

CONDUCTING IEP MEETINGS WITHOUT FORMAL ASSESSMENTS

58. Parent contends that Meniffee denied Student a FAPE when it convened the IEP meetings without conducting the assessments which she denied consent for. The determination of whether a Student was denied FAPE must look at the information available to the IEP team at the time it was developed. Parent prevented Meniffee from conducting 10 assessments in her areas of demonstrated need. Therefore, Meniffee had to use alternative means of determining Student's present levels of performance. Meniffee was not required to pursue the consent override procedures before holding Student's IEP. A school district does not violate its child find obligations, its assessment and reassessment obligations, or its obligations to determine eligibility when it has made reasonable attempts to obtain consent and the parent fails to respond. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii), (c)(iii), (2)(i), (ii), (d)(5); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Meniffee made reasonable efforts to obtain parental consent to assess Student. While having those assessments prior to the IEP meetings would have been optimal, Meniffee was able to conduct Student's IEPs without them, and had the legal obligation to develop the IEP. (See *Doug. C. v. Hawaii Depart. of Education* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) Meniffee's decision to proceed with the IEPs using alternative assessment methods, and to file a due process complaint to override Parent's lack of consent for the triennial assessment to provide Student with a FAPE, complied with the IDEA and applicable California laws. (See *I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d. 1164, 1169-1170.)

59. Meniffee's alternate means of determining Student's present levels of performance and development of goals provided FAPE because it was thorough, detailed and exhaustive. The IEP process lasted six days, approximately three hours each, for a total of 18 hours. The IEP team members who reported on Student's performance had the required training, certification and knowledge of Student. Mother actively

participated and discussed Student's progress with the various providers. Present levels and goals were discussed and modified in seven areas of need. The IEP team developed 14 annual measureable goals. Meniffee acknowledged Student's special factors of orthopedic impairment and her need for augmentative communication. Meniffee developed a health plan. Meniffee took detailed notes of each meeting to document the discussions. As its offer of FAPE, Meniffee also offered supplementary aids, services, and supports which consisted of consultation time for the providers to consult with each other and Parent.

60. Meniffee met its burden of establishing it provided a FAPE. The December 4, 2017 IEP complied with the procedures set forth in the IDEA. The goals and services comported with Student's unique needs, and the IEP was reasonably calculated to provide Student access to her education and receive educational benefits. Once these requirements were met, Meniffee satisfied its FAPE obligation. Meniffee may implement the December 4, 2017 IEP.

ORDER

1. Meniffee may assess Student in the following areas, (1) academic achievement; (2) adaptive behavior; (3) motor development; (4) language, speech and communication; (5) intellectual (cognitive) development (6) health; (7) social emotional; (8) assistive technology; (9) occupational therapy; and (10) physical therapy, pursuant to the October 13, 2017 assessment plan, without parental consent. Meniffee shall assess Student and hold an assessment IEP within 15 days of the completion of all assessments.

2. Within 14 days of this Decision, Meniffee shall notify Parents of the days, the times, and places, if not at Student's home, that Parent is to present Student for assessment, and Parent shall cooperate in presenting Student for assessment on those days, times, and at those places. Throughout the time that the assessments are being conducted, Parent shall cooperate and make Student available for assessment.

3. If Student is unable to be assessed on a day chosen by Menifee, because of illness, Parent shall promptly communicate this fact to Menifee and provide Menifee with contemporaneous medical documentation of Student's unavailability. Menifee shall notify Parent of the new days and times for the assessments to be conducted that are no more than 14 days from the dates that Menifee originally proposed. Any delay due to Student unavailability, will toll the 60 day timeline for assessment.

4. Parents shall timely complete and return any documents reasonably requested by Menifee as a part of the assessment process.

5. Menifee may implement the December 4, 2017 IEP, without parental consent.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Menifee prevailed on both issues presented for decision.

RIGHT TO APPEAL THIS DECISION

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

IT IS SO ORDERED.

DATE: September 27, 2018

/s/

DEBORAH MYERS-CREGAR

Administrative Law Judge

Office of Administrative Hearings