

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022020266

PARENT ON BEHALF OF STUDENT,

v.

GOLETA UNION SCHOOL DISTRICT.

DECISION

January 3, 2023

On February 8, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Goleta Union School District. On March 15, May 13, and August 11, 2022, OAH continued the scheduled hearings. Administrative Law Judge Laurie Gorsline heard this matter by videoconference on September 27, 28, and 29, October 11, 12, 13, 14, 18, 19, and 20, and November 1, 2, 3, and 8, 2022.

Attorney Andrea Marcus represented Student. Parent attended parts of the hearing days on Student's behalf. Student did not attend the hearing. Attorney Melissa Hatch represented Goleta Union. Amanda Martinez, Assistant Superintendent

of Pupil Services, attended all hearing days for at least part of the day, on Goleta Union's behalf. Spanish language interpreters Jose Taveras, Marisol Martinez, Adriana Monsalve, Lorena Lazcano, Evelyn Palacio, Andres Marquez, and Maria del Carmen Aguirre de Carcer interpreted spoken language and/or translated written documents during the proceedings for the parties, witnesses, and the ALJ.

At the parties' request, the matter was continued to December 5, 2022, for written closing briefs. The record was closed, and the matter was submitted on December 5, 2022.

ISSUES

Did Goleta Union School District deny Student a free appropriate public education in the two-year period prior to the filing of the complaint by:

- A. Failing to assess Student in all areas of suspected disability, specifically:
 - i. Autism, in preparation for the January 4, 2022 triennial review?
 - ii. Social-emotional functioning, specifically, by failing to conduct any formal assessments of Student in this area after August 30, 2021?
 - iii. Academics, specifically, by failing to conduct any formal assessments of Student in this area in preparation for his January 4, 2022 triennial review?

- B. Failing to timely conduct the special circumstance instructional assistance assessment after obtaining a signed assessment plan given to Parent in September 2021?
- C. Failing to address bullying of Student at school during the 2021-2022 school year, resulting in lost educational benefit?
- D. Failing to properly provide incident reports during the 2021-2022 school year involving injuries to Student, thereby significantly impeding the opportunity of Parent to participate in the decisionmaking process regarding the provision of a free appropriate public education to Student?
- E. Predetermining a change in Student's eligibility category in Student's 2022 triennial individualized education program, and at the January 4, 2022 individualized education program team meeting, without conducting a comprehensive triennial evaluation?
- F. Failing to provide an adequate prior written notice for denying Parent's April 20, 2021 request to reassess Student in the areas of speech, behavior, and math?
- G. Failing through the date of filing the complaint to implement the September 3, 2021 individualized education program by not providing a one-to-one aide?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.;

34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) All future references to the Code of Federal Regulations are to the 2006 version.

The main purposes of the IDEA are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this case, Student had the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was eight years old and in third grade at the time of the hearing. Student resided with Parent within Goleta Union's geographic boundaries since the summer of 2017, and attended his school of residence, Isla Vista Elementary School.

Parent's native language was Spanish, and she had limited understanding of English. Student was initially found eligible for special education and related services in 2018, under the category of autism. He continued to be eligible for special education and related services under the category of autism until January 4, 2022. At Student's triennial IEP review in January 2022, Goleta Union offered special education eligibility only under the category of speech or language impairment.

For clarity, the Issues in this Decision are addressed in chronological order, rather than numerical or alphabetical order.

ISSUE 1F: DID GOLETA UNION DENY STUDENT A FAPE BY FAILING TO PROVIDE AN ADEQUATE PRIOR WRITTEN NOTICE FOR DENYING PARENT'S APRIL 20, 2021 REQUEST TO REASSESS STUDENT IN THE AREAS OF SPEECH, BEHAVIOR, AND MATH?

Student contends that by letter dated April 20, 2021, Parent requested Goleta Union conduct assessments of Student within 30 days, in the areas of speech, behavior, and math. Student argues Goleta Union's response denying Parent's request for assessment failed to comply with the law regarding prior written notice.

Goleta Union contends it complied with all prior written notice requirements under the IDEA and its regulations. Goleta Union argues that its April 25, 2021 letter denied Parent's request for assessment but indicated that an IEP team meeting would be convened to discuss Parent's concerns. Goleta Union contends it convened an IEP team meeting on May 12, 2021, where the team fully discussed Parent's concerns. Goleta Union claims that even if the April 25, 2021 letter was procedurally defective, that

through the May 12, 2021 IEP process, Parent was put on notice of Goleta Union's proposals and refusals, and Parent stated at the meeting that all of her concerns had been addressed.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386 [137 S.Ct. 988, 1000-1001].)

Assessments are required to determine eligibility for special education, but also the type, frequency, and duration of specialized instruction and related services that are required. The term "assessment" used in the California Education Code has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5.)

A reassessment must be conducted if the school district determines the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reassessment, or if the pupil's parents

or teacher requests a reassessment. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a)(1).) Parents must be notified in writing when a school district refuses to evaluate a child, as requested by parents, and provide an explanation for the basis of the refusal. (34 C.F.R. § 300.503(a)(2) & (b).) When a parent requests reevaluation and the school district concludes reevaluation is unnecessary to determine the child's educational needs based on a review of existing data, the public agency must notify the child's parents of that determination and the reasons for that determination. (34 C.F.R. § 300.305(a), (b) & (d)(1)(i).)

Prior written notice is required to be given by the public agency to parents of a child with exceptional needs upon initial referral for assessment, and a reasonable time before the public agency initiates or changes, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or provision of FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503; Ed. Code, § 56500.4, subd. (a).) The notice is required to include a description of the action proposed, and an explanation why the agency proposes the action. It must also contain a description of each assessment procedure, assessment, record, or report used as a basis for the proposed action. The notice must also include a description of any other options that the IEP team considered and the reasons why those options were rejected, and other factors relevant to the proposal or refusal of the agency. (20 U.S.C. § 1415(c)(1); Ed. Code, § 56500.4, subd. (b).) It must also include a statement that the parents of the child with a disability have procedural safeguards protection, the means by which procedural safeguards can be obtained, and sources for parents to contact to obtain assistance. (*Ibid.*, 34 C.F.R. § 300.503(b)(4) & (5).) Prior written notice must be provided in the native language of the parent unless it is clearly not feasible to do so. (20 U.S.C. § 1415(b)(4); 34 C.F.R. § 300.503(c).)

As discussed below, Student proved by a preponderance of the evidence that Goleta Union committed a procedural violation when it failed to provide Parent with a legally compliant prior written notice in response to Parent's April 20, 2021 request for assessments in the areas of speech, behavior, and math.

STUDENT'S JANUARY 2019 TRIENNIAL REVIEW

As discussed in Issue 1A below, Goleta Union conducted a multidisciplinary psychoeducational assessment of Student while he was still in preschool just after he turned five years old and documented the results in a report dated January 22, 2019. At the IEP team meeting held on January 22, 2019, to review the results of the assessment, Student's areas of need were identified as communication development, social-emotional functioning, and pre-academic skills. Goleta Union offered Student eligibility for special education and related services under the category of autism and offered him specialized academic instruction and speech services.

PARENT'S APRIL 20, 2021 REQUEST FOR ASSESSMENT IN THE AREAS OF SPEECH, BEHAVIOR, AND MATH

Student participated in distance learning for a portion of the 2020-2021 school year. At some point prior to March 2021, Student returned to in-person learning on the Isla Vista campus. In March 2021, classroom instructional assistant Sandra Avila reported to Parent that Student complained he did not have any friends and he felt alone when on the playground. When Parent asked him about it, Student said he felt "lost in the playground." Parent reported Student's comment to his first-grade teacher at the time, Cheryl Takahara, via text message. Parent also explained to Takahara that Student had been bullied at home by children in the neighborhood, so when Student

tried to make friends with the other kids, they avoided him because of the “bad way” he had been “stereotyped.” Takahara replied by text message and told Parent Student did not have an aide assigned to him during both recesses, and that “we might want to make a case that he needs it, especially for social opportunities.” Takahara said she had brought it up before, but “maybe” Parent could advocate for it as well.

Parent sent a letter in English to Isla Vista principal Lorena Reyes on April 20, 2021. In the letter, Parent requested an IEP team meeting as soon as possible within 30 days. Parent explained Student was having challenges with social skills and behavior that impacted his learning, including “following directions, class participation, group work, etc.” Parent also explained that Student’s behavior and social skills challenges were also impacting his life outside the classroom, including his personal relationships. In the letter, Parent further requested that Goleta Union conduct assessments in the areas of speech, behavior, and math before the requested IEP team meeting and that Parent receive a copy of the assessments and all of Student’s school records at least five days prior to the IEP team meeting.

GOLETA UNION’S APRIL 25, 2021 PRIOR WRITTEN NOTICE FAILED TO COMPLY WITH THE LAW

On April 26, 2021, Reyes responded to Parent by letter in English dated April 25, 2021, which Reyes characterized as “prior written notice.” Reyes’s letter stated that Student’s annual IEP team meeting was held on January 8, 2021, and Parent consented to that IEP on January 21, 2021. The letter also denied Parent’s request for assessment. Goleta Union agreed to hold an IEP team meeting to discuss Parent’s concerns. Reyes stated she would attend, along with the general education teacher, resource specialist, school psychologist, and speech-language pathologist. Goleta Union proposed three

IEP team meeting dates, including May 12, 2021. Goleta Union enclosed a copy of parent's rights and procedural safeguards. There was no evidence presented at hearing that parent's rights and procedural safeguards did not satisfy 34 Code of Federal Regulations part 300.503(b)(4) or (b)(5).

Contrary to Goleta Union's arguments, the April 25, 2021 letter fell far short of the legal requirements for prior written notice. On its face, Goleta Union's prior written notice was also legally deficient because it was not provided in Parent's native language. (20 U.S.C. § 1415(b)(4).) Native language means the language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child. (20 U.S.C. § 1401(20); 34 C.F.R. § 300.29(a)(1).) Although at times Parent corresponded with Goleta Union in English, the preponderance of evidence established that her mode of communication was oral and written language, and her native language was Spanish.

Goleta Union's April 25, 2021 prior written notice was also defective in other ways. Although it clearly stated that Goleta Union was denying Parent's request for assessment, the cursory response failed to include any explanation or basis for its refusal to assess Student. It also failed to include a description of each assessment procedure, assessment, record, or report used as a basis for the proposed refusal to assess. The passing reference in the factual background that Student's annual IEP team meeting was held on January 8, 2021, and attachment of that IEP to the letter, were insufficient to establish compliance because the letter did not state the IEP was used as a basis for Goleta Union's refusal to assess. Student had not been formally assessed as part of that IEP, and, in fact, had not been assessed in over two years - since January 2019 before he entered kindergarten. Furthermore, the prior written notice did not contain a description of other options Goleta Union considered, or the reasons why those options

were rejected. The April 25, 2021 letter merely gave a one sentence denial of the request for assessment without explanation and offered Parent an IEP team meeting. Goleta Union's April 26, 2021 prior written notice failed to comply with the law, which amounted to a procedural violation of the IDEA and state law.

THE MAY 12, 2021 IEP DID NOT PROVIDE LEGALLY COMPLIANT PRIOR WRITTEN NOTICE FOR THE REFUSAL TO ASSESS STUDENT

Goleta Union is correct that an IEP can provide prior written notice, however, it must be provided within "a reasonable time" and it must contain all of the same notice requirements set out in 34 Code of Federal Regulations part 300.503. (34 C.F.R. § 300.503(a), (b) & (c).) Goleta Union's assertion that the May 12, 2021 IEP cured any defect in the April 25, 2021 letter, is not persuasive because that IEP did not properly comply with all of the elements of prior written notice, as explained below.

THE MAY 12, 2021 IEP TEAM NEVER DISCUSSED THE ASSESSMENTS REQUESTED BY PARENT

On May 12, 2021, Goleta Union convened an IEP team meeting as Parent requested on April 20, 2021, and as proposed in Goleta Union's April 25, 2021 letter. Reyes asked Parent to share her concerns with the IEP team. Parent explained that she had received input from the classroom teacher and instructional aide that Student had been frustrated at times, that Student continued to need socialization support, and Parent wanted to know how the IEP team could support him.

The IEP team reviewed Student's current services. At that time, Parent was informed Student received adult support at recess, including supervision by playground supervisors during the morning recess to help Student with integration and conflicts.

Parent was also informed that social facilitation was addressed by helping Student interact or initiate games, and that an instructional aide did these tasks during the lunch recess. Student's first-grade general education teacher, Takahara, said she was in communication with the playground supervisor during the morning recess and that Student was responsive and cooperative. The resource specialist stated Student needed to continue to work on being flexible and that the Isla Vista team was supporting this. Parent was informed that the speech-language pathologist was implementing a social thinking curriculum that provided Student with resources and strategies to support social language growth, and Student was responding well. The speech-language pathologist offered to share social thinking resources with Parent. The resource specialist explained that the goal was to provide Student with the least restrictive environment, and Student could become prompt- and support-dependent if he had an aide all day. The resource specialist also explained that Student was responding well to the allotted instructional aide support and classroom structures/procedures. The school psychologist added that the staff at Isla Vista continued to monitor Student's progress and address his additional needs.

Parent informed the IEP team she believed Student needed a full-time instructional assistant. Parent expressed she wanted Student to have more support during recess and lunchtime for socialization opportunities. Parent did not believe she had the opportunity to communicate or interact with the teacher about Student's behavior as much as she would have liked because of COVID-19 restrictions. Takahara said Student was responding well to the support provided and although lunchtime was an initial area of concern, it was being addressed with the aide support during lunch and that the support had been effective. The IEP team agreed it was important for Student to have the morning recess to apply social skills with playground supervision. Parent

shared with IEP team she was confused, and said she had to advocate for Student because there had been some behavioral concerns during lunch recess. Takahara informed Parent Student was getting the one-to-one support during lunch recess that Parent had advocated for, but Takahara did not think constant one-to-one support was appropriate because Student might become dependent on that support. Parent stated she was happy these supports were in place.

At the IEP team meeting, the resource specialist reviewed Parent's April 20, 2021 letter. Takahara opined Student was doing well, and that the support Student already had in the areas of following directions, group work, and class participation were effective. Takahara also explained that she had implemented the positive behavioral supports in the classroom and Student responded well.

Parent stated it appeared everyone was on the same page but requested more communication about Student's behavior to keep current. The Goleta Union staff stated they could provide the requested improved communication about Student's behavior progress. Parent explained that the type of communication she was looking for was information about Student's behavior, social skills inside and outside of the classroom, as well as information regarding conflicts and conflict resolution. The Goleta Union IEP team members agreed this was a great idea.

Takahara reported on Student's math progress at the May 12, 2021 IEP team meeting, stating Student was doing great in math and had not had many difficulties in this area. Goleta Union staff shared Student's recent STAR 360 scores with Parent. STAR 360 was a periodic assessment given to all students to measure their reading and math levels. Parent responded that Student could read complex words but had

difficulty with comprehension. The resource specialist suggested Student read at home and practice “wh-questions.” Takahara explained that Student had made progress in reading comprehension, but Student was not alone because his peers also struggled with answering questions. Parent thanked the IEP team and indicated all of her concerns had been addressed. Parent consented to the IEP on May 16, 2021.

THE MAY 12, 2021 IEP DID NOT CURE THE DEFECTS IN GOLETA UNION’S
APRIL 25, 2021 PRIOR WRITTEN NOTICE

Goleta Union’s after-the-fact attempt to characterize the May 12, 2021 IEP as sufficient prior written notice is not persuasive. The May 12, 2021 IEP failed to fulfill the requirements of an appropriate prior written notice. The IEP never mentioned the assessments requested by Parent on April 20, 2021 and did not clearly state the reasons why Goleta Union refused to assess Student as of April 25, 2021. Nor did the IEP give a description of each evaluation procedure, assessment, record, or report Goleta Union used as a basis for its April 25, 2021 refusal to assess Student, or give a description of the other options Goleta Union considered, and the reasons why those options were rejected. Finally, there is no description of the other factors listed relevant to Goleta Union’s refusal to assess Student, as required under 34 Code of Federal Regulations part 300.503(b) or Education Code section 56500.4, subdivision (b).

While the IEP notes reflected there was a discussion during the IEP team meeting about Student’s performance in socialization, behavior, math, and reading comprehension, those notes did not clearly explain why Goleta Union refused to assess Student in the areas Parent requested of behavior, math, and speech. The IDEA explicitly requires written prior notice to parents when an educational agency refuses to assess a student pursuant to parent request. (See 20 U.S.C. § 1415(b)(3)(B).) The

Supreme Court has explained the great importance of such procedural components of the IDEA. "When the elaborate and highly specific procedural safeguards embodied in § 1415 [of the IDEA] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid." (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*), quoting *Rowley, supra*, 458 U.S. at p. 205 [102 S.Ct. at p. 3050].)

Furthermore, as with Goleta Union's April 25, 2021 prior written notice, the May 12, 2021 IEP was not provided in Parent's native language, and as such, it failed to constitute appropriate prior written notice for refusing to assess Student. (34 C.F.R. § 300.503(c)(1)(ii).) Specifically, although Parent was provided a copy of the May 12, 2021 IEP, her testimony was uncontroverted that she never received a copy of that IEP in Spanish. While it is true that Parent attended the May 12, 2021 IEP team meeting, providing a parent with verbal notice as a substitute for written notice does not fulfill the technical prior written notice requirements of the IDEA, regardless of whether the verbal notice was substantively proper. (See e.g., *Union, supra*, 15 F.3d at p. 1526.) The fact that Parent was supported at the IEP team meeting by a social worker she brought to the meeting, and Parent may have said at the meeting all of her concerns were addressed, does not change this analysis.

Goleta Union committed a procedural violation by failing to provide appropriate prior written notice to Parent in response to Parent's April 20, 2021 request for assessments in the areas of speech, behavior, and math.

GOLETA UNION'S FAILURE TO PROVIDE LEGALLY COMPLIANT PRIOR WRITTEN NOTICE IN RESPONSE TO PARENT'S REQUEST FOR REASSESSMENT DENIED STUDENT A FAPE

A procedural violation results in a denial of a FAPE only if the violation:

- (1) impeded the child's right to a FAPE;
- (2) significantly impeded the parent's opportunity to participate in the decisionmaking process; or
- (3) caused a deprivation of educational benefits.

(20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); *W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*), superseded in part by statute on other grounds ["... procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."])

At hearing, Parent explained that she called for the May 2021 IEP team meeting because Takahara told her that Student needed more support, but at the meeting Takahara "back peddled," which at the time, confused Parent. Parent's testimony was inconsistent as to whether during the May 2021 IEP team meeting, she told the other IEP team members that her concerns were addressed. At one point, Parent stated she did not recall saying it, and at another point, she denied she told the IEP team all of her concerns had been addressed. Parent explained at hearing that all of her concerns were

never actually addressed, but she put her faith in Goleta Union and wanted to believe that her concerns were being addressed so she consented to the IEP. The May 12, 2021 IEP notes reflected Parent's confusion during the meeting.

Notwithstanding the inconsistency in Parent's testimony, the preponderance of evidence established that by failing to provide an appropriate prior written notice on April 25, 2021, or thereafter, in Parent's native language, Parent was at a disadvantage, which significantly impeded her opportunity to participate in the decisionmaking process in the development of Student's IEP. Going into the May 2021 IEP team meeting, Parent did not know the basis for Goleta Union's refusal to reassess Student. Nor did Goleta Union make it clear during the IEP team meeting the specific reasons it had refused to assess Student. Goleta Union had the opportunity to explain its decision in the April 25, 2021 letter, during the May 12, 2021 IEP team meeting, or in writing after the meeting, but it never did.

Goleta Union unpersuasively argues that it was very clear during the May 2021 IEP team meeting what was being offered and what was being rejected. However, this assertion misses the point. Goleta Union never explained the basis for its April 25, 2021 refusal to assess Student. By requesting reassessment, Parent was clearly looking for data-driven proof of Student's present levels of performance so she could be properly informed and meaningfully participate in the IEP process, given the reports she had received from Student's instructional aide and his teacher.

Instead, the May 2021 IEP team provided Parent with mostly anecdotal or incomplete information and superficial statements to appease Parent and reassure her that Student was doing fine. The information shared with Parent during the May 12, 2021 IEP team meeting and contained in the IEP, were no substitute for the formal,

standardized assessments Parent sought in the areas of speech, behavior, and math. (*E.g., N.B. v. Hellgate Elementary School Dist., ex rel. Board of Directors, Missoula County, Mont.* (9th Cir. 2008) 541 F.3d 1202, 1210 (*Hellgate*) [Without evaluative information about a student's autism, it was not possible for the IEP team to develop a plan reasonably calculated to provide the student with meaningful educational benefit].) Parent had a right to all of the specific information a prior written notice was required to contain, including a full explanation of the reasons why Goleta Union refused to assess Student, other options Goleta Union considered and the reasons those options were rejected, and a description of any other factors relevant to Goleta Union's refusal. By failing to provide that information, Goleta Union deprived Parent of the information she needed to participate in the educational decisionmaking process in an informed way.

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

The IDEA's procedural safeguards are intended to protect the informed involvement of parents in the development of an education for their child. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994] (*Winkelman*).) "[T]he informed involvement of parents" is central to the IEP process. (*Ibid.*) Protection of parental participation is "[a]mong the most important procedural safeguards" in the IDEA. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 (*Amanda J.*).)

Particularly with assessments, the importance of a school district informing a parent of the reasons why it is refusing to reevaluate a student cannot be overstated. On its face, the IDEA requires the school district to conduct a comprehensive evaluation when a parent makes a request, if the student has not been assessed in the last year. (34 C.F.R. § 300.303(a)(2).) The law appears to give a school district the opportunity to demonstrate to the parents that assessments are unnecessary by reviewing existing data and identifying what additional data, if any, is required, to determine, among other things, the student's educational needs. (34 C.F.R. § 300.305(a).) If after such a review, the IEP team and other qualified professionals, as appropriate, determine that no additional data is needed to determine the child's educational needs, the public agency need not perform the reevaluation at that time. (34 C.F.R. § 300.305(d)(1) & (2).) However, it must notify the parents of that determination, the reasons for that determination, and the right of parents to request an assessment. (34 C.F.R. § 300.305(d)(1)(i) & (ii).) The public agency is not required to conduct the assessment unless the parents persist in their request. (34 C.F.R. § 300.305(d)(2).)

The preponderance of evidence established that Goleta Union's failure to provide Parent with prior written notice for denying Parent's April 20, 2021 request for assessments, significantly impeded Parent's opportunity to participate in the decisionmaking process. Goleta Union denied Student a FAPE by failing to provide adequate prior written notice for denying Parent's April 20, 2021 request to reassess Student in the areas of speech, behavior, and math.

ISSUE 1B: DID GOLETA UNION DENY STUDENT A FAPE BY FAILING TO TIMELY CONDUCT THE SPECIAL CIRCUMSTANCE INSTRUCTIONAL ASSISTANCE ASSESSMENT AFTER OBTAINING A SIGNED ASSESSMENT PLAN GIVEN TO PARENT IN SEPTEMBER 2021?

Student contends Goleta Union denied him a FAPE by failing to timely conduct the special circumstance instructional assistance assessment offered at the September 3, 2021 IEP team meeting. Student contends it took Goleta Union 102 days to complete the assessment, and that it demonstrated poor supervision and implementation of the assessment process resulting in the assessment not being completed until December 14, 2021.

Goleta Union contends it timely conducted the special circumstance instructional assistance assessment and held an IEP team meeting to review the assessment results within 60 days of Parent's signed consent to the assessment plan. Specifically, Goleta Union argues it did not receive Parent's signed consent to the assessment until October 20, 2021, and that the assessment was timely completed and reviewed on December 14, 2021. Goleta Union argues Student is incorrect in asserting that it took 102 days to complete and review the assessment because the operative start date for determining timeliness within the 60-day period did not begin until October 20, 2021.

The evaluation of a child for special education and related services generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for assessment, the school district must provide proper notice to the student and his or her parents. (20 U.S.C. §§ 1414(b)(1),

1415(b)(3) & (c)(1); Ed. Code, § 56321, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental rights and procedural safeguards under the IDEA and companion state law. (Ed. Code, § 56321.)

When a student is referred for special education assessment, the school district must provide the student's parent with a written proposed assessment plan within 15 days of the referral, not counting days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days, from the date of receipt of the referral. (Ed. Code, §§ 56043, subd. (a), 56321, subd. (a).)

The proposed assessment plan must be in language easily understood by the general public. (Ed. Code, § 56321, subd. (b)(1).) It must be provided in the native language of the parent or other mode of communication used by parent. (Ed. Code, § 56321, subd. (b)(2).) It must also explain the types of assessments the district proposes to conduct and state that an IEP will not result from the assessment without the consent of the parent. (Ed. Code, § 56321, subds. (b)(3) & (4).) The school district must give the parent 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).)

The assessment may begin immediately upon receipt of the parent's consent. (Ed. Code, § 56321, subd. (c)(4).) Consent means the parent has been fully informed, in the parent's native language, of all information relevant to the activity for which consent is sought, the parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent describes that activity. (34 C.F.R. § 300.9(a) & (b).)

The school district has 60 days from the date it receives the parent's written consent, excluding days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days, to complete the assessment and convene an IEP team meeting to review the assessment, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (f), 56344, subd. (a).)

As discussed below, Student failed to prove Goleta Union did not timely conduct the special circumstance instructional assistance assessment, also referred to as a special circumstances independence assessment, or SCIA. The weight of evidence established that Goleta Union did not receive Parent's consent to the assessment plan for the independence assessment until October 20, 2021, and that the assessment was timely completed within 60 days after receiving Parent's written consent.

Specifically, on September 2, 2021, Parent delivered a letter to Goleta Union dated September 1, 2021. In the letter, Parent asked whether Student could be placed on home hospital instruction after Student reported that on August 30, 2021, an instructional aide grabbed him, which is further discussed in Issue 1D. Parent explained she was unwilling to send Student to school until he had a concrete education plan that met Student's "special necessities" in a normal class environment. Parent also requested a quick response and an emergency IEP team meeting to discuss the situation.

On September 3, 2021, Goleta Union held an amendment IEP team meeting to discuss Parent's request for a change of placement, the request for a full-time one-to-one aide, and to discuss the August 30, 2021 incident involving the aide. During the IEP team meeting, Assistant Superintendent of Pupil Services at the time, Cherylin Lew, stated that further assessment was necessary to determine the appropriate level of support Student required. Goleta Union offered to assess Student's need for the

requested aide support. It agreed to send an assessment plan to Parent and to convene an IEP team meeting to review the assessment. The IEP notes document that the proposed assessment would gather data on Student's needs and how to support his independence.

On September 17, 2021, Parent sent a letter to Goleta Union, reminding it that she had not received the proposed assessment plan. On September 23, 2021, speech-language pathologist Linda Nadalet sent to Parent by email an assessment plan for the proposed independence assessment.

Nadalet was a California licensed and credentialed speech-language pathologist. She held a master's degree in speech-language pathology. She was employed by Goleta Union as a speech-language pathologist and was Student's IEP case manager during the 2021-2022 school year. She provided Student with his IEP speech and language services during the 2021-2022 school year.

The assessment plan was sent only in English, which was not Parent's native language. In the email, Nadalet stated the assessment plan required Parent's signature, and offered to make arrangements for Parent to physically sign it in person, or by mail. By email on September 23, 2021, Parent requested that Nadalet have the assessment plan translated into Spanish and sent to her.

At some point between September 23 and October 8, 2021, Nadalet sent Parent a Spanish translated version of the assessment plan. The assessment plan stated, among other things, the description of the proposed assessment and the reasons for the proposed evaluation.

On October 8, 2021, Nadalet sent an email to Parent, asking if Parent had received the assessment plan that was sent home, and if Parent had any questions about the assessment.

On October 11, 2021, Parent sent an email to Nadalet, attaching the Spanish version of the assessment plan, signed and dated by Parent on October 11, 2021. However, Parent did not check any of boxes indicating whether or not Parent consented to the assessment.

On October 18, 2021, Nadalet responded by email, advising Parent that she had not checked any of the boxes on the assessment plan regarding consent. Nadalet informed Parent she needed to check the box consenting to the independence assessment or check the box denying consent. Nadalet also offered to make arrangements for Parent to sign the assessment plan in person.

On October 20, 2021, Parent sent the signed Spanish version of assessment plan to Goleta Union, marking the box indicating that she consented to the assessment plan. Nadalet acknowledged receipt of the signed and consented-to assessment plan on October 20, 2021, and thanked Parent by email a few minutes later. Nadalet documented on the assessment plan that Goleta Union received it on October 20, 2021.

Accordingly, it was not until October 20, 2021, that Goleta Union received Parent's consent for it to conduct the independence assessment. The assessment plan Parent returned on October 11, 2021, did not constitute Parent's consent for assessment because Parent had not checked the box indicating she was consenting to the assessment. It was not until October 20, 2021, that Parent returned the signed, Spanish-translated assessment plan with the box checked evidencing her consent to the independence assessment. It was only as of October 20, 2021, that all of the elements

necessary for valid consent had been satisfied. Prior to October 20, 2021, Parent had not agreed in writing to Goleta Union carrying out of the activity for which consent was sought. (See 34 C.F.R. § 300.9(a) & (b).)

Goleta Union completed the independence assessment by December 14, 2021. On December 14, 2021, Goleta Union held an IEP team meeting, which Parent attended, to review the results of the independence assessment. Based on the school calendar, there were less than 60 calendar days between October 20, and December 14, 2021. Accordingly, Goleta Union timely conducted the independence assessment because it completed the assessment within 60 days of receiving Parent's written consent to the assessment plan on October 20, 2021.

Within the limited scope of Issue 1B, Student was not persuasive in his assertion that Goleta Union demonstrated poor supervision and implementation of the assessment process, resulting in Goleta Union taking 102 days to complete the independence assessment. Student's argument ignores that Issue 1B solely challenged the timeliness of the independence assessment after obtaining Parent's signed consent to the assessment plan. Student's argument also overlooks that the timeliness of the assessment is calculated from the date Goleta Union received Parent's written consent, not from September 3, 2021, the date it first agreed to send out an assessment plan. (See Ed. Code, § 56043, subd. (f).) Because of the narrow scope of Issue 1B identified by Student in the complaint as Issue "b," and later clarified during the hearing, this Decision does not reach any other conclusions on issues which may be raised by Student pertaining to the assessment plan, including defects in the assessment plan or its timeliness.

Goleta Union did not deny Student a FAPE by failing to timely conduct the special circumstance instructional assistance assessment after obtaining a signed assessment plan, given to Parent in September 2021.

ISSUE 1D: DID GOLETA UNION DENY STUDENT A FAPE BY FAILING TO PROPERLY PROVIDE INCIDENT REPORTS DURING THE 2021-2022 SCHOOL YEAR INVOLVING INJURIES TO STUDENT, THEREBY SIGNIFICANTLY IMPEDING THE OPPORTUNITY OF PARENT TO PARTICIPATE IN THE DECISIONMAKING PROCESS REGARDING THE PROVISION OF A FAPE TO STUDENT?

Student contends Goleta Union failed to provide Parent with incident reports during the 2021-2022 school year when Student was injured, which significantly impeded Parent's opportunity to participate in the IEP process. Specifically, Student argues Goleta Union failed to provide incident reports to Parent when Student was injured by his aide on August 20, 2021, and then refused to allow staff to discuss the incident during an IEP team meeting. Student also contends there were four other incidents at school involving a peer, on September 29, November 2, November 5, and December 15, 2021; yet, Goleta Union only provided one incident report to Parent. On the first day of hearing, Student also identified an incident on September 8, 2021, as the basis of Issue 1D. However, Student's closing brief does not mention that incident in his contentions regarding Issue 1D.

Goleta Union contends it provided incident reports to Parent, although it was not

legally required to do so. Goleta Union also asserts Student failed to show any nexus between Parent's non-receipt of reports and any impediment to Parent's opportunity to participate in the IEP process.

GOLETA UNION DENIED STUDENT A FAPE BY FAILING TO PROVIDE PARENT WITH A REPORT REGARDING THE AUGUST 30, 2021 INCIDENT INVOLVING THE INSTRUCTIONAL AIDE

Student proved by a preponderance of evidence that he was denied a FAPE by Goleta Union's failure to provide Parent with a report regarding the August 30, 2021 incident with the instructional aide.

The IDEA requires IEP teams to consider the use of positive behavioral interventions and supports, and other strategies to address behaviors that impede a student's learning or that of others. (20 U.S.C. § 1414 (d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i).) A district's failure to develop positive behavior interventions can amount to a denial of FAPE. (See e.g., *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028, 1029; *C.F. ex rel. R.F. v. New York City Dept. of Education* (2d Cir. 2014) 746 F.3d 68, 81.) Procedures for the elimination of maladaptive behaviors shall not include those that cause pain or trauma. (Ed. Code, § 56520, subd. (a)(4).)

Emergency interventions may only be used to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the individual with exceptional needs, or others, and that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. (Ed. Code, § 56521.1, subd. (a).) Emergency interventions shall not be used as a substitute for a systematic positive behavior plan that is designed to change,

replace, modify, or eliminate a targeted behavior. (Ed. Code, § 56521.1, subd. (b).) No emergency intervention shall be employed for longer than is necessary to contain the behavior. (Ed. Code, § 56521.1, subd. (c).) Emergency interventions shall not use an amount of force exceeding that which is reasonable and necessary under the circumstances. (Ed. Code, § 56521.1, subd. (d)(3).)

To prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions, parents must be notified within one school day if an emergency intervention is used. (Ed. Code, § 56521.1, subd. (e).) A behavior emergency report must be immediately completed by the school where the intervention occurred, kept in the student's file, and provide all of the following information:

- The name and age of the individual with exceptional needs;
- The setting and location of the incident;
- The name of the staff or other persons involved;
- A description of the incident and the emergency intervention used, and whether the individual with exceptional needs is currently engaged in any systematic behavior intervention plan; and
- Details of any injuries sustained by the individual with exceptional needs, or others, including staff, as a result of the incident. (*Ibid.*)

An emergency behavior report must be immediately forwarded to, and reviewed by, a designated school administrator. (Ed. Code, § 56521.1, subd. (f).)

GOLETA UNION COMMITTED A PROCEDURAL VIOLATION BY FAILING TO PROVIDE PARENT WITH A REPORT REGARDING THE AUGUST 30, 2021 INCIDENT WITH THE AIDE

Avila was an instructional aide in second grade teacher Geraldo Arroyo's general education classroom at the beginning of the 2021-2022 school year. Avila provided aide support for both Student and a peer in the classroom, referred to in this Decision as XX.

On August 30, 2021, Parent noticed Student had bruises on his arm. Student reported to Parent that Avila grabbed Student because he was doing something wrong and not following directions. Student also told Parent that Avila used a strong grip and it hurt. Parent videotaped Student's explanation of what occurred, which depicted Student pointing to two red bruises on his arm.

Parent sent Goleta Union a letter on August 31, 2021, in which she described that on August 30, 2021, while bathing her son, she noticed some bruises on his right arm clearly looking like fingerprints. Parent stated Student identified Avila as the one who grabbed him because he was not paying attention and did not follow Avila's directions. Parent stated Avila grabbed Student's arm in an abrupt manner "to the point of causing trauma to his forearm." Parent reported Student said there were other children around who may have observed what happened. Parent also informed Goleta Union she filed a police report and that the officers took pictures of Student's arm and made a report to Child Protective Services. Parent asked that Goleta Union investigate this incident. Parent and Student met with Assistant Superintendent of Pupil Services Lew on August 31, 2021. Lew watched the video Parent recorded of Student telling Parent what happened, and Lew also asked Student what happened.

The evidence established that Goleta Union initiated some form of investigation after the August 30, 2021 incident. Some staff were interviewed as part of that investigation. The full scope of the investigation and the results of the investigation were not established at hearing.

The evidence established that Avila engaged in a physical restraint of Student because Student was doing something wrong and not following directions. Parent was never provided with a report regarding the August 30, 2021 incident, as required under Education Code section 56521.1, subdivision (e). Goleta Union committed a procedural violation of the law when it failed to provide Parent with a report about the August 30, 2021 incident.

GOLETA UNION SIGNIFICANTLY IMPEDED PARENT'S PARTICIPATION IN THE IEP PROCESS BY FAILING TO PROVIDE THE REPORT, THEREBY DENYING STUDENT A FAPE

The procedural violation of failing to provide Parent with a report regarding the August 20, 2021 incident, denied Student a FAPE because it significantly impeded parental participation in the IEP process. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); *Target Range, supra*, 960 F.2d at p. 1484.)

If a behavior emergency report is written regarding an incident concerning a student eligible for special education who does not have a behavioral intervention plan, the designated responsible administrator shall, within two days, schedule an IEP team meeting to review the emergency report, to determine the necessity for a functional

behavioral assessment, and to determine the necessity for an interim plan. The IEP team shall document the reasons for not conducting the functional behavioral assessment, not developing an interim plan, or both. (Ed. Code, § 56521.1, subd. (g).)

As described in Issue 1B above, on September 2, 2021, Parent delivered a letter to Lew dated September 1, 2021, asking for an emergency IEP team meeting to discuss the matter and that Student be placed on home hospital while the incident with Avila was resolved.

At the September 3, 2021 IEP team meeting, Parent requested an update on the investigation regarding the August 30, 2021 incident with Avila. Lew stated that an investigation was in process and offered another meeting to discuss the results of the investigation. Lew stated that once the investigation was complete, a non-IEP meeting would be held to answer Parent's questions. Although Parent made it clear she wanted to discuss the incident, Lew refused, claiming that the matter was still under investigation, and they could not talk about it. Parent was never given any details about the incident or provided with a date that the matter could be discussed.

Not only did Parent have the right to the report containing the information required by Education Code section 56521.1, subdivision (e), but Parent had the right to have the IEP team review the report and to have a full discussion of the incident at the September 3, 2021 IEP team meeting. (Ed. Code, § 56521.1, subd. (g).) That did not occur because Goleta Union never provided a report to Parent. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.501(b) & (c); Ed. Code, §§ 56304, 56341, 56342.5.) Parents are entitled to bring to an IEP team

meeting their questions, concerns, and recommendations as part of a full discussion of a child's needs and the services to be provided to meet those needs before the IEP is finalized. (*Assistance to States for the Education of Children with Disabilities* (March 12, 1999) 64 Fed. Reg. 12478-12479.)

A school district is required to conduct not just an IEP team meeting, but a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d at p. 1485; see *N.L., supra*, 315 F.3d at p. 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.) "Participation must be more than mere form; it must be *meaningful*." (*Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 858 [citations omitted; emphasis in original] (*Deal*); see also, *Winkelman, supra*, 550 U.S. at p. 524 [127 S.Ct. 1994]; *Amanda J., supra*, 267 F.3d at p. 882.) The IEP team shall consider the concerns of the parent for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)A) & (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).)

The failure to provide the report denied Parent information necessary to have a full, meaningful, and informed discussion with the IEP team at the September 3, 2021 IEP team meeting to determine Student's needs and the services before the IEP was finalized. Not only was Parent deprived of the information statutorily required to be in the report, the Goleta Union members of the IEP team who testified at hearing, denied they had any details pertaining to the incident. As such, Parent was also deprived of their informed input regarding the matter in the formulation of the September 3, 2021 IEP. Specifically, at hearing, speech therapist Nadalet, Student's second-grade general education teacher Arroyo, and Isla Vista's principal Reyes denied knowing any real details about this incident. At hearing, Arroyo would not even say if he knew the incident occurred in his classroom.

The IEP notes documented that there was no full discussion of Parent's concerns about the incident because Lew prohibited the IEP team from discussing it. Instead, Parent told the IEP team she was concerned with her son's safety and the IEP team discussed Parent's request for a change of placement and her request for a one-to-one aide. Parent told the IEP team Student needed "support/assistance constantly," as evidenced by the incident with Avila. Specifically, Parent stated that the lack of constant aide support was "the reason why [Student's aide] pulled his arms because he was not paying attention." Parent explained Student was easily distracted and needed redirection constantly. At hearing, Parent testified she was worried Student would be bullied and wanted to prevent it from happening. She was also worried about the emotional impact on Student. Arroyo shared with the September 3, 2021 IEP team that Student finished his work quickly and could be distracted when not engaged with a task, and sometimes walked around the classroom and asked Arroyo questions. Goleta Union offered Student placement at another school with speech and language services. It also offered Student a one-to-one aide until the independence assessment was completed, as diagnostic placement to gather data on Student's needs and how to develop his independence. Nadalet was charged with putting a communication log in place to give Parent regular updates as to what was going on with Student at school.

Had Goleta Union provided Parent the required behavior emergency report, it would have provided the IEP team, as well as Parent with information as to the setting and location of the incident, the names of any others involved, and a description of the incident and the intervention used. The report would have afforded Parent a full discussion of the matter in the development of Student's IEP, including determining the necessity for a functional behavior assessment or an interim behavior intervention plan. Specifically, Lew would have not been able refuse to discuss the matter during the

meeting and cloak it in secrecy, depriving the IEP team of basic information about the event. Moreover, neither a functional behavior assessment nor an interim behavior intervention plan was ever discussed. Instead, Parent was forced to participate in the formulation of Student's IEP and make decisions without this information, which was never provided. By failing to provide the report to Parent, Goleta Union denied Parent the opportunity to discuss the report and prevented Parent from asking questions or otherwise participating in the development of an appropriate program for Student. (See *T.K., et. al v. New York City Dept. of Education* (2d Cir. 2016) 810 F.3d 869, 876-877 (*T.K.*) [refusal to discuss parents' reasonable concerns about bullying and the effects on their daughter's ability to learn during the student's IEP meetings significantly impeded parent's right to participate in the development of her child's IEP.])

Therefore, Goleta Union significantly impeded Parent's opportunity to meaningfully participate in the decisionmaking process and denied Student a FAPE.

THE PEER-RELATED INCIDENTS

THE SEPTEMBER 8, 2021 BATHROOM INCIDENT

On September 8, 2021, there was a physical altercation in the bathroom between Student and peer XX. Student's second-grade teacher Arroyo thought that Student and XX were friends because their interactions were playful. And even after this specific incident, Arroyo saw that the boys were playful with each other. Arroyo never saw any negative incidents between Student and XX in the classroom. Goleta Union school psychologist, Alejandra Serrano saw Student and XX playing and interacting at school between the beginning of the 2021-2022 school year, and December 2021. It appeared to her they were friends.

Parent initially learned about the bathroom incident from instructional assistant Julia Smith when Parent arrived to pick Student up from school on September 8, 2021. Smith told Parent both boys were in the bathroom and XX pushed Student and punched him in the chest, and Student cried. Parent asked Smith who else was watching, and Smith told her no one.

Lorena Chavez, acting principal at the time because Reyes was offsite, wrote a note about the incident dated September 8, 2021, documenting that she spoke to XX between 10:30 AM and 11:00 AM on September 8, 2021. The note said XX was sent to the office for hitting Student in the bathroom and that XX told Chavez he hit Student because Student would not move, and Student hit him back. Both boys were talked to about using words and making better choices, instead of hitting. Chavez also documented that she spoke to Arroyo.

Principal Reyes did some investigating by reading Chavez's note and speaking to both boys. Reyes determined both students hit each other. Reyes had a discussion with Parent after school the same day and told Parent what happened. Reyes then documented her conversation with Parent in a hand-written note dated September 8, 2021. In the note, Reyes stated Parent did not believe her when she reported to Parent that Student had hit XX. It also stated that in Parent's presence, Student admitted to hitting XX. Reyes told Parent staff would walk Student to the restroom in the future and that both students would not be allowed to go to the restroom at the same time. Parent never saw the notes written by Chavez and Reyes prior to filing the due process complaint in this case.

THE SEPTEMBER 29, 2021 HOOLA HOOP INCIDENT

On September 29, 2021, there was another incident between Student and XX involving a hoola hoop. On September 29, 2021, aide Smith gave Parent a daily communication log, documenting that Student reported XX hit him with a hoola hoop, and Student was noticeably upset so Smith made certain he saw the nurse and staff was notified. The log also stated Student saw a nurse during recess "due to hand hurting." Smith also told Parent she took Student to the nurse and Student was upset, but Smith did not provide a lot of details.

On October 5, 2021, Goleta Union prepared a Student Accident Report regarding the hoola hoop incident but gave far fewer details than were in the communication log. It merely stated Student hit his hand with a hoola hoop during recess, he had pain in his right hand, ice was applied to his hand, and he was allowed to rest before returning to class. Principal Reyes did not investigate the hoola hoop incident.

THE NOVEMBER 2, 2021 KNEE-BUMP INCIDENT

Through the parties' exchange of evidence before the hearing, Goleta Union provided Student a document reporting an incident that occurred on November 2, 2021, in which Student's ear was bumped by an unidentified student's knee, which required ice in the office. At hearing, after reading the document, Parent was asked if it was plausible that another student bumped his knee against Student's left ear, which required ice in the office. Parent testified it was not, but she never explained the basis for her answer. An incident report was prepared, but there was no evidence presented at hearing establishing who prepared it, or when it was prepared. At hearing, when

asked if this incident involved XX, principal Reyes denied any recollection of this incident involving XX. Goleta Union never gave Parent a copy of the incident report prior to the document exchange.

THE NOVEMBER 5, 2021 RUNNING INCIDENT

On November 5, 2021, there was another incident at recess between Student and XX. Both Students were brought to the office by aide Smith. Principal Reyes investigated the incident by speaking to both students, and Smith, and asking them all what happened. Smith told Reyes the boys were running to get in line, and that as XX went toward Student to give him, what Reyes described at hearing as a "side hug," XX hit Student in the shoulder. Student told Reyes he got hit in the shoulder and he showed her what happened. XX was unable to articulate what happened so Reyes had XX show her. Reyes testified at hearing to having spoken to as many witnesses as possible to get a full picture, but it was not established at hearing who else she spoke to. Reyes determined XX did not intentionally hit Student and XX was trying to run up and hug Student, but did not have appropriate body control, which caused him to hit Student in the shoulder area.

Reyes called Parent on November 5, 2021, and informed Parent about the incident. Reyes told Parent Student had been injured in the recess area when XX ran up and tried to give him a friendly hug. Reyes asked Parent if she wanted to pick Student up from school. Parent picked Student up from school and took him to urgent care.

In a personal note prepared on November 5, 2021, Reyes documented she talked to the boys during afternoon recess and tried to get them to show her or tell her what

happened. The note stated XX could not remember, and Student said XX hit him. The note also documented that Reyes called both families and Parent said she would pick Student up from school and take him to the doctor.

Goleta Union also prepared a Student Accident Report on November 5, 2021. The report stated that while on the playground, a student ran to Student to give him a hug. It stated the student was running too fast and hit Student on the shoulder. It also stated Student had mild pain in the left shoulder/chest region and ice was placed on Student's left shoulder. It noted that Student returned to class and was picked up by Parent. The report identified Smith as the person in charge and present at the time of the accident.

PARENT REQUESTS FOR INCIDENT REPORTS

On November 8, 2021, Parent sent an email to Goleta Union, stating she was writing to request that Goleta Union promptly send the reports involving XX's aggression toward Student on September 29 and November 5, 2021. On November 9, 2021, school office assistant Margarita Diaz-Rea responded by email that she would send the reports home with Student on November 10, 2021.

On November 16, 2021, Parent wrote Goleta Union and again requested the incident reports involving XX. Parent reported that Student had been bothered by XX on several occasions. Parent asked what the school was doing about this, and stated Student was "uncomfortable returning to the classroom for fear of this classmate." Parent also reminded Goleta Union of her October 11, 2021 request to have Student separated from XX or moved to another classroom, and that she had not yet received

a response or the reports she had requested. Finally, Parent stated she was very concerned about Student's emotional state and the effect on his academics because of the incidents and requested a prompt response.

On November 17, 2021, Reyes responded to Parent in an email that Diaz-Rea had sent the requested incident reports home and asked Parent if they were received. Reyes also stated there had "only been two instances of interaction" with XX and she would be attending a conference on November 18, 2021, to obtain more information about Parent's concerns.

On November 18, 2021, Diaz-Rea wrote Parent an email informing Parent that Diaz-Rea had sent the reports home with Student in a large yellow envelope in his backpack the day he returned to class on November 12, 2021. At hearing, Parent denied she received any incident reports in Student's backpack in November 2021. Parent said she got the reports from an instructional aide named Celia. Parent was uncertain how many reports she got or when, but she believed there were not more than two reports, and she got them on November 16, 2021. She believed one of the reports concerned the November 5, 2021 running incident. However, Parent admitted on cross examination that she received the reports she had been requesting regarding the incidents of aggression involving XX.

On November 18, 2021, Parent sent an email to Diaz-Rea confirming that she received the reports from Student's aide after she sent her November 16, 2021 email requesting the reports.

THE DECEMBER 15, 2021 CHEST INCIDENT

On December 15, 2021, there was a physical altercation between Student and XX. Smith told Reyes she was at the swings with Student when the bell rang. Student ran to get into the line to transition back to class and Smith tried to catch up to Student. When Smith got to the line, Student reported to Smith that XX hit him in the chest. Reyes spoke to Student and XX about the incident, but it was not clearly established at hearing what was said during these conversations.

On the same day as the incident, Parent wrote to principal Reyes, case manager and speech therapist Nadalet, and general education teacher Arroyo stating Student had been "beaten today." Parent said she needed to know what happened with XX. Parent asserted she could "no longer tolerate this kind of aggression" toward Student, and asked, "How long does this abuse have to be tolerated?" Parent wanted to know what the administration would do about this. Parent informed them Student was "scared" when she picked him up that day and asked how it was possible that no one could provide "an explanation of anything." Parent said she asked Smith about it, but Smith did not want to say anything. Parent demanded the "bullying" against Student stop and said she needed answers as soon as possible.

On December 15, 2021, Reyes spoke to Parent about the incident. Reyes set up a meeting with Parent and Lew to take place on January 3, 2022, for the purpose of discussing Parent's concerns. Reyes documented in an email to Lew and Goleta Union special education coordinator Ashley Johnson, that she talked to Parent on the telephone regarding the incident on December 15, 2021, and forwarded a meeting invite to Lew for the January 3, 2022 meeting with Parent.

Johnson was Goleta Union's special education coordinator since August 2021. She was responsible for coordinating instructional assistance staffing across the district. Prior to becoming the coordinator of special education, Johnson held other positions at Goleta Union. She was a resource specialist for six years and a special day class teacher for two years. She held a master's degree in education, an education specialist instruction credential for students with mild to moderate disabilities, and a preliminary administrative services credential.

STUDENT FAILED TO PROVE GOLETA UNION WAS REQUIRED TO PREPARE WRITTEN INCIDENT REPORTS REGARDING THE SEPTEMBER 8, 2021 BATHROOM INCIDENT, AND DECEMBER 15, 2021 CHEST INCIDENT, AND PROVIDE THEM TO PARENT

There was no evidence Goleta Union prepared a formal incident report regarding the September 8, 2021 bathroom incident. The only contemporaneous documentation of that event were two handwritten notes, one written by Chavez and one written by Reyes, which are addressed below. Similarly, there was no evidence Goleta Union prepared a formal incident report or notes regarding the December 15, 2021 chest incident.

In his closing brief, Student cites no legal authority that required Goleta Union to prepare written incident reports regarding the peer-related incidents and provide them to Parent. With regard to the notes written by Reyes and Chavez regarding the bathroom incident, Student failed to prove Parent was entitled to receive a copy of those notes.

To guarantee parents the ability to make informed decisions about their child's education, the IDEA requires school districts to establish procedures to give parents of a

child with a disability the opportunity to examine all records relating to that child. (20 U.S.C. § 1415(b)(1).) Parents may request copies of their child's educational records at any time and are entitled to receive those copies within five business days of their request. (Ed. Code, § 56504.) Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act, called FERPA, to include "records, files, documents, and other materials" containing information directly related to a student, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); see also, Ed. Code, § 49061, subd. (b).) Pupil or education records do not include "records of instructional, supervisory, and administrative personnel ... which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(B)(i); see also, Ed. Code, § 49061, subd. (b).)

Notably, Student does not argue the notes written by Chavez and Reyes fell within the parameters of "education records" entitling Student to production. In any event, neither of the handwritten notes made by Chavez and Reyes appear to be the type of education records contemplated by FERPA and Education Code section 56504. Chavez did not testify at hearing and there was no evidence Chavez's note was shared with anyone other than Reyes. The evidence established that when Chavez wrote her note, she was filling in for Reyes, thus, acting in her stead. There was no evidence at hearing that Chavez's note was not her own personal, handwritten note. Furthermore, Reyes testified that her note was a personal note, and there was no evidence Reyes shared it or Chavez's note with anyone other than Goleta Union's attorney. In other words, Student failed to establish these notes either were kept in Student's cumulative

file or were otherwise pupil records to which Parent was entitled. Student failed to establish the notes were education records within the meaning of FERPA and the Education Code.

Further, Student did not prove the failure of Goleta Union to provide to Parent an incident report or the notes of the September 8, 2021 event, significantly interfered with Parent's opportunity to participate in the decisionmaking process regarding a provision of FAPE for Student. The preponderance of evidence established that after Reyes investigated the matter, she promptly spoke to Parent on the day of the incident and informed Parent what she had determined. Although at hearing Parent denied she had a conversation with Reyes about the bathroom incident, Parent's testimony was not credible. Parent not only initially admitted she spoke to Reyes, but she also admitted to being confused about which incident she discussed with Reyes. In contrast, Reyes documented in her September 8, 2021 note the conversation she had with Parent. Furthermore, the incident was also discussed at Student's December 14, 2021 IEP team meeting, convened to review the independence assessment. In short, Student failed to prove what information Parent was not already orally provided, was necessary for her to meaningfully participate in the IEP process.

Reyes also spoke to Parent on December 15, 2021, about the chest incident that had occurred that day. At hearing, Reyes did not recall much about her phone call with Parent other than speaking with Parent about what Goleta Union had done and intended to do to support Student. However, there was no persuasive evidence presented that Parent was not informed during that call about what had occurred earlier that day. Furthermore, the incident was also discussed at Student's triennial IEP team meeting on January 18, 2022. At that time, special education coordinator

Johnson explained to Parent that during recess, Student had slipped out of the eyesight of the instructional assistant. Reyes told Parent Student had run from the swings and the aide was not able to catch up to Student before the incident occurred. Again, Student failed to prove what information Parent was not orally provided, was necessary for her to meaningfully participate in the IEP process.

Absent any legal requirement to mandating that Goleta Union prepare an incident report, Student failed to meet her burden of proof. Goleta Union did not deny Student a FAPE by failing to prepare and provide Parent with incident reports regarding the September 8 and December 15, 2021 altercations with his peer.

STUDENT DID NOT PROVE GOLETA UNION DENIED STUDENT A FAPE BY NOT PROPERLY PROVIDING PARENT AN INCIDENT REPORT REGARDING THE SEPTEMBER 29, 2021 HOOLA HOOP INCIDENT

Student acknowledges in his written closing argument that Parent received the Student Accident Report dated October 5, 2021, regarding the September 29, 2021 hoola hoop incident. Nonetheless, Student argues he was denied a FAPE because the report was "contradicted" by the communication log provided to Parent on September 29, 2021. Specifically, Student argues that the communication log stated XX hit Student with the hoola hoop, whereas the Student Accident Report stated Student "hit his hand with a hoola hoop during recess."

While it is true that the report did not contain all of the details stated in the communication log, Student failed to demonstrate how this discrepancy significantly interfered with Parent's participation in the IEP process. It is undisputed that Parent was informed about the incident on September 29, 2021, including the details, when Smith gave her a copy of the communication log. The fact that Parent was also later given a

Student Accident Report that did not contain all of the same information did not change the fact that Parent had already been informed about this incident in writing on the day it occurred, including that XX hit Student with the hoola hoop. There was no persuasive evidence presented at hearing that the so-called "contradiction" between the two documents undermined Parent's IEP participation.

The preponderance of evidence established that Parent received the October 5, 2021 Student Accident Report no later than November 16, 2021. Given that Parent was informed about the incident on September 29, 2021, through the communication log, there was no persuasive evidence that the delay in receiving the October 5, 2021 report impeded Parent's IEP participation rights.

Goleta Union did not deny Student a FAPE by failing to properly provide Parent with an incident report regarding the September 29, 2021 hoola hoop incident.

STUDENT DID NOT PROVE GOLETA UNION DENIED HIM A FAPE BY NOT PROPERLY PROVIDING PARENT AN INCIDENT REPORT REGARDING THE NOVEMBER 2, 2021 KNEE-BUMP INCIDENT

Student's written closing argument does not specifically address the November 2, 2021 knee-bump incident other than arguing that it was another bullying incident involving Student and XX, and that Parent never received the incident report pertaining to this incident. Notably, on the first day of hearing, when Student's attorney was asked what incidents formed the basis of Issue 1D, Student's attorney did not include the November 2, 2021 incident report even though she had been made aware of its existence through the parties' prehearing document exchange.

Student failed to elicit sufficient testimony to establish the November 2, 2021 incident report was an education record to which Parent was entitled. Nor does Student make this argument in his closing brief. Reyes testified she recognized the report, but she was not asked any further questions regarding why she recognized it, when or where she first saw it, who prepared it, or where it was kept. Although Student had previously sought to admit the document into evidence, which the ALJ deferred until further foundation was laid, on the last day of hearing, Student did not object to the document being withdrawn.

Even assuming the November 2, 2021 incident report was an education record, within the meaning of FERPA and the Education Code, to which Parent was entitled, Student did not establish and does not argue how the failure to provide this one report involving Student and some unidentified peer had any impact on Parent's ability to participate in the IEP process, let alone significantly impede her rights given that Parent was keenly aware of the other peer-related incidents. Student failed to prove the November 2, 2021 incident was anything more than a one-time minor mishap on the playground with a peer other than XX, not uncommon in grade school.

Student established Goleta Union never gave Parent an incident report regarding the incident on November 2, 2021, but Student failed to prove by a preponderance of evidence that Goleta Union denied Student a FAPE by failing to properly provide Parent with an incident report regarding the November 2, 2021 knee-bump incident.

STUDENT DID NOT PROVE GOLETA UNION DENIED HIM A FAPE BY NOT PROPERLY PROVIDING PARENT AN INCIDENT REPORT REGARDING THE NOVEMBER 5, 2021 RUNNING INCIDENT

Student's claim that Parent only received one incident report, the September 29, 2021 incident report, is contrary to the weight of evidence. Parent not only admitted she also received the November 5, 2021 Student Accident Report regarding the running incident by November 16, 2021, but this was established by the preponderance of other evidence. Specifically, on November 8, 2021, Parent asked for the report regarding the November 5, 2021 incident, and on November 16, 2021, Parent wrote Diaz-Rea an email confirming that she received it.

Student takes issue with the report because it reflects Reyes's determination that another student who was running too fast hit Student on the shoulder when he tried to give him a hug. However, Student failed to present any persuasive evidence that the information in the report was inaccurate. Student also attacks the report because it does not say what would be done to prevent XX from injuring Student in the future. However, Student cites no legal authority that required Goleta Union to include that information in the Student Accident Report.

Student also takes issue with the report because it does not state whether or not Student consented to the hug or whether the incident was traumatizing for Student. However, Student presented no evidence that Parent did not already know the answers to those particular questions on November 5, 2021. Parent took Student to urgent care and more likely than not spoke to Student about the incident and his health care providers. In addition, Reyes investigated the matter and informed Parent

what happened on the day of the accident. Furthermore, the incident was also discussed at Student's December 14, 2021 IEP team meeting, where Reyes again informed Parent what occurred.

Student failed to prove that anything included in or absent from the report significantly impeded Parent's opportunity to participate in the IEP process. Student also failed to prove Parent was entitled to a copy of Reyes's handwritten notes regarding the incident. Reyes testified her notes were personal, and there was no evidence she shared them with anyone, or that they were part of Student's cumulative file. Student failed to establish Reyes' notes were an education record within the meaning of FERPA and the Education Code.

The preponderance of evidence established Parent received the November 5, 2021 Student Accident Report no later than November 16, 2021. Given that Parent was orally informed about the event on November 5, 2021, and further discussed it at the IEP team meeting on December 14, 2021, Student failed to prove the delay in receiving the November 5, 2021 report, impeded Parent's IEP participation rights.

Goleta Union did not deny Student a FAPE by failing to properly provide Parent an incident report regarding the November 5, 2021 running incident.

ISSUE 1C: DID GOLETA UNION DENY STUDENT A FAPE BY FAILING TO ADDRESS BULLYING OF STUDENT AT SCHOOL DURING THE 2021-2022 SCHOOL YEAR, RESULTING IN LOST EDUCATIONAL BENEFIT?

Student contends Goleta Union failed to address the bullying of Student during the 2021-2022 school year, resulting in lost educational benefit. Student appears to

premise his bullying claim on the same events on which Issue 1D is based, specifically, the August 30, 2021 incident involving classroom aide Avila, and the peer-related incidents on September 8 and 29, November 2 and 5, and December 15, 2021. Student argues that by not taking action to prevent or otherwise address the bullying of Student by Avila and XX, Student became ill, resisted attending school, and ultimately, missed weeks of instruction during the 2021-2022 school year. Student asserts Goleta Union should have considered whether additional services were appropriate, including additional supervision and services to help Student develop skills needed to have positive peer relations and reduce the likelihood of bullying in the school environment. Student argues the IEP team refused to discuss how to keep Student safe from continued assaults or the effects of the bullying on Student.

Goleta Union contends bullying did not occur. It also argues that even if bullying occurred, it appropriately addressed the incidents by convening IEP team meetings to discuss the incidents, and Student suffered no loss in educational benefit. Goleta Union asserts XX was significantly more impacted by his disability than Student and could not form the intent to bully or harm Student and that the incidents involving XX were not part of a pervasive pattern of aggressive acts, and Parent was the only one who characterized the incidents as bullying. Goleta Union further argues there was no substantial detrimental effect on Student resulting from the incidents at school. Student's report cards demonstrated he predominantly met grade-level standards across academic areas and that he met two of his three goals, the third of which he had substantially met by January 4, 2022 IEP team meeting. Goleta Union contends Student's doctor's recommendation for home hospital instruction on December 20, 2021, is not persuasive evidence of harm that Student suffered as a result of the alleged bullying incidents. Goleta Union asserts Parent did not give the note to the school until

January 3, 2022, and Parent did not testify Student suffered angst while he was at home between December 15, 2021, his last day of school, and February 22, 2022, the date he returned to school. Goleta Union also argues Student's experts failed to establish Student's anxiety was the result of bullying at school.

A school's responsibilities toward any particular student are highly contextual, and there is no "one-size-fits-all" approach to bullying. (*Csutoras v. Paradise High School* (9th Cir. 2021) 12 F.4th 960, 967, 970 (*Csutoras*) [rejecting the claim that any instance of peer-on-peer harassment or bullying directed toward a disabled student regardless of the harasser's motivations or the school's precautions creates a colorable claim of discrimination].) As other courts have observed, "[j]udges make poor vice principals,' and thus need to be careful second-guessing a school's disciplinary decisions or restricting the flexibility that school administrators require and our laws afford." (*Id.* at p. 967.) The United States Department of Education "Dear Colleague Letters" are not binding authority and their application is limited. (*Id.* at pp. 967-968.)

Conduct need not be outrageous to fit within the category of harassment that rises to a level of deprivation of rights of a disabled student. The conduct must, however, be sufficiently severe, persistent, or pervasive that it creates a hostile environment. (*T.K., et al v. New York City Dept. of Education* (E.D.N.Y. 2011) 779 F.Supp.2d 289, 317.) Where a student is verbally abused repeatedly and suffers other indignities, such as having his property taken or is struck by his fellow students, and a school does nothing to discipline the offending students despite its knowledge that the actions have occurred, the student has been deprived of substantial educational opportunities. (*Ibid.*)

In 2013, the United States Office of Special Education and Rehabilitative Services, called OSERS, and the Office of Special Education Programs, called OSEP, issued a joint

letter providing guidance on the IDEA with regard to bullying. (*Dear Colleague Letter* (August 20, 2013).) Bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied. (*Ibid.*) In its guidance, OSERS and OSEP defined bullying as "... aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time." (*Ibid.*) Bullying can involve overt physical behavior or verbal, emotional, or social behaviors and can range from blatant aggression to far more subtle and covert behaviors. (*Ibid.*) In footnote 4, OSERS and OSEP stated that the focus of their joint letter was peer-to-peer bullying, but they acknowledged that teachers and school staff can be a party to school bullying. (*Ibid.*)

California has its own definition of bullying. California Education Code section 48900, subdivision (r)(1) defines "bullying" as any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including one or more of the acts committed by a pupil or a group of pupils as defined in sections 48900.2 (sexual harassment), 48900.3 (hate violence) or 48900.4 (intentional harassment, threats, or intimidation), directed toward one or more pupils that has or can be reasonably predicted to have the effect of one of more of the following:

- Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property;
- Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health;
- Causing a reasonable pupil to experience substantial interference with the pupil's academic performance; or

- Causing a reasonable pupil to experience substantial interference with the pupil's ability to participate in or benefit from the services, activities, or privileges provided by a school.

A reasonable pupil means a pupil , including, but not limited to, a pupil with exceptional needs, who exercises average care, skill, and judgment in conduct for a person of that age, or for a person of that age with the pupil's exceptional needs. (Ed. Code, § 48900, subd. (r)(3).)

Under Education Code section 48900.4, harassment, threats, or intimidation is defined as intentional conduct that is that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel or pupils by creating an intimidating or hostile educational environment.

In an unpublished decision, the Second District of the California Court of Appeal addressed Education Code section 48900 in the context of a custody proceeding.

(*Hendrickson v. Rizzo* (December 5, 2016, No. B264336) 2016 WL 7048717 at *7-8, (*Hendrickson*)). *Hendrickson* affirmed the lower court order, which had found no credible evidence of a pattern of bullying, finding that the alleged acts of bullying were "at worst, isolated events of inappropriate behavior" by the child's classmates typical of adolescent boys that "would not cause a 'reasonable pupil' to experience any of the negative consequences described in subdivision (r)." (2016 WL 7048717, *7.)

Hendrickson also involved many incidents of claimed bullying of the child, including that he had become afraid of another student who put a heated pistachio shell on his arm, which burned him and required him to see the school nurse. The child also he reported being pushed by another student while seated in English class. He also claimed, among

other things, he had been tripped while walking in a crowd of students, but it was unclear whether or not he was tripped intentionally. At an IEP team meeting, one of the parents reported the child did not feel safe at school. The child also claimed in a handwritten statement he had been subjected to a series of other bullying events and that he felt unsafe at school. The court affirmed the lower's court's conclusion that the child had been manipulated by his parent into believing he had been bullied. (2016 WL 7048717, *6, 8.)

FAPE claims involving alleged bullying have been addressed in other cases. In *A.L., et al., v. Jackson County School Board*, the Florida State Educational Agency found that where a student did not appear to have any serious injuries, an isolated instance of rough play between peers was insufficient to establish bullying under the IDEA. (SEA FL December 27, 2012), *affirmed on other grounds, A.L. v. Jackson County School Board* (N.D.Fla.) 2014 WL 5500631, *affirmed in part, A.L. v. Jackson County School Board* (11th Cir. 2015) 635 Fed. Appx. 774.)

In *Shore Regional High School Board of Education v. P.S.* (3d Cir. 2004) 381 F.3d 194, the student was the victim of relentless physical and verbal harassment as well as social isolation by his classmates during middle school. He was called such names as

- "faggot,"
- "gay,"
- "homo,"
- "transvestite,"
- "slut,"
- "queer,"
- "loser,"

- “big tits,” and
- “fat ass.” (*Id.* at p. 195.)

He was hit with a padlock and rocks by his peers and ostracized. When he sat down at a cafeteria table, the other students moved. The school district failed to remedy the situation after repeated complaints. The harassment became so severe that the student attempted suicide. (*Id.* at p. 196.) The Third Circuit reversed the lower court overturning of a state administrative law judge’s decision, which found a denial of FAPE based on the likelihood that a proposed high school placement would subject the student to continued bullying by the same middle school students because of his perceived effeminacy. (*Id.* at pp. 195, 197.)

In *T.K., supra*, the Second Circuit found a denial of FAPE and awarded tuition reimbursement where the school consistently rebuffed the parent’s attempts to discuss the bullying of their daughter. (810 F.3d at p 873.) In that case, the student’s schoolmates bullied her so severely that she came home crying and complained to her parents on a near-daily basis. The bullying was corroborated by the testimony of three of the student’s one-to-one special itinerant teachers. (*Id.* at pp. 872-873.) A neuro-developmental pediatrician found that the “minimal interactions” the student had with her classmates were “mostly negative.” (*Id.* at p. 873.) The witnesses supported these generalized assessments by describing specific instances of bullying, including

- calling the student names,
- drawing demeaning pictures of her,
- tripping her,
- laughing at her,
- pinching her hard enough to cause a bruise,
- stomping on her toes,

- ostracizing her,
- refusing to touch a pencil because she had touched it, and
- making a prank phone call to her home. (*Ibid.*)

Two of the itinerant teachers explained that the classroom teachers ignored their own concerns about the bullying. Her father described her as emotionally unavailable to learn as a result of the bullying and his assessment was supported by other facts in the record. (*Ibid.*; see *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 650 [If a teacher is deliberately indifferent to the teasing of a child with a disability and the abuse is so severe that the child can derive no benefit from the services that he is offered by the school district, the child has been denied FAPE.])

STUDENT DID NOT PROVE HE WAS BULLIED IN THE AUGUST 30, 2021 INCIDENT WITH AVILA

Avila, as Student's classroom aide since kindergarten, was in a superior position of power over Student at the time of the August 30, 2021 incident, in which Avila was reported to have grabbed Student's forearm forcefully enough to bruise him. Nonetheless, Student failed to prove by a preponderance of evidence that Avila bullied Student.

The circumstances surrounding the August 30, 2021 incident, which reportedly resulted in bruising on Student's forearm, was never established at hearing. Neither Avila nor Student testified, and the witnesses who were asked about the incident testified they did not witness the event or claimed not to know anything about the incident. Lew, who was involved in the investigation, also did not testify. Student reported to Parent that Avila grabbed him because he was doing something wrong and

not following directions, but during the hearing, Student did not establish what he was specifically doing or not doing at the time that caused the aide to grab him. For example, Avila could have grabbed Student for reasons related to Student's safety or the safety of others.

Furthermore, this seemed to be a one-time occurrence. Avila worked with Student and XX in Arroyo's classroom during fall 2021. Avila had been a classroom instructional aide in Student's classrooms since kindergarten and there was no persuasive evidence at hearing that there were prior incidents involving Avila and Student. Student's written closing argument essentially acknowledges this. Furthermore, second-grade teacher Arroyo, who did not witness the incident never saw Avila grab Student. He never saw Avila touch Student except for occasional soft guidance with her hand or when Student needed help opening his water bottle. Arroyo was interviewed by Goleta Union administration and informed them he never saw any "red flags" regarding Avila.

The only other incident involving Avila that was referred to during the hearing was something that occurred in May 2021, when Student got upset when his project was thrown away. However, Parent was the only one who testified about this event and her testimony about it was confusing, unclear, and otherwise unreliable. Moreover, right after the incident on August 30, 2021, Avila was transferred to another school. Thus, there was no likelihood of the incident being repeated with Student.

Student had the burden of proof to establish bullying occurred as a foundational element of Issue 1C. Throughout the hearing, Student's attorney asserted Student was "bullied" by Avila. However, in his written closing argument, Student did not specifically address how what occurred with Avila constituted bullying or explain how the specific elements of Education Code section 48900 were established at hearing. The evidence

was simply inadequate to prove by a preponderance of evidence that Student was “bullied” by Avila. Student failed to establish Avila bullied Student. As such, Student did not prove Goleta Union denied him a FAPE by failing to address bullying with regard to the August 30, 2021 incident involving Avila.

With the exception of Issue 1Aii pertaining to Goleta Union’s obligation to assess Student in the area of social-emotional functioning discussed below, this Decision does not address whether Goleta Union denied Student a FAPE by failing to appropriately address Parent’s complaints about bullying by Avila.

STUDENT DID NOT PROVE HE WAS BULLIED IN THE SEPTEMBER 8, 2021 BATHROOM INCIDENT

The evidence was insufficient to establish there was an imbalance of power between Student and XX at the time of the September 8, 2021 incident in the bathroom. XX was a peer with an IEP. There was no evidence XX was bigger or stronger than Student or that there was otherwise any perceived power differential. The only information provided at the hearing regarding XX was that he was, according to principal Reyes and teacher Arroyo, more impacted by his disability than Student was. Principal Reyes’s opinion that XX could not bully Student because XX had a lower cognitive level than Student was not persuasive. (See, e.g., *Dear Colleague Letter*, *supra*.) Notwithstanding the lack of proof of a power differential, Student did not prove XX’s conduct on September 8, 2021, or in the aggregate with the other incidents, met the specific definition of bullying under Education Code Section 48900, or how the conduct otherwise constituted bullying under federal law.

As with the bullying claim regarding Avila, the circumstances surrounding the September 8, 2021 bathroom incident were never fully established at hearing sufficient to prove that bullying occurred. The weight of evidence established that both boys hit each other and although XX apparently hit Student first, it was also reported that it was because Student would not move. There was no evidence regarding what precipitated the physical altercation, or from where, or to, or away from what, Student would not move. Again, neither Student nor instructional aide Smith testified. Both teacher Arroyo, and principal Reyes, who investigated the matter, testified about the event. However, their testimony along with the other evidence was insufficient to establish XX's conduct met the definition of bullying as defined by law.

As of September 8, 2021, there was no pattern of aggressive behavior by XX toward Student. Arroyo testified he never saw, or suspected, Student was being bullied or abused by XX, and he never saw any negative incidents between Student and XX in the classroom. In fact, as stated above, Arroyo thought the boys were friends because their interactions were playful. And even after this incident, the boys were playful with each other. Arroyo's perception that the boys were friends was corroborated by school psychologist Serrano's four or five observations between September and December 2021. In any event, after this incident, Goleta Union took steps to ensure that an adult walked Student to the bathroom to avoid another incident in the bathroom.

Again, while Student asserts that he was bullied by XX, his written closing argument does not specifically address how what occurred constituted bullying. The evidence was simply inadequate to prove by a preponderance of evidence that XX bullied Student on September 8, 2021.

STUDENT DID NOT PROVE HE WAS BULLIED ON SEPTEMBER 29, 2021

There was no evidence sufficient to establish there was an imbalance of power between Student and XX at the time of the September 29, 2021 incident in which Student's hand was hit by a hoola hoop, with XX's involvement. Notwithstanding that, Student did not prove the conduct met the specific definition of bullying under Education Code Section 48900, or how the conduct constituted bullying under federal law.

While it was documented on the communication log that Student reported XX hit him with a hoola hoop and that he was upset, and Smith had Student speak to the office staff about what happened, there was no evidence presented regarding the circumstances surrounding the incident sufficient to prove Student was bullied. Student failed to prove this incident was more than an accident on the playground. Again, neither Student nor instructional aide Smith testified. Nor did Student call as witnesses any of the staff Student spoke with on the day of the incident. Significantly, the communication log for September 29, 2021, also documented that Student remained at school the entire day and did well and was in a good mood. The evidence presented at hearing was simply inadequate to establish that bullying occurred on September 29, 2021, or when considered together with the prior bathroom incident.

STUDENT DID NOT PROVE HE WAS BULLIED IN THE NOVEMBER 2, 2021 KNEE-BUMP INCIDENT.

There was no evidence at hearing establishing the knee-bump incident involved XX or bullying. There was no evidence that there was an imbalance of power between Student and the unidentified peer involved in the November 2, 2021 incident.

Furthermore, there was no evidence satisfying the definition of bullying under Education Code Section 48900, or that otherwise established bullying occurred under federal law. At hearing, Parent merely stated, without explanation, she did not believe it was plausible that another student bumped his knee against Student's left ear, which required ice in the office. Principal Reyes, the only other witnesses to testify about the event, did not provide any further details about this incident. As stated above, Student failed to establish that the November 2, 2021 incident was anything more than a one-time, minor mishap on the playground with an unidentified peer. Student did not prove he was bullied on November 2, 2021. Having failed to establish he was bullied, Student did not prove Goleta Union denied him a FAPE by failing to address bullying related to the November 2, 2021 incident.

STUDENT DID NOT PROVE HE WAS BULLIED IN THE NOVEMBER 5, 2021 RUNNING INCIDENT

There was no evidence of an imbalance of power between Student and XX at the time of the November 5, 2021 incident. In addition, there was also no persuasive evidence establishing that the incident involved anything more than XX accidentally hitting Student in the shoulder when XX tried to hug Student sideways. In fact, Reyes promptly investigated the matter by talking to both boys and the aide in charge, and determined XX did not have appropriate control of his body after running when he attempted to hug Student. The evidence failed to establish Reyes's determination was inaccurate. (See e.g., *Csutoras, supra*, 12 F.4th at p. 967.) In fact, at the December 14, 2021 IEP team meeting, Parent acknowledged that it was an accident. The notes for the

IEP team meeting document that after Reyes again explained what happened on November 5, 2021, Parent stated that she understood, but she was alarmed when she found out Student was hurt.

Student failed to prove Student was bullied on November 5, 2021. There was no persuasive evidence establishing XX's conduct placed or could have been reasonably predicted to have placed a reasonable pupil with Student's disabilities in fear of harm. There was also no convincing evidence establishing that such conduct did or would have caused a reasonable pupil with Student's disabilities

- to experience a substantially detrimental effect on physical or mental health,
- or to experience substantial interference with academic performance,
- or to experience substantial interference with the ability to participate in or benefit from school services, activities, or privileges.

There was also no persuasive evidence XX's November 5, 2021 conduct substantially interfered with Student's academic performance or his ability to participate in or benefit from activities at school, or that such conduct had a substantially detrimental effect to his health. In fact, Student was not only interviewed about the event, but he was sent back to class after his shoulder was iced. Although Parent took Student to the doctor after school that day, Student presented no persuasive evidence that his injuries were serious.

Student did not persuasively establish that Student's subsequent illness on November 7, 2021, had any relationship to the events on November 5, 2021. Specifically, on November 7, 2021, two days after the incident on November 5, 2021,

Parent took Student to the hospital. At hearing, Parent explained she took Student to seek medical treatment after he began to vomit because he had an anxiety attack when another boy accidentally hit Student while sliding down a slide outside of school. Although Parent claimed Student's doctor told her that the anxiety attack could have been a reaction to a traumatic event due to repetitive bullying, Parent presented no reliable documentary evidence from the doctor stating this and the doctor did not testify. Nor was there any specific testimony from either of Student's experts, specifically or persuasively attributing Student's anxiety to the November 5, 2021 event.

Having failed to establish he was bullied, Student did not prove Goleta Union denied him a FAPE by failing to address bullying related to the November 5, 2021 incident, or when considered together with the other incidents.

STUDENT DID NOT PROVE HE WAS BULLIED IN THE DECEMBER 15, 2021 CHEST INCIDENT

While Student asserts that XX bullied him on December 15, 2021, once again, he does not specifically explain in his closing brief how XX's conduct constituted bullying as defined by law. Student does not otherwise address the elements of bullying under Education Code section 48900 or explain how each of those specific elements were established at hearing regarding this incident.

In fact, as with the other incidents involving XX, there was inadequate evidence regarding the circumstances of this event to prove that it fell within the legal definition of bullying. The evidence established Smith reportedly lost sight of Student after he left the swings and ran to get into line to transition back to class, when Student reported to Smith XX hit him in the chest. However, there were no other sufficient details elicited at

hearing regarding the circumstances of the incident to prove bullying occurred. Indeed, Student's 2021-2022 English language development teacher, Tanya Mishler, testified that Student liked to be first in line and sometimes Student tried to put himself first in line even when there was another person there.

Although Parent took Student to see a doctor, that evidence was not persuasive in establishing bullying occurred on December 15, 2021. As further discussed in Issue 1A below, Parent took Student to see a doctor on December 20, 2021, who filled out an application for home hospital instruction, which stated Student had "autism spectrum disorder" and "an adjustment disorder with anxiety." It also stated Student was having "significant somatic symptoms from anxiety and social situation at school," and was "unable to properly perform and learn and would benefit from home/hospital program until his somatic symptoms have improved." Yet, Student failed to call the doctor to testify. There was no evidence persuasively establishing upon what the doctor based her opinions in attributing Student's issues to the social situation at school and her determination Student could not properly perform and learn. In short, there was insufficient proof the doctor's conclusions were valid.

Significantly, Parent did not send the application for home hospital instruction to Goleta Union until January 3, 2022, the day before the first of two IEP team meetings convened as part of Student's triennial review. Other evidence called into doubt the reliability of the doctor's December 20, 2021 unsubstantiated conclusions. On February 1, 2022, the same doctor wrote a letter, releasing Student to return to school. The letter stated Student was doing very well, and "having good relationships with other children at school." At that time, Student had been out of school since December 15, 2021, and contrary to what the doctor reported, was not socializing with other children at school.

Having failed to establish he was bullied on December 15, 2021, Student did not prove Goleta Union denied him a FAPE by failing to address bullying related to the December 15, 2021 incident.

None of the peer-related incidents separately, or when considered together, proved the foundational element of Issue 1C, that Student was bullied by XX, or another unnamed peer. Further, despite Parent's conclusory accusations of bullying further discussed in Issue 1A below, the evidentiary support for these accusations, regarding the incidents upon which this claim appears to be based, fell short of satisfying the legal definition of bullying under Education Code section 48900, subdivision (r), or federal law. With the exception of Issue 1Aii pertaining to Goleta Union's obligation to assess Student in the area of social-emotional functioning discussed below, this Decision does not address whether Student was denied a FAPE by failing to address Parent's complaints about bullying by XX.

Student failed to prove Goleta Union denied him a FAPE by failing to address bullying at school during the 2021-2022 school year.

ISSUES 1Ai, 1Aii, AND 1Aiii: DID GOLETA UNION DENY STUDENT A FAPE BY FAILING TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY, SPECIFICALLY IN THE AREAS OF AUTISM AND ACADEMICS IN PREPARATION FOR THE JANUARY 4, 2022 TRIENNIAL REVIEW, AND SOCIAL-EMOTIONAL FUNCTIONING AFTER AUGUST 30, 2021?

Student contends Goleta Union denied him a FAPE by failing to comprehensively assess him for his January 4, 2022 triennial review in the areas of autism and academics, and by failing to assess him in the area of social-emotional functioning after August 30,

2021. Student argues he had a diagnosis of autism since age three and he had been found eligible for special education and related services under the eligibility category of autism since 2018. Yet, Goleta Union only assessed Student in the area of speech and language for his January 4, 2022 triennial review and, without a psychologist present at the IEP team meeting, removed his autism eligibility and failed to offer appropriate goals to address his needs. Further, Student argues that even when Parent requested an assessment in the area of academics in April 2021 after assisting Student during distance learning, Goleta Union refused to thereafter assess Student.

Student also contends Goleta Union was required to assess in the area of his social-emotional needs after August 30, 2021, to determine the social-emotional impacts of the trauma he experienced after the incidents involving Avila and XX discussed above in Issues 1D and 1E. Student asserts he was especially vulnerable due to his history of witnessing domestic violence in the home. Student argues that despite knowing all of this, Goleta Union failed to comprehensively assess him in all areas of suspected disability, preventing the IEP team from determining, considering, and addressing his unique needs related to his social-emotional functioning at the IEP team meetings after August 30, 2021, and his unique needs in the areas of autism, social-emotional functioning, and academics at his triennial review on January 4, 2022.

Goleta Union contends that based on Student's functioning at the time Goleta Union drafted the assessment plan for Student's January 2022 triennial review, it appropriately determined to assess his needs in the area of speech and language and that there was no need to comprehensively reassess Student. Goleta Union asserts Student failed to prove he had any different "autism symptoms" other than those already known and addressed by Student's IEP speech and language services. Goleta Union claims Student's functioning never changed and he never manifested any

different needs besides the need for speech and language services. Goleta Union contends it did not need to assess Student's social-emotional functioning until it received notice of his home hospital application on January 3, 2022, and that he manifested no symptoms of anxiety after the August 30, 2021 incident. It claims there was no evidence Student was bullied or that the incidents involving XX resulted in the need to assess his social-emotional functioning. Goleta Union argues Student was functioning at grade level and he continued to access the general education curriculum and make academic, social, and behavioral progress.

Goleta Union also argues that even if it committed a procedural error in failing to properly assess Student, it corrected the error on January 10, 2022, when Goleta Union offered Parent an assessment plan to comprehensively assess Student. It asserts it was prevented from completing those assessments because Parent signed consent, then revoked her consent to the assessment plan on January 25, 2022. Goleta Union contends if it committed any procedural error, it did not rise to a substantive violation tantamount to a FAPE denial. Goleta Union claims any procedural error was mitigated by its February 9, 2022 agreement to fund an independent psychoeducational evaluation.

An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345 subd. (a)(1).) An IEP must contain a statement of the special education and related services and supplementary aids and services to be provided to the pupil, or on behalf of the pupil, and a statement of the program modifications or supports for school personnel that will be provided to enable the student to advance appropriately toward attaining the annual goals and to be involved in and make progress in the regular

education curriculum and participate in nonacademic activities, and to be educated and participate with other individuals with exceptional needs and nondisabled pupils. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); Ed. Code, § 56345, subd. (a)(4).)

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).) For each area in which a special education student has an identified need, the IEP team must develop annual goals that are based upon the child's present levels of academic achievement and functional performance. (Ed. Code, § 56345, subd. (a)(2); *Letter to Butler*, (OSERS March 25, 1988).)

To determine the contents of an IEP, a student eligible for special education under the IDEA must be assessed in all areas related to the student's suspected disability. (20 U.S.C. § 1414 (a)(2) & (3); Ed. Code, § 56320.) School district evaluations of students eligible for special education under the IDEA help IEP teams identify the special education and related services the student requires. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.303, 300.324(a)(1); Ed. Code, § 56341.1.)

The IDEA provides for reevaluations, referred to as reassessments in California law, to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school 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).)

The threshold for suspecting that a child has a disability is relatively low. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D.Hawaii 2001) 158 F.Supp.2d 1190, 1195

(*Cari Rae S.*) A disability is “suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1109 (*Timothy O.*.) Such notice may come in the form of concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child’s behavior. (*Id.* at p. 1120 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796 and *Hellgate, supra*, 541 F.3d 1202].)

A school district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Timothy O., supra*, 822 F.3d at p. 1109; see *Cari Rae S., supra*, 158 F.Supp.2d at p. 1195.) The actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (*See Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann, supra*, 993 F.2d at p. 1041.)

A school district’s failure to assess a child may constitute a procedural violation of the IDEA. (*D.K. v. Abington School Dist.* (3d Cir. 2012) 696 F.3d 233, 249; see also *Park v. Anaheim Union High School Dist., et.al.* (9th Cir. 2006) 464 F.3d 1025, 1032 (*Park*) [A failure to properly assess is a procedural violation of the IDEA.]

As explained below, Goleta Union violated the law when it failed to assess Student in the areas of autism and academics in preparation for his January 4, 2022 triennial review, and by failing to begin the process of assessing Student in the area of social-emotional functioning by November 16, 2021.

STUDENT'S 2017 DIAGNOSIS OF AUTISM

On or about August 18, 2017, Parent provided Goleta Union with a letter from the Tri-Counties Regional Center staff psychologist, referring Student for a full evaluation and noting that he likely needed significant support in the preschool program. The letter informed Goleta Union that on August 15, 2017, Ubaldo Sanchez, Ph.D., diagnosed Student with autism spectrum disorder, with both intellectual and language impairment, as well as a level three rating, meaning Student needed the highest level of support, in both social communication and restricted repetitive behavior. The letter stated that Student would be eligible for lifelong regional center services.

On or shortly after August 31, 2017, Parent also gave Goleta Union a copy of Dr. Sanchez's August 2017 psychological evaluation, which was conducted for the purposes of determining Student's eligibility for regional center services. The report explained Student met the criteria for autism spectrum disorder in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, called the DSM-5. It explained that two measures used fell within the autism spectrum cut-off. It noted Parent was exposed to domestic violence from the sixth month of pregnancy and Student witnessed domestic violence, including verbal and physical abuse of Father toward Parent, and that Father had died six weeks earlier.

THE 2018 INITIAL SPECIAL EDUCATION ASSESSMENT AND IEP

Goleta Union conducted an initial multidisciplinary psychoeducational assessment of Student just after he turned four years old, documented in a report dated January 22, 2018, which concluded Student met the criteria for special education eligibility under the

categories of autism and speech and language impairment. It noted the domestic violence Student witnessed in the home, and that Father died during a confrontation with the police when they interceded during a domestic violence incident. In the January 22, 2018 IEP, Goleta Union offered Student eligibility for special education and related services under the category of autism. Parent consented to the IEP on January 22, 2018.

THE JANUARY 2019 TRIENNIAL ASSESSMENT AND IEP

Goleta Union reached the same conclusions in January 2019, after conducting a second multidisciplinary psychoeducational assessment of Student, documented in a report dated January 22, 2019. In the area of social-emotional functioning, his scores were statistically significant in six areas. In adaptive behavior, his scores reflected significant concerns in the home and school environment, including difficulty with daily functioning. In the area of academic achievement, his school concepts score fell in the average range, but his self/social awareness score was below average, which the report stated was not unusual for a child with autism.

Student continued to meet the criteria for special education eligibility under the categories of autism and speech and language impairment. Along with his deficits in the areas of receptive, expressive, and pragmatic language, Student exhibited statistically significant ratings in social-emotional functioning based on the Conners Early Childhood Autism Spectrum Rating Scale in the following areas: social functioning, atypical behaviors, inattentive/hyperactive behaviors, sensory sensitivity, behavioral rigidity and behaviors that exhibit stereotypy, indicating social/emotional functioning difficulties in both the home and school environments. There were significant concerns in adaptive behavior development in both the school and home environments, including daily functioning skills for eating, toileting, dressing, and hygiene. Student's nonverbal

communication and social interaction were significantly affected within the educational environment, and he displayed stereotyped movements, repetitive activities, lack of sensitivity regarding his proximity to other people, and indicated a significant need for sensory regulation.

In the January 22, 2019 IEP, Student's areas of need were identified as communication development, social-emotional functioning, and pre-academic skills. Goleta Union again offered eligibility for special education and related services under the category of autism, along with specialized academic instruction for 1,200 minutes a week, and speech and language services totaling 60 minutes per week, with 60 percent of his time outside the regular environment. Parent consented to the IEP on January 22, 2019.

THE MAY 2020 TRANSITION TO KINDERGARTEN IEP

At the May 20, 2019 IEP team meeting, convened for the purposes of discussing Student's transition to kindergarten, Goleta Union maintained Student's autism eligibility. The May 2019 IEP also stated that based on the January 2019 Conners Early Childhood Autism Spectrum Rating Scale, observations of Student's behaviors in the following areas were statistically significant:

- social functioning,
- atypical behaviors,
- inattentive/hyperactive behaviors,
- sensory sensitivity,
- behavioral rigidity, and
- behaviors that exhibit stereotypy.

These scales indicated areas of social-emotional functioning difficulties in both the home and school environments. His areas of need were identified as communication development and social-emotional functioning, and goals continued to be offered in those areas.

Goleta Union offered Student 1,200 minutes per week of specialized academic instruction in a group through the end of the 2018-2019 school year, along with group speech and language services, and individual totaling 60 minutes per week and a combination of individual and group counseling totaling 40 minutes monthly through January 2020. Goleta Union offered Student access to adult support in the general education environment as needed for the 2019-2020 school year. The IEP stated Student would spend four percent of his day outside the regular environment and 96 percent of his day in the regular environment for kindergarten. Parent consented to the IEP in June 2019.

THE JANUARY 2020 ANNUAL IEP CONTINUED STUDENT'S AUTISM ELIGIBILITY FOR SPECIAL EDUCATION

At the January 17, 2020 annual IEP, held during Student's kindergarten year, Goleta Union continued to offer Student autism eligibility for special education and related services. The IEP reported Student did not meet his social-emotional goal and only met one of his three communication goals. The general education teachers reported he was friendly and well-liked by his peers. Parent reported Student's relationship with other students had been great, but he was now noticing rejection from other students and Parent wanted to avoid any possible effects as a result.

At hearing, Parent explained that at home, Student was being rejected by neighborhood peers because of his communication deficits. She was unsure if she shared any examples with the IEP team, but claimed social interaction was his biggest obstacle. He wanted to be social with other children but had difficulties interacting with them. He had difficulties asking other children to play with him and he needed help in learning how to do this. Parent believed Student had the same difficulties with social interaction at school.

At the January 17, 2020 annual IEP, the school psychologist reported Student required adult support to stay focused as he was easily distracted, put his hands in his mouth, and fidgeted with his shoes. He required reminders to stay in his personal space and was observed being in very close proximity to his peers. He responded well to routines, preferential seating, and visual schedules. He also responded well to different level of gestural, verbal, and physical prompts. He could sustain play up to 30 minutes with adult support and could follow the rules and take turns when supported with prompting and cues. Adult support was needed to help him stay engaged, focused on the task, and to facilitate interactions to initiate and maintain conversations with peers. The school psychologist reported that Student's spontaneous social language skills were minimal, but he was observed to respond appropriately in social games. The present levels of performance noted that Student had expressive, receptive, and pragmatic language delays.

The January 2020 IEP team developed goals in the areas of expressive communication, receptive language, and pragmatics. Goleta Union offered Student placement for 10 percent of his day outside the general education environment, along with group speech and language services for 60 minutes weekly, an instructional

assistant in the general education classroom as needed, and consultation services with the school psychologist for 200 minutes yearly. Parent consented to the IEP on February 5, 2020.

GOLETA UNION'S JANUARY 2021 ANNUAL IEP CONTINUED STUDENT'S AUTISM ELIGIBILITY FOR SPECIAL EDUCATION

On January 8, 2021, while Student was in first grade, Goleta Union held Student's annual IEP team meeting. The January 2021 IEP noted that Student's home language was Spanish. Parent's biggest concern was that Student had difficulties attending to computer-based instruction during distance learning for extended periods of time and that he lost focus easily during each lesson. Parent stated that Student was doing well with computer-based instruction, but she was concerned about his focus. The school psychologist noticed Student needed support with personal space and staying focused. The IEP team meeting notes reflected that the general education teacher indicated Student needed cues to complete tasks. During computer-based instruction, Parent observed XX was receiving aide support and asked the IEP team if Student was going to get the same type of aide support. Parent explained Student responded well when supported by an instructional aide and she wanted more support for him. The IEP team agreed to follow up with Parent regarding her request for more aide support.

The classroom teacher reported academic present levels of performance. Student was average or above average in phonics and writing and was performing at grade level in the areas of math "and comprehension." The IEP stated Student followed directions, completed assigned classwork and homework, and put forth his best effort. In communication development, he made progress in expressive and receptive language

skills. When given visual or verbal prompts, he responded to questions and made comments when interacting with others but continued to require support to do so independently on a consistent basis.

In social-emotional/behavioral, the IEP stated he required individualized prompts throughout the day to attend to structured lessons and to learn how to complete assigned tasks. He also continued to need support in his ability to engage with peers and benefitted significantly from minimal prompting to do so. He needed reminders to maintain his own personal space when with peers. Goleta Union reported nothing for Student's present levels of performance in the area of adaptive/daily living skills, except "[n]ot an area of suspected disability at this time."

Goleta Union reported Student's goal baselines for receptive and pragmatic language. He exhibited particular difficulty with social inferencing and determining what was occurring in social situations. He demonstrated increased difficulty when asked to follow two to three step directions with embedded prompts. When given visual cues, Student could engage in five to ten conversational exchanges with a clinician. Student did not meet his social-emotional goal and met one of his three communication goals. Student's areas of need were identified as receptive and pragmatic language.

In the January 8, 2021 IEP, Goleta Union continued to offer Student autism eligibility for special education and related services. The IEP team developed three goals, two in the area of pragmatic language and one for receptive language. Goleta Union offered Student two percent of his day outside the general education environment and 98 percent of his day in the general education environment, along with 210 minutes monthly of group speech and language services, an instructional

assistant in the classroom for 600 minutes per week, and 200 minutes of yearly consultation services with the school psychologist. Parent agreed to implementation of this IEP on January 21, 2021.

PARENT'S APRIL 2021 REQUEST FOR ASSESSMENT AND MAY 2021 IEP

As discussed in Issue 1F above, in March 2021, Avila reported to Parent that Student told Avila he felt alone on the playground and did not have any friends. Parent reported her concerns to Student's first-grade teacher Takahara and explained he had been bullied in the past and that other kids avoided him. Based on Parent's text message conversation with Takahara and her own observations of Student during distance learning, Parent requested in an April 20, 2021 letter that Goleta Union assess Student in the areas of speech, behavior, and math. Parent also informed Reyes that Student was having challenges with social skills and behavior that impacted his learning. Despite Parent's specific request for assessment and without providing Parent with any adequate written response for its refusal, Goleta Union denied Parent's request. At the May 12, 2021 IEP team meeting, Goleta Union failed to properly inform Parent of the basis for its refusal to assess Student or inform Parent of her right to request an assessment.

THE SEPTEMBER 3, 2021 IEP AFTER THE INCIDENT WITH AVILA

At the September 3, 2021 IEP team meeting, Parent explained that Student needed support/assistance constantly, explaining that Avila pulled his arm because he was not paying attention. At that time, Parent explained Student was easily distracted and needed redirection constantly. Second-grade teacher Arroyo agreed Student could be distracted when not engaged with a task.

PARENT'S OCTOBER 11, 2021 LETTERS TO GOLETA UNION

On October 11, 2021, Parent sent a letter to Lew. The letter stated Student required more assistance in the classroom and during recess. Parent informed the school Student was not eating his lunch and may need redirection because he tended to get distracted and did not eat. Parent also notified Goleta Union Student needed reminders to submit work on time because he was coming home with items in his bag that should have been turned in. Parent also stated Student needed reminders to keep his mask on and to replace it with a new one when it got wet, and not to put things in his mouth. Parent said Student could not yet tie his shoelaces and someone needed to tie them for him.

The same day, on October 11, 2021, Parent wrote an email to Reyes, Lew, and Nadalet. The letter documented that after visiting other Goleta Union schools with Lew over the past few weeks, Parent decided to keep Student at Isla Vista, but Parent still worried about whether Student's needs were being met, mentioning his relationship with XX and "the incidents of bullying they have had."

PARENT'S NOVEMBER 2021 LETTERS TO GOLETA UNION

On November 16, 2021, Parent wrote to Goleta Union notifying it Student was uncomfortable to go back to the classroom because he was afraid of XX. Parent stated she was worried about Student's emotional status and the effect on his academics because of the incidents and that she was expecting a prompt response.

On November 29, 2021, Parent wrote an email to principal Reyes. Parent stated she was writing to verify that Student's aide should be at the door of the entrance at the beginning of the school day to redirect Student to his classroom. She wrote that

Student arrived to school at 8:05 a.m., and for several weeks the aide had not been present, and in the aide's absence at the school doorway, Student was running off to somewhere other than his classroom. Parent said she had already told Reyes and Arroyo about this concern in a parent-teacher meeting. Parent stated Student could not do things himself and needed adult assistance.

THE TRIENNIAL REVIEW ASSESSMENT PLAN

On December 2, 2021, Goleta Union sent Parent an assessment plan for the January 2022 triennial evaluation. Case manager and speech-language pathologist Nadalet prepared the assessment plan. Nadalet decided which areas of assessment to include, with no specific input from Parent and little or no input from other district staff about the scope of the assessment plan, despite her unconvincing testimony to the contrary. School psychologist Serrano confirmed at hearing it was the case manager's responsibility to determine the scope of the triennial evaluation in preparation for Student's January 4, 2022 IEP. The assessment plan requested permission from Parent to assess Student only in the areas of health by the school nurse, and language/speech communication development by the speech language pathologist. As further discussed below, Goleta Union determined, without consulting Parent or getting her permission, not to assess in the areas of autism, social-emotional functioning, or academics for Student's triennial review. Goleta Union decided Student's only area of concern was speech and language, and as such, to only assess Student in the area of speech and language and health for his 2022 three-year review.

THE DECEMBER 14, 2021 IEP HELD TO REVIEW THE INDEPENDENCE ASSESSMENT

At the December 14, 2021 IEP team meeting, Goleta Union reviewed the December 2021 independence assessment that had been conducted by school psychologist Sarah Rodriguez. Rodriguez did not testify at hearing.

The stated purpose of the independence assessment was to examine what level of independence Student exhibited through the day, across settings. The evaluation consisted only of a review of records, interviews, and observations, and referred only to the January 22, 2019 multidisciplinary report for standardized and/or curriculum-based assessments.

The report stated Student did not need much adult support at school, but appeared to need much more support at home. It also stated that “despite having support from a classroom aide, [Student] was observed to need no more prompts or support than his general education peers.” The report concluded that based on the data collected during observations for the independence assessment, Student did not demonstrate a need for additional adult support.

At the December 14, 2021 IEP team meeting, Parent explained Student required constant supervision to complete homework, and because he lacked an understanding about safety. She said Student did not notice when other kids were being mean to him. Parent reported Student sometimes needed support to go to the bathroom and she had to support him to get dressed or take a shower. The IEP team discussed some of the incidents with XX, and Goleta Union’s staff commented that Student was not distracted by noises, was focused, and on task. Parent asked why Student did not like going to the

bathroom by himself or to fill his water bottle, and the school psychologist responded she never asked Student. Arroyo stated Student had been vocal about not going to the bathroom by himself since the bathroom incident involving XX. Parent reported Arroyo told her that Student had been touching other students.

A goal for increasing independence was proposed, and school psychologist Rodriguez recommended keeping the existing level of adult support with a fade plan for increasing Student's independence. When Parent asked if Student was getting one-to-one support, she was told the current IEP did not say one-to-one, but that Student received 600 minutes weekly of additional adult support in the classroom.

PARENT'S DECEMBER 15, 2021 LETTER

On December 15, 2021, Parent wrote an email to Nadalet, Reyes, and Arroyo about the chest incident discussed in Issues 1C and 1D, above, making the accusation XX had "beaten" Student, Student had been bullied, and Student was scared when she picked him up from school that day. Student's last day of school was December 15, 2021, and he did not return until February 22, 2022.

PARENT'S JANUARY 3, 2022 LETTER REGARDING HOME HOSPITAL

On January 3, 2022, Parent wrote a letter to Goleta Union attaching an application for home hospital instruction signed by Parent on December 8, 2021, and a doctor on December 20, 2021, described in Issue 1C above. Parent's letter stated that Parent was concerned about the "current circumstances" and the impact it was having on Student's health and academic performance. She explained Student had been bullied by his peers the last few months which she notified the school about to no avail, and "physically assaulted" by an aide in August 2021. Parent stated Student had been through "many

difficult circumstances,” but he was getting worse when he went to school. She explained Student’s doctor was concerned about Student’s “mental regression and trauma due to ‘bullying,’” and that the doctor recommended Student remain at home while receiving therapy.

Parent also explained Student would remain at home until she received a plan from the school to ensure Student was physically and emotionally safe. The doctor’s statement on the application said Student required home hospital instruction due to a diagnosis of “autism spectrum disorder” and “adjustment disorder with anxiety.”

THE TRIENNIAL SPEECH AND LANGUAGE ASSESSMENT

Case manager and speech-language pathologist Nadalet conducted a speech and language assessment and prepared a report dated January 4, 2022.

Nadalet included the nurse’s health summary in her report, which noted Parent’s primary concerns were emotional stability and academic performance needs due to Student’s autism. The health report also noted Student was exposed to domestic violence and witnessed Father’s death in 2017. Parent described Student as a sensitive child who was emotionally affected by events in his surroundings. Nadalet unpersuasively claimed at hearing that in preparing her assessment report, she took into consideration conversations over the year with Parent, but aside from the information Parent provided for the health assessment, there was no evidence Nadalet ever interviewed Parent.

Nadalet’s evaluation included observations. At hearing, when asked if she saw any social-emotional concerns for Student during her observations, Nadalet admitted

she saw Student sometimes had difficulties with social interactions. She observed a peer get upset after Student tried to talk to that peer and an aide had to step in to resolve the situation.

Ultimately Nadalet determined Student's pragmatic/social language skills were impaired, and he qualified for special education under speech and language impairment, and recommended Student continue to receive speech and language services.

THE JANUARY 4, 2022 TRIENNIAL IEP

Student's three-year review IEP team meeting took place over the course of two days, January 4 and 18, 2022. In the January 4, 2022 IEP team meeting, Parent's concerns were documented as Student being sensitive and that he did not know what to do when other students were mean to him, and she was concerned his emotional health would impact his educational and social progress.

However, on the present levels of performance page, Student's social-emotional/behavioral functioning was left blank except the statement that it was not an area of suspected disability at this time. No present levels were reported. Similarly, Goleta Union failed to report any of Student's present levels in the areas of adaptive daily living skills, vocational skills, or gross/fine motor development, merely stating in they were not areas of suspected disability. The only areas in which present levels of performance were reported were for communication, health, and academics. However, in academics, the IEP merely stated Student was respectful and friendly in class, performed at or above grade level in all academic areas, was a hard worker, and completed his work quickly. Notably, Student's areas of need were identified as receptive language, expressive

language. Social/behavioral/emotional skills was also identified as an area of need, contradicting the statement made on the present level page for social-emotional/behavioral functioning.

THE JANUARY 4, 2022 IEP TEAM MEETING

At the January 4, 2022 IEP team meeting, Goleta Union informed Parent that Student met two of his three goals, and made progress on his pragmatic language goal. After reviewing the assessment report, Nadalet informed Parent that Student qualified for special education under the category of speech or language impairment.

Parent asked if Student qualified under autism, and Johnson informed her that although he had previously been identified with autism, he only qualified for speech and language services based on his areas of need, and that students are reassessed every three years. Parent asked why there had not been a full evaluation for the January 2022 IEP. Johnson stated that based on the assessment results, concerns about behavior and some adaptive skills, she recommended a full evaluation. Parent asked if a full evaluation was needed, why it had not been done earlier. Johnson stated that when the evaluations were started, the concerns about behavior and some adaptive skills were not present. Johnson told Parent when the assessment plan was sent out, the school team was only looking at the continued eligibility under speech and language, whereas the concerns about behavior and anxiety were more recent. Johnson informed Parent that Goleta Union could not assess in those areas because Parent only consented to a speech and language assessment. Parent correctly pointed out that the assessment plan, which only included evaluating Student's speech and language communication development and health, was developed by Goleta Union.

Parent asked if Student was assessed for academic achievement and when was the last time he had been assessed in this area, to which Johnson stated the last time was in January 2019. Johnson told Parent Student was currently performing within grade-level expectations, but academic achievement would be included in the new assessment plan, which would be sent to Parent within 15 days. Parent asked how it had been determined that academic achievement would not be assessed for the three-year review. Johnson said it was based on report card information, classroom assessments, and STAR 360 scores. Goleta Union informed Parent another IEP team meeting was necessary for a discussion about home hospital because the school nurse needed to be present.

THE JANUARY 18, 2022 IEP TEAM MEETING

Another IEP team meeting was held on January 18, 2022. The school nurse opined home hospital was an appropriate placement so Student could receive the therapies he needed in an environment that was not stressful. Johnson asked Parent about her concerns related to autism eligibility. Johnson explained that based on the current concerns, Goleta Union proposed additional areas of assessment. Parent questioned whether the new proposed assessment should have been included in the current assessment. Johnson explained that her concern related to the assessment had been documented in the IEP notes, and that the new assessment plan would include other areas of suspect disability related to his diagnosis of autism. Parent disagreed with the offered speech or language impairment eligibility.

Parent also reported she was concerned Student was scared and confused, and she believed Student was being bullied. Reyes responded that because of the incidents,

- team members have been provided strategies,
- roles and responsibilities had been clarified,
- structures were provided to the playground supervisors for supervision,
- progressive discipline had been used, and
- incidents were communicated to parents.

Parent stated she was worried about bullying and Student's emotional state, and that Student had not been in class for a long time. Johnson offered to change Student's classroom assignment and told Parent school personnel wanted Student to attend in person, but they were granting Parent's home hospital request. Parent stated Student needed one-on-one support to help with his emotional needs or applied behavior analysis therapy.

Goleta Union's offer of special education and related services included eligibility under speech or language impairment. It also offered two goals in the areas of communication, and one goal in the area of self-care/independent living even though the IEP did not state it was an area of need and did not report any present levels of performance for adaptive/daily living skills. It offered home hospital for five hours per week beginning on January 19, 2022, to be reviewed again on or before April 18, 2022. It also offered 210 minutes per month of group speech and language services outside of general education when Student returned to school in person, and during home hospital instruction, the speech and language services would be provided in person at

school in two weekly 30-minute sessions. It also offered an instructional assistant in the classroom for 600 minutes per week and consultation in the classroom with the school psychologist for 200 minutes per year to support Student and staff.

By an email, Parent consented to implementation of the January 4, 2022 IEP on January 25, 2022, with the exception of eligibility because it did not include autism. In the email, Parent wrote she had no other option because the school denied Student the support he needed due to his autism. At hearing, Parent explained that she accepted the home hospital hours and services for speech and language, but she did not understand why the IEP did not include autism. She did not understand why Goleta Union denied the one-to-one services Lew had promised on September 3, 2021, and why Student was not assessed in the area of social-emotional functioning. Parent believed autism impacted Student in areas other than speech and language, including social skills, and mentioned Student being stigmatized by peers because he sometimes stuttered and lacked focus. Parent also believed Student needed an adult redirecting him all the time in class based on her observations of him during distance learning, when he was unable to complete his work without Parent's assistance.

THE JANUARY 10, 2022 ASSESSMENT PLAN AND PARENT'S REVOCATION OF CONSENT

Goleta Union developed a new assessment plan on January 10, 2022, which Parent signed and delivered to Goleta Union the same day. It sought permission from Parent to assess Student in the areas of academics, health, intellectual functioning, visual perceptual skills, motor skills, social-emotional functioning, and adaptive skills, and to review the assessment done in the area of speech and language.

On January 25, 2022, Parent revoked her consent to the assessment plan and requested independent assessments in the areas of psychoeducation, speech, and the need for an independent special circumstances instructional assistance assessment. At hearing, Parent explained she revoked her consent for many reasons, including that Student never received the support she requested, Student's safety was in jeopardy, and the eligibility dispute.

ISSUE 1Ai: GOLETA UNION DENIED STUDENT A FAPE WHEN IT FAILED TO ASSESS STUDENT IN THE AREA OF AUTISM FOR HIS JANUARY 2022 TRIENNIAL REVIEW

Goleta Union violated the law when it failed to assess Student in the area of autism in preparation for his January 4, 2022 triennial review. The weight of evidence demonstrated Goleta Union was legally obligated to assess Student in the area of autism in preparation for the January 4, 2022 IEP.

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (34 C.F.R. § 300.8(c)(1)(i); Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in title 5 California Code of Regulations section 3030, subdivision (b)(4). (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1)(A); see also 34 C.F.R. § 300.8(c)(1)(ii).)

An assessment must be sufficiently comprehensive to identify all of the student's special education and related service needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304(c)(6).) A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, abrogated in part on other grounds, *Schaffer, supra*, 546 U.S. at pp. 56-58.)

The "educational benefit" to be provided to a student requiring special education is not limited to addressing the student's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

At the outset, when Goleta Union began the triennial review assessment process in 2021, it was keenly aware Student had autism and that autism was an area of known or suspected disability. It was aware he had been diagnosed with autism in 2017, and since 2018, he had been eligible for special education and related services under the category of autism after multidisciplinary evaluations in 2018 and 2019. Goleta Union's argument that Student was required to prove he demonstrated symptoms of autism different than those it already knew about is contrary to the law. Because autism was a known disability for Student which was impacting him at school, Goleta Union had an obligation to assess in that area for his triennial IEP.

Goleta Union asserts it was not required to comprehensively assess Student because the only concerns before it sent the December 2, 2021 triennial assessment plan to Parent were in the area of speech and language. However, this assertion completely disregards the abundance of evidence establishing there were other issues,

including autism-related concerns, before it sent the December 2, 2021 assessment plan to Parent. For example, Goleta Union's January 4, 2022 triennial speech and language assessment report documented Parent's main concerns were Student's emotional stability and academic performance needs due to his autism. As far back as March 2020, Parent expressed concerns to first-grade teacher Takahara about Student's social-emotional health, followed by Parent's April 20, 2021 letter to principal Reyes requesting a reassessment because of Parent's concerns about Student's behavior and social skills. Parent expressed further concerns about Student's functioning at the IEP team meeting on September 3, 2021, and in her October 11, 2021 letter, including his attention issues, as well as his adaptive and executive functioning skills. She also expressed concerns about Student's relationship with XX and what she perceived was bullying, and whether Student's needs were being met. On November 16, 2021, Parent specifically mentioned Student was uncomfortable going to class because he was afraid of XX, and she was worried about Student's emotional status and the effect on his academics. On November 29, 2021, Parent notified Goleta Union that Student had been eloping when he was dropped off at school and complained of his inability to do things himself. Thus, Student's reported issues went beyond speech and language concerns.

Although at hearing, case manager and speech-language pathologist Nadalet tried to pigeonhole Student's needs as merely speech-and-language-related issues, her testimony was unpersuasive. In an obvious after-the-fact attempt to justify the indefensible scope of the triennial assessment, Nadalet claimed she concluded Student had no needs outside speech and language based on some nonspecific conversations with other members of the IEP team, the services Student had been receiving over the years, and her review of some of his records. However, she could not or did not identify any specific conversations or provide any detail about what she had been told during

those alleged conversations. It was clear from Nadalet's testimony that these so-called conversations were at most some sort of general conversations where anecdotal information was shared but were not intended to elicit information relevant to uncovering if Student had any autism-related issues. In fact, at hearing, Nadalet admitted she was unfamiliar with all of the different elements of autism eligibility for special education.

As discussed in Issue 1E, below, the weight of evidence established Nadalet decided only to assess Student in the area of speech and language and health because she had already determined he had no needs in the area of autism. In making this determination, Nadalet completely ignored and failed to appreciate Student's autism diagnosis and autism eligibility, Parent's April 2021 request for assessment, the concerns raised in the health and developmental history form documented in the speech and language evaluation, the concerns raised in Parent's letters and at IEP team meetings, as well as the reasons for Student's social and communication-related issues, and other concerns which went beyond speech and language issues.

At hearing, Nadalet claimed she was aware of or received some of Parent's letters expressing Parent's concerns about Student before she sent the December 2, 2021 assessment plan. However, at hearing, she did not demonstrate familiarity with the concerns raised in Parent's letters. In fact, the weight of evidence established that Nadalet either was unaware of or ignored those letters in determining which areas of assessment to put into the assessment plan. Significantly, Nadalet admitted Student had autism-related issues. She testified Student had social communication difficulties that were based on his autism. She also testified Student's pragmatic language could be impacted by autism, including his ability to read different social situations and understand certain conversational cues or body language. Another characteristic she

attributed to Student's autism was his lack of appropriate eye contact, which she observed throughout the 2021-2022 school year during conversations with him, and that did not change. She admitted that not making eye contact and not facing the person when speaking were a part of pragmatic language, were behaviors often observed in people with autism, and were behaviors she observed in Student. She also agreed these were atypical behaviors, and not typically, socially appropriate. The weight of the evidence showed Nadalet knew Student displayed symptoms of autism.

Goleta Union's witnesses demonstrated a fundamental misunderstanding of a school district's obligation to assess. Goleta Union basically determined Student's needs without Parent's input based on some supposed discussions amongst themselves and then decided in which areas to assess him. This was inconsistent with what special education law requires. The purpose of a school district's special education evaluation is to gather information from a variety of sources to determine the student's present levels of academic achievement and functional performance, so the IEP team can determine the student's needs, develop goals in those areas, and identify the special education and related services the student requires. Goleta Union did not do that.

Goleta Union unpersuasively claims that based on Student's functioning in late November 2021, it did not need to comprehensively assess him for his January 2022 three-year review, including in the area of autism, one of Student's known disabilities. However, it was not possible to know Student's present levels of academic achievement and functional performance because Goleta Union only conducted an assessment in the areas of speech and language and health, completely ignoring the areas of academic achievement, intellectual development, perceptual motor development, social-emotional functioning, and adaptive skills/behavior. This could not be more apparent than in the January 4, 2022 IEP itself, where Goleta Union failed to include Student's present levels

for adaptive/daily living skills, social-emotional functioning/behavior, vocational skills, and gross and fine motor development. Instead of reporting on Student's present levels in these areas, the IEP states nothing except, "1/4/2022 Not an area of suspected disability at this time." Goleta Union purported to report present levels in academic achievement. However, the present levels page provided only scant, superficial information, without any specifics. The absence of this required information from Student's January 4, 2022 IEP is itself proof that a comprehensive assessment was necessary. Without current assessment data, Goleta Union did not have sufficient data to report Student's present levels in all necessary areas.

Notwithstanding Goleta Union's unimpressive attempt to distinguish *Timothy O.*, the law required Goleta Union to conduct a comprehensive assessment of Student for his January 2022 triennial review, which should have included autism. Student had not been comprehensively assessed since 2019, before he entered kindergarten. Without this critical information, it was impossible for the IEP team know the full scope of Student's autism-related needs in order to develop appropriate goals and services. Without formally assessing Student, Goleta Union did not have the information necessary to know how his autism impacted his education. As the Ninth Circuit Court of Appeals has clearly mandated, Goleta Union was obligated to assess Student for autism, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment. (*See Timothy O., supra*, 822 F.3d at p. 1119 ("School districts cannot circumvent th[eir] responsibility [to assess children in all areas of a suspected disability] by way of informal observations, nor can the subjective opinion of a staff member dispel such reported suspicion.").)

Further, the fact that Goleta Union readily offered to provide Parent with a comprehensive assessment plan on January 4, 2022, demonstrates that at least as of

that date, it realized its earlier mistake when Parent asked why a full evaluation had not been done. The attempts by Goleta Union's witnesses to attribute the motives for its decision to propose a comprehensive assessment as based solely on the information learned at the January 4, 2022 IEP team meeting were unconvincing.

Goleta Union committed a procedural violation by failing to assess Student in area of autism. This procedural violation significantly impeded the opportunity of Parent to participate in the IEP process and denied Student a FAPE.

At the January 4 and January 18, 2022 IEP team meetings, Parent was denied the information necessary for her to participate in an informed and meaningful way. For example, Goleta Union could not answer her question as to whether Student qualified for special education due to autism. Moreover, the IEP team did not have complete or standardized, data-driven information that would have otherwise been provided had Student been properly assessed in the area of autism as part of his triennial review. The IEP team meeting notes documented Parent told the IEP team her questions had not been answered. Instead of answering her questions, Goleta Union staff told Parent she would have to wait until Student returned to school to have her questions answered about applied behavior analysis therapy and her request for counseling, and until March 11, 2022, to review the results of the additional assessments Goleta Union belatedly proposed to conduct.

"[T]o succeed on a claim that a child was denied a free appropriate public education because of a procedural error, the individual need not definitively show that his educational placement would have been different without the error." (*Timothy O., supra*, 822 F.3d at p. 1124.) In fact, the Ninth Circuit has held that "[o]n more than one occasion ... the provision of a free and appropriate public education is 'impossible' when

the IEP team fails to obtain information that might show that the child is autistic.” (*Ibid.*) Here, Student’s January 4, 2022 IEP goals, which consisted only of two communication goals and one self-care/independent living goal, and services were likely inadequate because they were made without sufficient evaluative information about his individual capabilities as an autistic child. The fact that Goleta Union offered a comprehensive assessment plan at the January 4, 2022 IEP team meeting indicates it had insufficient evaluative information about Student to develop an appropriate IEP. There is strong reason to believe that alternative goals and services would have at least been considered during the IEP process had Goleta Union formally assessed Student for autism. Accordingly, because Goleta Union failed to properly assess Student for his triennial review, delaying until January 10, 2022, to provide a comprehensive assessment plan to begin the process of obtaining information that might reflect the impact of his diagnosis of autism on his educational needs, it was “impossible” for Goleta Union to offer a FAPE to Student in the January 4, 2022 IEP. (See *ibid.*) In short, because Goleta Union did not assess Student in the area of autism it could not determine the extent to which Student’s autism was impacting his education.

Goleta Union’s triennial was not sufficiently comprehensive to identify all of the student’s special education and related service needs because they did not assess him in the area of autism. Goleta Union denied Student a FAPE by failing to assess Student in all areas of suspected disability for his January 4, 2022 triennial review, specifically in the area of autism.

ISSUE 1Aii: GOLETA DENIED STUDENT A FAPE BY FAILING TO ASSESS STUDENT IN THE AREA OF SOCIAL-EMOTIONAL FUNCTIONING AFTER AUGUST 30, 2021

A student's unique needs that must be addressed under the IDEA may include behavior, social-emotional functioning, and mental health. (*County of San Diego v. California Special Education Hearing Office*, *supra*, 93 F.3d at pp. 1467-1468.)

For the same reasons discussed in Issue 1Ai above, regarding autism, the evidence proved Goleta Union violated the law when it failed to assess Student in the area of social-emotional functioning in preparation for his January 4, 2022 triennial review.

Student's social-emotional functioning was an area of concern as of December 2, 2022, when Goleta Union provided Parent the triennial assessment plan. As detailed above, Goleta Union staff was aware of Student's March 2021 complaints of loneliness and his history of being ostracized by peers as reported by Parent. By October 2021, they were also aware Parent reported Student was not eating his lunch at school and Parent believed Student was being bullied at school.

By November 16, 2021, Goleta Union was aware Parent had reported Student was uncomfortable going to class because he was afraid of XX, and Parent was worried about Student's emotional well-being and the effect on his academics. At hearing, second-grade teacher Arroyo corroborated Parent's testimony that Student said he was afraid to go to the bathroom by himself. Arroyo recalled that at some time later toward the end of the fall 2021 semester, Student expressed that he was uncomfortable being around XX. Arroyo also noticed that around this time, Student started to behave

differently in class. Arroyo's demeanor and the tentative nature of his speech indicated he was a reluctant witness. Despite this, Arroyo testified Student was complaining more toward the end of that semester about being uncomfortable in class around XX and wanted someone to walk with him to the bathroom. The December 14, 2021 IEP notes documented Goleta Union was aware Student did not like going to the bathroom by himself and had been vocal about not going to the bathroom by himself since the September 8, 2021 bathroom incident. Moreover, Nadalet admitted at hearing that her evaluation observations revealed social-emotional concerns, which were apparent well before the January 4, 2022 IEP team meeting. Moreover, some of the input Arroyo and Nadalet provided for Student's April 2022 private psychoeducational assessment, discussed in Remedies below, corroborated the existence of social-emotional concerns.

Goleta Union's special education coordinator Johnson also testified on this issue. She unpersuasively testified Student had no social-emotional issues. Initially, Johnson said her statement was based on the data presented at the January 4 and 18, 2022 IEP team meetings. When asked what data she was referring to, she pointed to Goleta Union's December 2021 independence assessment and the data staff presented at those IEP team meetings. Johnson earlier said she did not consider parent concerns to be data. When asked what data staff provided, Johnson admitted data may not have been collected because Student's social-emotional functioning was not an area of concern. When asked whether an independence assessment was sufficient to determine Student's social-emotional needs, Johnson's answers were inconsistent and evasive. Johnson claimed she could not give a "narrow enough answer." She also asserted that the independence assessment could have determined Student's social emotional needs in combination with staff reports. Later, Johnson admitted an independence assessment was not sufficient, by itself, to determine Student's social

emotional needs. Johnson also explained that an independence assessment was not a social emotional assessment, primarily because a social emotional assessment included tools an independence assessment did not. Johnson also admitted the purpose of the independence assessment was to determine the level of independence and support Student needed across environments in the school setting. Remarkably, in an attempt to justify Goleta Union's failure to conduct a social emotional assessment prior to January 4, 2022, Johnson then asserted that teacher interviews and observations were enough to determine Student's social emotional needs, and she did not believe any additional data was necessary. Notably, Johnson made these statements even though she had no direct involvement with Student and had never met him. Based on Johnson's testimony, she did not believe it was necessary to obtain input from Parent or Student to determine if Student had social emotional issues. Johnson's testimony was inconsistent, and her opinions lacked foundation, and were otherwise illogical. Throughout her testimony, Johnson presented as an unreliable, evasive, and biased witness, which undermined her overall credibility.

School psychologist Serrano's testimony sharply contrasted with Johnson's. Unlike Johnson, Serrano had some familiarity with Student. Serrano testified it was important for the triennial IEP team to consider Student's history of exposure to domestic violence. Serrano also thought it was important for the IEP team to have had current social-emotional evaluation results. Finally, Serrano believed it was important for triennial IEP team to have Student's self-report of his experience and functioning.

The weight of evidence proved Goleta Union was obligated by November 16, 2021, to assess Student's social-emotional functioning. Student did not establish by a preponderance of the evidence that Goleta Union was required to assess him the area of social-emotional functioning between August 30 and November 16, 2021.

The evidence presented regarding the period prior to November 16, 2021, was inadequate to trigger Goleta Union's obligation to assess Student's social-emotional functioning. In particular, Parent's April 2021 request for assessment did not specifically ask for an assessment in the area of social-emotional functioning. Neither the August 20, 2021 incident with Avila, nor the September and November 2021 peer-related incidents discussed in Issues 1C and 1D, above, required Goleta Union to assess Student in the area of social-emotional functioning at that time. There was no persuasive evidence Student's social-emotional functioning was an area of suspected disability because of the one-time incident involving Avila or the subsequent peer-related incidents with XX. Although in her letter of October 11, 2021, Parent characterized the prior incidents as "bullying," the weight of persuasive evidence did not support this characterization or suggest that the events could have or did adversely affect Student's emotional status at that time. In fact, the first time Parent mentioned in writing that she had concerns about Student's emotional well-being because of the incidents at school was in her November 16, 2021 letter to Goleta Union. Arroyo's testimony that he routinely checked in on Student to make sure he was comfortable, and it was not until toward the end of the fall 2021 semester that he noticed a change in Student's behavior, corroborated Parent's November 16, 2021 concerns.

Goleta Union's failure to assess Student in the area of social-emotional functioning was a procedural violation of the law. This procedural violation significantly impeded the

opportunity of Parent to participate in the IEP process and denied Student a FAPE. By failing to assess Student's social-emotional functioning, Parent and the IEP team were deprived of the detailed, data-driven information that a comprehensive assessment would have provided, and which was necessary for Parent to obtain informed input from the IEP team and effectively participate in the IEP process, including the January 4, 2022 IEP team meeting. Had Goleta Union timely assessed Student, Goleta Union and Parent would have had the opportunity at the January 4, 2022 IEP team meeting to consider the impact of the prior year's events, including the concerns raised in Parent's December 15, 2021 letter, on Student's emotional status. Further, Goleta Union would have likely been earlier informed about matters raised in the December 20, 2021 home hospital application and Parent's concerns related to it as outlined in her January 3, 2022 letter, to enable the IEP team to consider it at the January 2022 triennial review.

Similar to *Timothy O.*, Student's IEP goals and services were likely inadequate because the IEP team developed the offer without sufficient evaluative information about Student's social-emotional functioning. (See 822 F.3d at p. 1126.) Accordingly, because Goleta Union failed to timely assess Student, waiting until January 10, 2022, to finally provide a comprehensive assessment plan to begin the process of obtaining information that might have reflected Student's social-emotional needs, it was "impossible" for Goleta Union to offer a FAPE to Student in the January 4, 2022 IEP. (See *ibid.*)

Goleta Union denied Student a FAPE by failing to assess Student in all areas of suspected disability beginning on November 16, 2021, specifically in the area of social-emotional functioning.

ISSUE 1Aiii: GOLETA UNION DENIED STUDENT A FAPE BY FAILING TO ASSESS STUDENT IN THE AREA OF ACADEMICS IN PREPARATION FOR THE JANUARY 4, 2022 TRIENNIAL REVIEW

For the same reasons discussed in Issues 1Ai and 1Aii above, regarding autism and social-emotional functioning, the evidence proved Goleta Union violated the law when it failed to assess Student in the area of academics in preparation for his January 4, 2022 triennial review.

Again, Goleta Union was required to include in the January 2022 IEP information regarding Student's present levels of academic achievement and functional performance, so that it could appropriately develop goals and offer services to meet Student's needs in the area of academics. What Goleta Union provided were three conclusory sentences without any details, including Student was performing at or above grade level in all academic areas.

At the January 4, 2022 IEP team meeting Parent asked if Student was assessed in academic achievement. In response, special education coordinator Johnson deflected, stating Student was performing within grade-level expectations, but academic achievement would be included in a comprehensive assessment. When Parent wanted to know how it was determined Student was meeting grade level expectations, it was Johnson, not second-grade teacher Arroyo – who was also present – who responded to Parent's question, and Arroyo offered no input. The IEP team meeting notes established Johnson told Parent the conclusion was based on Student's report card information, classroom assessments, and STAR 360 scores, which she told Parent Goleta Union analyzed. Johnson offered no further details. However, while the report card for the 2021 winter quarter contained more detailed information, there was no evidence Parent

had Student's report card at the time of the IEP team meeting. Even so, the report card did not contain, and the classroom assessments and STAR 360 did not generate, the same detailed comprehensive reporting information and data that a formal, special education academic assessment would have provided. For example, the STAR 360 assessments were given to all students and were not assessments designed to determine a student's special education needs. The fact that Goleta Union had no real substantive information on the January 4, 2022 IEP academic present levels page, and then immediately offered to assess Student in academics in response to Parent's preliminary inquiries at the January 2022 triennial review, demonstrates Goleta Union had inadequate evaluative data to meaningfully inform Parent and the IEP team about Student's academic strengths and deficits. At hearing, school psychologist Serrano also thought it was important for the IEP team to have had Student's present levels of academic performance recently measured for his triennial review.

By failing to assess Student in academics, Goleta Union significantly interfered with Parent's IEP participation rights because it could not provide Parent with the information necessary for her to participate in the January 4, 2022 IEP team meeting in a meaningful way. Instead, it deflected and deferred any in-depth discussion about Student's academic performance until after it conducted a belated academic assessment. Goleta Union committed a procedural violation by failing to assess in the area of academics, which denied Student a FAPE.

However, Student did not prove he was deprived of educational benefit by Goleta Union's failure to assess in academics. As discussed in the Remedies section below, Student's expert, educational psychologist David Gilbertson, Ph.D., conducted a private psychoeducational assessment of Student in 2022. He testified Student did not require special education to address his academic performance, and his conclusion was

supported by the weight of other evidence, including the testimony of second grade teacher Arroyo, and Student's 2021-2022 English language development teacher, Mishler.

Goleta Union denied Student a FAPE by failing to assess Student in all areas of suspected disability for his January 4, 2022 triennial review, specifically in the area of academics.

ISSUE 1E: DID GOLETA UNION DENY STUDENT A FAPE BY PREDETERMINING A CHANGE IN STUDENT'S ELIGIBILITY CATEGORY IN STUDENT'S 2022 TRIENNIAL IEP AND AT THE JANUARY 4, 2022 IEP TEAM MEETING WITHOUT CONDUCTING A COMPREHENSIVE TRIENNIAL EVALUATION?

Student contends Goleta Union predetermined a change in Student's eligibility for special education and related services offered in his January 4, 2022 triennial IEP, from autism to speech and language impairment. Student argues that even though Parent made her concerns known to Goleta Union during the events leading up to the January 4, 2022 triennial review IEP team meeting, it improperly based the change in Student's eligibility on the only area it decided to assess – speech and language. Student asserts that to choose Student's eligibility category without a comprehensive evaluation is a violation of the law.

Goleta Union contends it did not predetermine a change in Student's eligibility either in Student's January 2022 IEP, or at or before the January 4, 2022 triennial IEP team meeting. It asserts it conducted an appropriate triennial assessment and there was no evidence that it came to Student's triennial IEP team meeting with a closed or inflexible mind. It argues that case manager and speech-language pathologist Nadalet

properly spoke with school staff before preparing the assessment plan to determine which areas to assess. It also argues that the notes of the January 2022 IEP team meetings reflect significant discussions between Parent and the school district members of the IEP team, including discussions about Student's eligibility and that it offered to conduct additional assessments based on Parent's concerns. Goleta Union claims it was willing to consider alternate eligibility categories, including autism, after a comprehensive assessment was completed. Goleta Union asserts Parent never consented to the change in eligibility category, and that regardless of the change, the services Goleta Union offered Student in the January 4, 2022 IEP, were the same as those he was offered and receiving in his prior IEP when he was autism-eligible. Goleta Union contends that even if it committed a procedural error, that error was mitigated when it offered Student a comprehensive assessment plan in January 2022, and that Student failed to prove any substantive FAPE denial arising from the alleged predetermination because he continued to perform at or above grade level and make excellent progress on his goals.

A school district that predetermines the child's program and does not consider parents' requests with an open mind has denied the parents' right to participate in the IEP process. (*Deal, supra*, 392 F.3d at p. 858; *Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 (*Ms. S.*), superseded on other grounds by statute.) For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the meeting and is unwilling to consider other alternatives. (*Deal, supra*, 392 F.3d at p. 857-858; *H.B. v. Las Virgenes Unified School Dist.* (July 3, 2007, No. 05-56486) (9th Cir. 2007) 239 Fed. Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn.10.)

Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to bring to an IEP team meeting their questions, concerns, and recommendations as part of a full discussion of a child's needs and the services to be provided to meet those needs before the IEP is finalized. (*Assistance to States for the Education of Children Disabilities, supra*, 64 Fed. Reg. 12478-12479.) School officials may permissibly form opinions prior to IEP meetings. However, if the district goes beyond forming opinions and becomes "impermissibly and deeply wedded to a single course of action," this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D.Ohio, January 17, 2013, No. 1:11-CV-398) 2013 WL 209478, *7.)

A school district's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of a FAPE. Substantive harm occurs when parents are denied meaningful participation in a student's IEP development. (*Deal, supra*, 392 F.3d at p. 859.)

Here, the weight of evidence proved Goleta Union predetermined Student's change in eligibility category before and at the January 4, 2022 IEP team meeting. The clearest evidence of this predetermination was the fact that Goleta Union chose to offer to assess Student only in the areas of health and speech and language without conducting the comprehensive evaluation of Student it was legally required to do, as discussed in Issues 1Ai, 1Aii and 1Aiii above.

Significantly, case manager and speech-language pathologist Nadalet admitted at hearing that it was determined through conversations with Goleta Union staff that autism did not need to be addressed and that Student's area of concern was just speech and language. She also admitted that Goleta Union staff agreed in meetings that did not include Parent, that Student did not need to be assessed in the area of autism.

Nadalet also testified Student was not assessed in the area of autism because at the time, she had concluded Student's identified areas of need were related to his speech and language and social communications/pragmatic skills. Notably, Nadalet admitted she was unfamiliar with all of the different elements of autism eligibility for special education. When she was specifically asked whether she had determined prior to writing the triennial December 2, 2021 assessment plan for health and speech and language that Student's autism was no longer impacting his ability to access his education, she was evasive in her response. She claimed Student was accessing the general education curriculum and performing at least at grade level, that math was an area of strength for him, and he may have been performing above grade level in math. But, when asked for details about Student's grade-level functioning at the time, Nadalet could provide no details, claiming she did not recall. Nadalet's evasiveness and her inability to provide details to support her statements negatively impacted her credibility.

As discussed in Issue 1Ai, the evidence established Goleta Union ignored Student's autism in deciding what areas it was required to assess in preparation for his January 2022 triennial assessment. Not only did Goleta Union know Student had a diagnosis of autism and had been eligible for special education under the category of autism since 2018, but Parent's main concerns regarding Student were documented in the January 4, 2022 speech and language assessment report as emotional stability and academic performance "due to his autism." Despite this, Goleta Union summarily concluded Student did not have to be assessed for autism and only had needs related to speech and language, ignoring that these speech and language needs could be directly caused by his autism. This fact was further evidence Goleta Union had already predetermined in advance of the January 4, 2022 IEP team meeting that Student's eligibility category would be speech and language impairment, and not autism.

Further proof that Goleta Union predetermined a change in Student's eligibility category was that it failed to have a school psychologist attend the January 4, 2022 IEP team meeting, despite the fact that special education eligibility was one of the core elements of the triennial IEP to be discussed. Nadalet testified she did not think it was important to have the school psychologist present for Student's IEP team meeting because the school psychologist had not completed any of Student's triennial evaluations. Failing to have a school psychologist present demonstrated Goleta Union's plan not to offer eligibility under the autism category in Student's January 4, 2022 triennial IEP.

Although Goleta Union invited a school psychologist to attend the January 18, 2022 IEP team meeting, it was only after Nadalet informed the IEP team on January 4, 2022, that Student qualified for special education based on speech and language impairment and Parent justifiably asked whether Student qualified under autism and why a full evaluation had not been completed. Special education coordinator Johnson admitted to Parent that when Goleta Union was assessing Student, it was only looking at eligibility under speech and language. Instead of being candid with Parent that the school district had made a mistake in failing to comprehensively assess Student, Johnson tried to improperly shift blame to Parent during the January 4, 2022 IEP team meeting. Specifically, Johnson disingenuously claimed that the school district could not assess Student in any other area because Parent had only consented to a speech and language assessment.

The fact that Goleta Union offered on January 4, 2022, to further assess Student and sent Parent a comprehensive assessment plan on January 10, 2022, demonstrates Goleta Union knew it erred when it failed to earlier assess Student in the area of autism in preparation for his three-year review. It should have been abundantly clear to the

January 4, 2022 IEP team that Student should have been assessed in the area of autism as part of his triennial review, and that it did not have complete information regarding Student's academic achievement and functional performance related to his autism.

Despite this, at the January 18, 2022 IEP team meeting, Goleta Union persisted in maintaining that Student only qualified for special education and related services under the category of speech or language impairment for purposes of the January 4, 2022 IEP, rather than maintaining his autism eligibility until the additional assessments could be completed. This conduct, in addition to the other evidence presented at hearing on this issue, demonstrated that Goleta Union was impermissibly and deeply wedded to a single course of action for purposes of the January 4, 2022 IEP.

Goleta Union predetermined Student's eligibility category in the January 4, 2022 IEP, and at the January 4, 2022 IEP team meeting. This was a procedural violation of the law. Parent was entitled to a full discussion of her questions, concerns, and recommendations about Student's autism eligibility before the IEP was finalized. That did not occur. Goleta Union had already decided outside of an IEP team meeting, without Parent's input, not to assess Student for autism to determine if he had any autism-related needs besides those assessed as part of Nadalet's speech and language assessment, because Nadalet had already concluded he had none. Despite the absence of information about whether Student continued to meet the criteria for eligibility under the category of autism, Goleta Union finalized its offer for special education and related services at the January 18, 2022 IEP team meeting, changing Student's eligibility category to speech or language impairment.

As with the failure to comprehensively assess Student discussed in Issue 1Ai, by predetermining his eligibility category, the IEP team was deprived of the information necessary for a meaningful discussion about Student's needs, which significantly impeded Parent's participation rights and denied Student a FAPE.

ISSUE 1G: DID GOLETA UNION DENY STUDENT A FAPE BY FAILING TO IMPLEMENT THE SEPTEMBER 3, 2021 IEP BY NOT PROVIDING A ONE-TO-ONE AIDE THROUGH THE DATE OF FILING THE COMPLAINT?

Student contends Goleta Union denied Student a FAPE by failing to implement the September 3, 2021 IEP because it did not provide Student with a one-to-one aide through February 2022. Student argues that at the September 3, 2021 IEP team meeting, Goleta Union offered a full-time one-to-one aide. Student contends Parent agreed to this offer on September 17, 2021, clarifying that she agreed to the provision of a one-to-one aide. Student argues Goleta Union's staff had a pattern and practice of telling Parent that Student was getting one-to-one support, but his school records conflicted as to when and what support Student received. Student argues one-to-one support was offered on September 3, 2021 but was never provided.

Goleta Union contends that at the September 3, 2021 amendment IEP team meeting, it offered a diagnostic one-to-one aide pending completion of the independence assessment, but it did not offer the aide for the entire school day. It argues Parent consented to the September 3, 2021 IEP with exceptions because the one-to-one aide was not offered for the entire school day. Goleta Union claims it

nevertheless materially implemented the September 3, 2021 amendment IEP by providing Student with diagnostic one-to-one support during unstructured times. Specifically, Goleta Union argues Student was provided with instructional aide assistance 600 minutes weekly throughout the 2021-2022 school year, and that after September 3, 2021, through December 15, 2021, Student received diagnostic one-to-one support during bathroom breaks, recess, and lunch, and when Student was dropped off at school in the morning and during “afternoon drop off.” (*Sic*) It argues that December 15, 2021 was the last day Student attended school before his placement on home hospital.

When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP. (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 815 (*Van Duyn*)). In a failure-to-implement claim, the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. (*Id.* at p. 822.)

Where a student alleges a denial of FAPE based on the failure to implement an IEP, the student must prove that any failure to implement the IEP was “material,” which means that minor implementation failures are not automatically actionable. (*Van Duyn, supra*, 502 F.3d at pp. 819-822.) No statutory requirement of perfect adherence to the IEP exists, nor is there any reason rooted in the statutory text to view minor implementation failures as denials of a FAPE. (*Id.* at p. 821.) “A material failure to implement an IEP occurs when there is more than a minor discrepancy between the

services a school provides to a disabled child and the services required by the child's IEP." (*Id.* at p. 826.) Implementation failures are substantive violations, not procedural errors. (*Id.* at p. 819.)

As explained below, Student failed to prove Goleta Union denied him a FAPE by failing to implement the September 3, 2021 amendment IEP.

THE OFFER OF AIDE SUPPORT IN THE SEPTEMBER 3, 2021 IEP

Pursuant to Student's January 2021 annual IEP, which Parent consented to on January 21, 2021, Student was entitled to receive 600 minutes a week of instructional aide assistance in the classroom, along with accommodations in the form of instructional aide support as needed. On March 13, 2021, Student's first-grade teacher informed Parent that Student did not have a one-to-one aide assigned to him during both recesses. At the May 21, 2021 IEP team meeting, Parent told the IEP team she wanted to see more support for Student during the morning recess and lunchtime, and she thought Student needed a full-time instructional assistant. Parent was informed that Student was already receiving aide support during the morning recess from playground supervisors as well as one-to-one support during lunch recess, but not constant one-on-one support, upon which Student could become dependent.

At the September 3, 2021 IEP team meeting, Parent requested a full-time one-to-one instructional aide and a follow up with commitments. This was documented in the IEP meeting notes. Lew agreed to provide Student with a one-to-one aide as a diagnostic placement pending the completion of independence assessment. Parent understood that to mean Student would have an all-day, one-to-one aide.

Directly below the sentence documenting Parent's request, the IEP team meeting notes state, "The District will offer a 1:1 aide assigned to [Student] which is considered a diagnostic placement" pending the results of an independence assessment. At the end of the notes, it states Goleta Union offered Kellogg Elementary School as the campus for Student's placement, with speech and language services and that "a 1:1 aide will be assigned until [an independence assessment] is completed."

At hearing, Johnson generally addressed the meaning of being assigned a one-to-one aide. Much of Johnson's testimony was inconsistent and she was evasive in many of her responses by not directly or candidly answering the questions she was asked. She testified a one-to-one aide referred to one adult assigned to one child. She also testified that a diagnostic aide meant providing a service on a temporary basis while conducting an assessment to review whether that service was appropriate to provide the student a FAPE.

At or after the September 3, 2021 IEP team meeting, Parent was provided with a copy of the signature page to the amendment IEP in both Spanish and English. Parent signed both the Spanish and English copies of the signature pages on September 17, 2021. However, neither signature page checked any box indicating that she had consented, in whole, or in part, to the IEP.

On September 19, 2021, Parent gave Goleta Union a letter dated September 17, 2021, clarifying that when she signed the September 3, 2021 amendment IEP on September 17, 2021, she was doing so with certain exceptions, and then specified the three areas with which she disagreed. First, Parent stated she disagreed with the way the reason for the meeting was notated. The letter stated that the reason for the meeting was that Student was "physically abused" by Avila and Parent had requested a

meeting to discuss the situation and possibly a change in schools and support services. Second, Parent specified that she had not received the “advisory plan” for the independence assessment. At hearing, Parent indicated she was referring to the assessment plan Goleta Union promised. Third, Parent stated she disagreed with the IEP because it did “not specify whether the 1:1 aide assigned to Student will be full time (the entire school day) or only half the day (as it has been in the past.)” At hearing, Parent explained that the IEP did not specify that Student would have a full-time aide and she wanted it to state what she was earlier promised by Lew at the September 3, 2021 IEP team meeting.

Interestingly, the assessment plan Goleta Union sent to Parent for the independence assessment, which was in Spanish, stated that the motive for the proposed evaluation was that Goleta Union had offered Student an assigned full-time aide as a diagnostic placement in response to the Parent’s concerns that Student was distracted easily and needed redirection constantly. The assessment plan also stated that the independence assessment would determine the level of support he required and a plan to support his independence. However, the assessment plan was prepared by school psychologist Serrano, who did not attend the September 3, 2021 IEP team meeting, at which the one-to-one aide was offered. Serrano claimed, at hearing, she got the information for the assessment plan from Nadalet, and Serrano translated “most of it” into Spanish. At hearing, Nadalet seemed uncertain about what was offered at the September 3, 2021 IEP team meeting, which she attended. Nadalet initially said she “believed” it was a full-time one-on-one aide that was offered, but then she hesitated, and corrected herself. She said it was at least a full-time aide. Nadalet’s recollection of the offer made at the September 3, 2021 IEP team meeting was unreliable.

At hearing, Johnson clarified that she also did not attend the September 3, 2021 IEP team meeting, so could not testify to what was discussed at that meeting. She also admitted she was not on campus on a day-to-day basis, so she could not testify to the IEP's implementation but insisted Goleta Union staff "assigned" an aide to provide the support listed in the January 8, 2021 IEP, which included one-to-one aide support for the 600 minutes. She also testified that the service Student had prior to September 3, 2021, continued after September 3, 2021, and that Student continued to share aide support with another student until December 15, 2021, Student's last day of attendance at school before being placed on home hospital. This testimony appeared to be in direct contradiction to what Johnson said at the January 18, 2022 IEP team meeting, documented in the IEP team meeting notes.

At the January 18, 2022 IEP team meeting, Parent specifically asked about the one-on-one support in the classroom and why the incidents with XX continued to occur. She asserted she signed consent for Student to have a one-on-one aide. The notes stated principal Reyes clarified that Student "continued to have a one-on-one aide in Arroyo's classroom. The current instructional assistant has stayed in the classroom." Parent then asked if the aide was only for Student. Instead of directly answering the question, Johnson engaged in double talk. The notes reflect, "Johnson reported the aide is assigned due [sic] help provide the supplementary aid and services for an instructional assistant in the classroom. The aide was there for [Student.]" Johnson also stated that the goal was to create independence for Student, therefore the aide would also help support other kids in the classroom when Student was being successful, while still supervising him. Parent responded that was not what the plan she signed said, citing the September 2021 IEP. Parent asked the IEP team why, if Student had a one-to-one aide, so many incidents occurred. Parent also brought up that they told her

they needed to structure the support differently so Student could walk to the bathroom and feel safe. Parent stated she was confused and asked for clarification, "Does [Student] have a one-on-one, yes or no?" The notes state, "Mrs. Johnson responded with, 'yes.' [Student] did have a one-on-one aide."

Without a doubt, the September 3, 2021 IEP offer by Goleta Union was a lot like the statements made by the Goleta Union members of the January 18, 2022 IEP team, and the testimony of Johnson at hearing – inconsistent, unclear, ambiguous, and misleading. After careful consideration of all of the evidence, it is unclear what Goleta Union intended when it made the September 3, 2021 IEP offer for a diagnostic one-to-one aide. On its face, the stated offer in the September 3, 2021 IEP was ambiguous as to whether the one-to-one aide support being offered was full-time, or only part-time, and in what setting.

PARENT FAILED TO PROVE SHE CONSENTED TO THE SEPTEMBER 3, 2021 IEP REGARDING THE AIDE SUPPORT

Regardless of whether Goleta Union offered full-time aide support, or a one-to-one aide for only part of the day, that is, one-to-one support for 600 minutes as Johnson claimed at hearing, or one-on-one aide support during unstructured time as argued in Goleta Union's written closing argument, Student failed to prove Parent consented to the September 3, 2021 IEP offer regarding the provision of the one-on-one aide support.

It was undisputed that Parent never provided her consent on the signature page of the September 3, 2021 IEP when she signed it on September 17, 2021. Instead, Parent provided the letter dated September 17, 2021. The letter does not state that

Parent is consenting to the IEP without exceptions, but rather, that Parent signed the IEP with certain exceptions. Even if the letter can be construed as Parent's agreement to the IEP, Parent made it clear she disagreed with the one-to-one aide support because it did not specify whether the aide would be full-time or half-time. This did not constitute consent to the provision of aide support offered in the IEP. A school district may only implement those portions of an IEP to which the parent consents. (20 U.S.C. § 1414(A)(1)(D)(i)(II); Ed. Code, § 56346, subd. (a).)

Student's written closing argument does not sufficiently clarify this issue, but seems to imply Goleta Union should have implemented the one-to-one aide regardless of whether it was full time or not. It is true that where a parent does not consent to all components of an IEP, a school district is required to implement those other components of the program to which parent did provide consent. (Ed. Code, § 56346, subd. (e).) However, Parent's September 17, 2021 letter stated she disagreed with the one-to-one aide component of the IEP. Stated another way, absent from Parent's September 17, 2021 letter is her agreement to the implementation of the one-to-one aide component of the September 3, 2021 IEP for any part of the day.

Accordingly, Goleta Union was not required to implement the aide component of the September 3, 2021 IEP, prior to, or after the completion of the independence assessment on December 14, 2021, through the date of the filing of the due process complaint on February 8, 2022. This is consistent with the December 14, 2021 independence assessment, which reported that the last consented to IEP was the January 8, 2021 IEP, which provided for an instructional assistant in the classroom for Student for 600 minutes. This is also consistent with Parent's October 11, 2021 letter to

Goleta Union, in which she suggested Goleta Union “keep a closer eye” on the instructional aide with Student “until he gets a full time [instructional assistant].”

Goleta Union did not deny Student a FAPE in failing to implement the one-to-one aide provision offered in the September 3, 2021 IEP.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

ISSUE 1Ai:

Goleta Union denied Student a FAPE by failing to assess Student in all areas of suspected disability, specifically autism in preparation for the January 4, 2022 triennial review.

Student prevailed on Issue 1Ai.

ISSUE 1Aii:

Goleta Union denied Student a FAPE by failing to assess Student in all areas of suspected disability, specifically social-emotional functioning, by failing to conduct any formal assessments of Student in this area after August 30, 2021.

Student prevailed on Issue 1Aii.

ISSUE 1Aiii:

Goleta Union denied Student a FAPE by failing to assess Student in all areas of suspected disability, specifically academics, by failing to conduct any formal assessments of Student in this area in preparation for his January 4, 2022 triennial review.

Student prevailed on Issue 1Aiii.

ISSUE 1B:

Goleta Union did not deny Student a FAPE by failing to timely conduct the special circumstance instructional assistance assessment after obtaining a signed assessment plan given to Parent in September 2021.

Goleta Union prevailed on Issue 1B.

ISSUE 1C:

Goleta Union did not deny Student a FAPE by failing to address bullying of Student at school during the 2021-2022 school year, resulting in lost educational benefit.

Goleta Union prevailed on Issue 1C.

ISSUE 1D:

Goleta Union denied Student a FAPE by failing to properly provide incident reports during the 2021-2022 school year involving injuries to Student,

thereby significantly impeding the opportunity of Parent to participate in the decision-making process regarding the provision of a FAPE to Student.

Student prevailed on Issue 1D.

ISSUE 1E.

Goleta Union denied Student a FAPE by predetermining a change in Student's eligibility category in Student's 2022 triennial individualized education program and at the January 4, 2022 IEP team meeting, without conducting any formal assessments.

Student prevailed on Issue 1E.

ISSUE 1F:

Goleta Union denied Student a FAPE by failing to provide an adequate prior written notice for denying Parent's April 20, 2021 request to reassess Student in the areas of speech, behavior, and math.

Student prevailed on Issue 1E.

ISSUE 1G:

Goleta Union did not deny Student a FAPE by failing through the date of the filing of the complaint to implement the September 3, 2021 IEP by not providing a one-to-one aide.

Goleta Union prevailed on Issue 1F.

REMEDIES

Student prevailed on Issues 1Ai, 1Aii, 1Aiii, 1D regarding the incident on August 30, 2021, 1E, and 1F. As a remedy, Student requested in his written closing argument compensatory education instruction by a credentialed teacher with an autism credential for the time Student missed instruction due to the “bullying” incidents. Student also seeks compensatory counseling for the period since August 2021, totaling 10 hours for “trauma.” Student also requests compensatory education for the period of time he was not kept safe at school. Prospectively, Student seeks district-wide training on bullying prevention, record keeping, and mandatory reporter duties. Student also seeks data-driven social-emotional and behavioral programming faded according to data. Specifically, Student seeks to have OAH order some of the recommendations made by his experts, educational psychologist and marriage and family therapist Dr. Gilbertson and board-certified behavior analyst, Sunny Kim, Ph.D.

From Dr. Gilbertson’s recommendations, Student requests individual one-to-one applied behavior analysis support for one year and supervision by a board-certified behavior analyst, an independent educational occupational therapy assessment, and an assistive technology assessment. It is unclear if Student is also seeking an independent educational functional behavior assessment and an independent educational speech and language assessment, because next to those requests in his written closing argument, it says “granted.” Student also requests intensive individualized academic instruction for 30 minutes a day in math and 30 minutes a day in reading, one hour per week of individual play-based psychotherapy provided by a licensed mental health professional, and the use of strategies including new communication forms, daily sensory diet plan, and sensory toolbox.

From Dr. Kim's recommendations, Student requests 1,920 minutes per week of instructional aide support and development of a systematic data-driven fade plan, with daily data collection, to monitor Student's on-task behavior and social interactions with peers, and weekly data analysis conducted by a board-certified behavior analyst. Student also requests training of staff, to consist of 10 hours of initial training of instructional assistants to follow the behavior support plan with fidelity and collect reliable data, and 60 minutes per week of board-certified behavior analyst support to assess for fidelity of implementation and reliability of the collected data.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(2)(C)(iii); see also, *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A* (2009) 557 U.S. 230, 243, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) An ALJ can award compensatory education as a form of equitable relief. (*Park, supra*, 464 F.3d at p. 1033.)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Park, supra*, 464 F.3d at p. 1033; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE.

(*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

An order requiring training of school district personnel can be an appropriate remedy to compensate a student for a school district's violations. (*Park, supra*, 464 F.3d at p. 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].)

Regarding all Issues on which Student prevailed, Student's written closing argument fails to explain why he is entitled to all of the remedies he requested. In other words, Student failed to explain the causal connection between any particular Issue and each of the remedies sought. For example, Student failed to explain or prove how based on any claim he brought, why he is entitled to have staff trained on mandatory reporter duties, concerning reporting suspected child abuse or neglect to law enforcement or a child protective services agency. An order for district-wide training on mandatory reporter duties is not appropriate.

Likewise, Student asks for compensatory education for the period of time he was "not kept safe at school," however he not only neglects to explain the type of compensatory education sought, but he did not prove he is entitled to that kind of award on any claim on which he prevailed. As explained in Issue 1C, above, Student did not prove he was bullied. Student did not establish by a preponderance of the evidence

this type of relief is appropriate on the other Issues on which he prevailed. An award of compensatory education for the period of time he was "not kept safe" is not appropriate.

Some of Student's requested remedies appear to be related only to particular claims. Specifically, because Student did not prove he was bullied, he is not entitled to an award of compensatory education instruction by a credentialed teacher with an autism credential for the time Student missed instruction due to the "bullying" incidents. An order for district-wide training on bullying is also not appropriate because Student did not prevail on Issue 1C.

Further, Student did not establish or argue why he should have been provided counseling services since August 2021 for "trauma." Neither Student nor Student's doctor testified, and the evidence was otherwise inadequate to establish Goleta Union was aware Student suffered "trauma" since August 2021. Significantly, Parent did not provide a copy of the December 20, 2021 home hospital application signed by the doctor to Goleta Union until January 3, 2022, the day before the January 4, 2022 IEP team meeting. Neither Student nor Student's doctor testified, and the reliability of his doctor's opinions was not proved at hearing by a preponderance of the evidence as discussed in Issue 1C. As such, Student is not entitled to 10 hours of compensatory counseling services since August 2021 for such alleged "trauma."

On Issue 1D, except for record-keeping training, Student failed to establish that his proposed resolutions are appropriate remedies for Goleta Union's failure to provide Parent with any behavior emergency report. Here, Goleta Union never provided Parent a report regarding the August 30, 2021 incident, which was required under

Education Code section 56521.1, subdivision (e). Thus, as a remedy, Goleta Union shall provide at least two hours of training to its administrative personnel and teaching staff regarding a school district's duties under Education Code section 56521.1.

Similarly, on Issue 1F, except for record-keeping training, Student failed to establish that his proposed resolutions are appropriate remedies for Goleta Union's failure to provide Parent with an adequate prior written notice. Here, Goleta Union's April 25, 2021 letter failed to comply with federal and state law regarding prior written notice because it did not set forth all of the items the law required, and it was not provided in Parent's native language. Thus, as a remedy, Goleta Union shall provide at least two hours of training to its administrative personnel and teaching staff regarding a school district's duties to provide parents prior written notices under state and federal law.

Issues 1Ai, 1Aii, 1Aiii and Issue 1E are integrally intertwined. Goleta Union failed to comprehensively assess Student, specifically in the areas of autism, social-emotional functioning, and academics because it decided Student had no issues in those areas and predetermined changing his eligibility category from autism to speech or language impairment without ever conducted an autism assessment or properly considering Parent's concerns. Goleta Union witnesses demonstrated a profound misunderstanding of a school district's assessment obligations under the IDEA and California Education Code. As a remedy for these violations, Goleta Union shall provide at least four hours of training to all of its administrative personnel and teaching staff, including case managers and related services providers, pertaining to a school district's obligations to assess, which shall include comprehensive training on a school district's duties to assess in all

areas of suspected disability, predetermination, determining and documenting a student's present levels of academic achievement and functional performance in an IEP, and a parent's participatory rights in the IEP process.

DR. KIM'S RECOMMENDATIONS

Student did not demonstrate by a preponderance of the evidence that he is entitled to an order that includes all of Dr. Kim's recommendations as a remedy for the violations proved in Issues 1Ai, 1Aii, and 1Aiii, and Issue 1E.

More particularly, Dr. Kim conducted an independent functional behavior assessment and independence assessment of Student in 2022, which resulted in two reports both dated May 9, 2022. At hearing, Dr. Kim was questioned about her assessments. Dr. Kim did not conduct an adequate review of Student's educational records to have a comprehensive understanding of Student's functioning to adequately establish the reliability of her opinions. Dr. Kim did not know Student and observed him on only three occasions in March and April 2022. Dr. Kim did not review all of Student's educational records, particularly his prior multidisciplinary assessments in 2018 and 2019, and the December 2021 independence assessment. When asked about whether she reviewed these documents, her testimony was contradictory, inconsistent, evasive, and unreliable, all of which negatively affected her credibility.

Initially, Dr. Kim claimed she asked for and reviewed Student's other assessments, and then said she did not recall whether she got any other assessments. She also said she would have noted what she reviewed in her report, but there was nothing in her report listing which prior assessments she had reviewed, if any. When specifically asked if she had reviewed Student's 2018 and 2019 assessments, she responded it was "hard

to say.” She then claimed she definitely read the assessment report because that was how she learned of Student’s eligibility category, but then claimed she got Student’s eligibility category from Student’s IEP. At hearing, Dr. Kim said she could not identify which IEP she reviewed, and then claimed she never got a copy of Student’s 2018 or 2019 multidisciplinary assessments.

Regarding the independence assessment, Dr. Kim said she “believed” she read the December 2021 independence assessment prepared by Goleta Union, but she could not recall when she got a copy of it. However, it was not listed among the reports or records she reviewed, and she had earlier stated she noted what records she reviewed in her reports. She said she knew she looked at it and was “pretty sure” it was before she wrote her report, but she was not certain. When asked why she did not mention it in her report, she unpersuasively claimed it was because her assessment was independent of the school district’s findings. In attempting to explain this glaring omission, she deflected, asserting she did not like to look at other reports before she did her own observations. When pressed for an answer as to why she did not note that she had reviewed Goleta Union’s independence assessment, she complained she completed the report in May 2022, and that it was hard to remember.

In several parts of her testimony, Dr. Kim was evasive in her responses. For example, in attempting to justify that she had not reviewed any of Student’s prior assessments, she unpersuasively claimed that it was not important to understand a child’s functioning when doing a functional behavior analysis, and then launched into what appeared to be “talking points” about human behavior, rather than giving a candid and understandable response to the questions posed. Later, in an after-the-fact attempt to justify why she had not included reference to the other reports in her evaluation, she claimed it was not necessary.

Significantly, Dr. Kim impeached herself. At hearing, Dr. Kim agreed that she had not included in her report multiple nonverbal gestures and comments by peers targeting Student she had testified about. When asked about her recollection of those events, she admitted her testimony may not be accurate. She said she thought she observed peers in some way gesturing at Student, including on the carpet, "but again it's y'know ... that's the thing about memory, as time drags on you kind of forget so a little hard to specifically state that." She then admitted that after looking at her report, maybe she did not see the behavior as many times as she mentioned it in her testimony.

In some parts of her testimony, Dr. Kim conceded there were some issues with her evaluation. For example, she used the words "prompt" and "reprimand" interchangeably, and at least some of the time they had a slight difference in meaning. She admitted that she should have teased out the reprimands from the prompts. She admitted she overlooked including a behavior plan. Moreover, her testimony about the behavior plan was inconsistent, defensive, and evasive. At hearing, she claimed she created a behavior plan. When asked where it was, she admitted she had not created a behavior plan, and that she had not been asked to create a behavior support plan, but she had created a fidelity plan. When asked how one could implement with fidelity without a behavior support plan, she responded she was only asked to do a functional behavior assessment and an independence assessment, and everything in the functional behavior assessment would be imbedded into the behavior plan. She also said she did not recommend a behavior plan, and that would be for the IEP team to discuss in a "greater context."

Dr. Kim appeared biased. She seemed to have a selective memory based on which party's attorney was questioning her. She had excellent recall and could provide many details when she was questioned by Student's counsel, but she did not demonstrate the

same ability when questioned by Goleta Union's counsel. Moreover, she appeared defensive when she was being cross examined by Goleta Union's counsel. She also admitted to texting during a break in her testimony, with Student counsel's paralegal who also attended some parts of the hearing. Dr. Kim was not initially forthcoming about the text messages. She then admitted the paralegal texted her during the break in her testimony in which he told her to "keep it up!" In all, Dr. Kim came across as more of an advocate for Student's position, rather than an unbiased witness, which negatively affected her credibility and the weight given to her opinions.

Aside from all of these issues, Student failed to present adequate evidence that the prospective remedies he is seeking would be appropriate now. This was underscored by Dr. Kim's testimony. Dr. Kim initially asserted that attending an IEP team meeting to review her evaluations would not change any of her recommendations. The inflexibility this statement demonstrated, adversely impacted her credibility because it showed she was unwilling to consider anything other than her own recommendations, regardless of her limited knowledge of Student. However, when it was pointed out that Student was in a new classroom for the 2022-2023 school year, her responses clearly indicated that this could make a difference in her recommendations. Dr. Kim made her recommendations based on how Student was functioning in March and April 2022, based on her observations and data collection at that time. Student failed to prove Dr. Kim's recommendations were appropriate for Student's current functioning and in his new classroom. Significantly, Dr. Kim's evaluation reports were never provided to Goleta Union or reviewed at an IEP team meeting, because Parent did not consent to providing them to Goleta Union.

For all of these reason, it is inappropriate to include Dr. Kim's recommendations as part of the remedy on Issues 1Ai, 1Aii, and 1Aiii, and Issue 1E, or any other claims on which Student prevailed.

DR. GILBERTSON'S RECOMMENDATIONS

Student did not demonstrate by a preponderance of the evidence that he is entitled to an order that includes all of Dr. Gilbertson's recommendations as a remedy for the violations proved in Issues 1Ai, 1Aii, and 1Aiii, and Issue 1E.

Dr. Gilbertson conducted a comprehensive psychoeducational assessment of Student from January through April 2022, which resulted in an assessment report dated April 28, 2022. Dr. Gilbertson concluded Student demonstrated a primary educational disability due to autism and that speech or language impairment was a secondary disability. He also determined that Student had a severe anxiety disorder, which he opined was related to his autism and social incidents at school. Dr. Gilbertson concluded, among other things, that Student demonstrated significant symptoms of autism that adversely affected his educational performance, social interactions, and adaptive behavior. There was no evidence establishing Student provided a copy of Dr. Gilbertson's report to Goleta Union prior to the exchange of evidence for the due process hearing in September 2022.

Dr. Gilbertson's recommendations suffered from the same problem as Dr. Kim's recommendations. They were based on a stale assessment and Student did not demonstrate the recommendations were prospectively appropriate for Student as of the time of the hearing. Significantly, at the time of the hearing, Dr. Gilbertson's assessment had never been reviewed by the IEP team. Thus, Dr. Gilbertson, who never observed

Student during lunch or recess, did not have the benefit of the entire IEP team's day-to-day knowledge about Student to make prospective recommendations based on Student's current functioning. Significantly, Dr. Gilbertson's April 2022 evaluation report recommended that the IEP team "convene to consider the findings of [his] evaluation and develop specific goals, services and placement." On these grounds alone, Student's requests for individual one-to-one applied behavior analysis support and supervision by a board-certified behavior analyst, intensive individualized academic instruction, individual play-based psychotherapy, and the use of strategies including new communication forms, daily sensory diet plan, and sensory toolbox, are not an appropriate remedy.

In addition, Dr. Gilbertson's testimony failed to establish Student was otherwise entitled to all of the relief sought. For example, Dr. Gilbertson admitted that in reading, writing, and math, Student was at or approaching grade level and that his concerns had less to do with academics and more to do with Student's functional skills, adaptive behavior, and social-emotional functioning. Accordingly, Student failed to establish he was entitled to intensive individualized academic instruction. Dr. Gilbertson also admitted, at hearing, Student probably did not need a full-time aide, which was contrary to his written recommendations. His testimony also indicated Student probably did not need the aide for a year, which was also contrary to his written recommendations. Based on his testimony, it appeared Dr. Gilbertson had overstated his recommendations, and that had a negative effect on the weight given to his written recommendations and adversely impacted his credibility.

Furthermore, Student's counsel was overheard during a break instructing the witness not to say something during his testimony, but was interrupted by the ALJ who informed the lawyer she had failed to mute her microphone, before counsel could

complete her instruction to Dr. Gilbertson. Although Student's counsel tried to explain away what she was overheard saying, this conduct negatively affected Dr. Gilbertson's credibility and the weight given his opinions.

The evidence does not support an order for an independent assistive technology assessment. Dr. Gilbertson did not adequately explain or justify the reasons for his recommendation for an assistive technology assessment.

It appears Student has withdrawn his claim for an independent speech and language assessment, because next to that request in his written closing argument, it says "granted." In any event, Student failed to establish why he was entitled to an independent speech and language assessment as a remedy for the Issues on which he prevailed. Goleta Union conducted a speech and language assessment for Student's January 2022 triennial review. Student withdrew his challenge to Goleta Union's failure to properly assess Student in the area of speech and language on the first day of hearing. That issue had been listed in the September 12, 2021 Order Following Prehearing Conference for Hearing by Videoconference as sub-issue in Issue 1A. Moreover, Goleta Union offered an independent educational speech and language assessment on February 9, 2022. Student is not entitled to an order for an independent educational speech and language assessment.

The evidence did not support an order for an independent functional behavior analysis assessment. It appears Student has withdrawn his claim for an independent functional behavior assessment, because next to that request in his written closing argument, it says "granted." In addition, at an IEP team meeting on February 18, 2022, Goleta Union offered Student a functional behavior assessment in response to Parent's request for applied behavior analysis services at school. In an assessment plan dated

March 3, 2022, Goleta Union offered Student a functional behavior assessment. At hearing, Parent was shown the March 3, 2022 assessment plan. Parent could not recall if, or why, she did not sign the assessment plan, but there was no testimony she did not receive it. Moreover, Student's request for an independent functional behavior assessment was based on Dr. Gilbertson's recommendation that a functional behavior assessment be conducted. However, Dr. Gilbertson never reviewed the functional behavior assessment performed by Dr. Kim or sufficiently explained why another functional behavior assessment was required. Student failed to establish why he was entitled to an independent functional behavior analysis assessment as a remedy for the Issues on which he prevailed. Student is not entitled to an order for an independent functional behavior analysis assessment.

The evidence supports an award for an independent educational occupational therapy assessment. Goleta Union was required to do a psychoeducational assessment as part of Student's triennial review, which presumably would have revealed the concerns Dr. Gilbertson found during his evaluation. Specifically, Dr. Gilbertson assessed Student's visual-motor integration as part of his assessment, which included looking at writing samples, and receiving input from Parent and Student's teachers. Student's visual-motor integration skills were below average when compared to students of similar age and grade-level placement. In the samples Dr. Gilbertson reviewed, he saw what appeared to be some challenges for Student in writing. Student's work was messy, not properly spaced, off the line, and the size of the letters were not consistent. Student often held his pencil in an awkward manner. Dr. Gilbertson recommended an occupational therapy assessment because Student demonstrated lower than average performance in fine motor and visual motor tasks, and based on his own observations, teacher, and Parent reports. This assessment seems particularly necessary given that there was some

discrepancy in the evidence. In contrast to Dr. Gilbertson's observations, Arroyo documented on Student's 2021 first semester report card Student had good handwriting. Further, Dr. Gilbertson saw that Student held his pencil in an awkward manner and Arroyo informed Dr. Gilbertson Student was practicing holding the pencil correctly, but Student's 2022 second grade teacher Rachel Tedesco reported to Dr. Gilbertson that Student held the pencil correctly. Moreover, both Arroyo and Nadalet reported balance or coordination issues during Dr. Gilbertson's evaluation, and Goleta Union included perceptual motor development on the January 10, 2022 assessment plan.

Although not recommended by Dr. Gilbertson, the evidence supports an award for an independent psychoeducational evaluation funded by Goleta Union. Goleta Union should have conducted a psychoeducational evaluation as part of Student's triennial review in January 2022. Clearly, the belated assessment it offered would have been completed by Goleta Union by March 2022, had Parent not withdrawn her consent to the January 10, 2022 assessment plan. However, when Goleta Union failed to timely assess Student, Parent had a right to seek a private assessment. Goleta Union agreed to fund a psychoeducational evaluation on February 9, 2022, and Dr. Gilbertson, who had already begun his assessment in January 2022 at the time of Goleta Union's agreement, testified his evaluation was not funded by Goleta Union. Thus, the evidence established that Student is entitled to an order requiring Goleta Union to pay for the psychoeducational evaluation Dr. Gilbertson conducted during the 2021-2022 school year, in an amount in accordance with Santa Barbara County Special Education Local Plan Area, called SELPA, guidelines. In addition, given that Dr. Gilbertson's evaluation is now almost a year old, Student is also entitled to an additional independent psychoeducational evaluation in accordance with Santa Barbara County SELPA guidelines.

ORDER

1. Goleta Union shall provide two hours of training to its administrative personnel, teaching staff, and case managers, including all principals and special education staff, regarding a school district's duties concerning behavior emergency reports under Education Code section 56521.1.
2. Goleta Union shall provide two hours of training to its administrative personnel, teaching staff and case managers, including all principals and special education staff, regarding a school district's duties concerning prior written notice under the IDEA, its implementing regulations, and the California Education Code.
3. Goleta Union shall provide four hours of comprehensive training to all of its administrative personnel, teaching staff, case managers, and related services providers, including all special education staff, on the following topics: a school district's duties to assess in all areas of suspected disability, predetermination, and a parent's participatory rights in the IEP process. The training shall also include a school district's obligations to properly determine and document a student's present levels of academic achievement and functional performance in an IEP.
4. The specified training shall be completed by no later than September 1, 2023. The training shall be conducted by an outside agency or firm with expertise in special education not affiliated with Goleta Union.
5. Goleta Union shall fund an independent educational occupational therapy evaluation and an independent psychoeducational evaluation by assessors of Parent's choice, who meet the criteria under Santa Barbara County SELPA guidelines for independent educational evaluations.

Student shall provide to Goleta Union a copy of each completed independent educational evaluation report within 10 days of Parent's receipt or Student attorney's receipt of each report, whichever occurs first. Goleta Union shall convene an IEP team meeting to review each report within 30 days of its receipt of each report.

6. Goleta Union shall pay for, or provide reimbursement for, the psychoeducational evaluation conducted by Dr. Gilbertson resulting in the report dated April 28, 2022, in an amount in accordance with Santa Barbara County SELPA guidelines.
7. All other relief sought by Student is denied.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Laurie Gorsline

Administrative Law Judge

Office of Administrative Hearings