

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

SAN MATEO-FOSTER CITY SCHOOL  
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2014100402

DECISION

The San Mateo-Foster City School District (San Mateo) filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 8, 2014, naming Student.

Administrative Law Judge Charles Marson heard this matter in San Mateo, California, on November 5, 2014.

Lenore Silverman, Attorney at Law, represented San Mateo. John Bartfield, Director of Special Education, attended the hearing on behalf of San Mateo.

Student's Uncle represented Student. Student's Mother attended the entire hearing. Student did not attend.

Attorney at Law Benjamin Kimberley appeared briefly for the witnesses Jessica Colangelo and Carly Earnshaw. Attorney at Law Jennifer Callahan also appeared briefly for Ms. Earnshaw.

A continuance was granted for the parties to file written closing arguments, and the record remained open until November 24, 2014. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

## ISSUE<sup>1</sup>

Did San Mateo's May 14, 2014, educationally related mental health services (ERMHS) assessment meet all legal requirements such that Mother is not entitled to an independent educational evaluation (IEE) at public expense?

## SUMMARY OF DECISION

This Decision holds that San Mateo's May 14, 2014 ERMHS assessment met all legal requirements, and that Mother is not entitled to an IEE at public expense.

### JURISDICTION

1. Student is a nine-year-old girl who is eligible for special education and related services in the category of emotional disturbance. She spent her early elementary years in the schools of the Belmont-Redwood Shores School District where she had significant behavioral difficulties. Student became a resident of San Mateo on March 3, 2014. At present she attends the day treatment program at Edgewood Community School (Edgewood), a non-public school in San Francisco, pursuant to her individualized education program.

2. In April and May 2014, Mother and San Mateo both believed that Student needed placement in a residential treatment center due to her behavioral outbursts. San

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<sup>1</sup> San Mateo's complaint set forth two other issues: Whether it was entitled to conduct an updated ERMHS assessment pursuant to its September 2014 assessment plan without conditions imposed by Mother and over Mother's objection, and whether it was authorized to send referral packets containing Student's confidential educational information to prospective placements without parental consent or edits. San Mateo's motion to dismiss those issues was granted at the beginning of the hearing.

Mateo employed Dr. Pamela Mills, a psychologist, to conduct an ERMHS assessment to determine whether Student required a residential placement to access her education. Dr. Mills concluded that Student did require a residential placement, the IEP team agreed, and since then the parties have been seeking such a placement for Student, so far without success.

3. Parent disagreed with Dr. Mills's ERMHS assessment and requested an IEE. Mother disagreed with the assessment primarily because she believes Dr. Mills's description of Student's behaviors is inaccurate, and that her description has led to Student's rejection by residential centers. Mother also believes Dr. Mills's interviewing was inadequate. San Mateo has declined to fund an IEE and filed this request for due process hearing instead.

#### THE NEED FOR AN IMMEDIATE ASSESSMENT

4. Student attended three preschools but was asked to leave all of them due to the severity of her misbehaviors. In kindergarten she qualified for special education and was assigned an emergency one-to-one paraprofessional to control her behavior, which included physical aggression and running away. By spring of her kindergarten year, Student's behavioral difficulties were so severe that she was placed on a home-schooling program. She was given a functional analysis assessment and a behavioral intervention plan to address her aggression, escape behavior, noncompliance and tantrums.

5. Student returned to school for the second grade and was placed in a special day class with a student-to-staff ratio of one-to-one. However, her misbehavior was so pronounced that by December of that year her IEP team agreed she needed a higher level of care. She was then placed in the day treatment program at Edgewood, which included two weeks in a hospital diversion program.

6. Student's behavioral challenges continued and worsened during the third grade at Edgewood. She attempted to escape 20 to 30 times a day, threw her body against the floor or wall, and hit, kicked, bit, scratched and stabbed herself, other students and staff. She disrobed in front of others and engaged in sexually provocative behavior. As a result, she spent, on average, 90 percent of her time out of class and received no apparent educational benefit.

7. On March 11, 2014, Student banged her head on concrete and required staples to her scalp. On March 18, 2014, Student was admitted to the psychiatric ward at John Muir Hospital due to her unsafe behaviors. Student remained there until March 27, 2014, but was unable to moderate her behavior significantly. Toward the end of her stay she improved somewhat, perhaps as the result of medications that included Depakote and Clonidine.

8. Student's behavior was also troublesome outside of school. She climbed up in closets and dove off, picked at scabs, swore at others and attacked them. She could not travel in a car without a harness to prevent her from attacking the driver or jumping out. She could not be taken into stores. She once had to be carried out of a public park because she kicked and bit people. She told John Muir staff she did not care for the safety of others, and that sometimes she throws knives at people at home or threatens them with legs she takes off tables.

9. Before and during this time, Child Protective Services (CPS) repeatedly investigated Student's welfare, in part because Student's body was covered with bruises. CPS concluded that her bruises were the consequences of her own behavior, and of the use of the many restraints that adults had to employ to keep her from running away or injuring herself or others. In approximately April 2014, CPS filed a petition in the juvenile court seeking removal of Student from her home due to her unsafe behaviors and the inability of the school or her relatives to control her.

10. San Mateo held an IEP team meeting for Student on May 1, 2014, at which Edgewood staff described their difficulties in controlling Student and recommended moving her to a more restrictive placement. At the meeting the CPS caseworker told the IEP team that if the school district did not provide a residential placement for Student, it would ask the juvenile court to place her in such a facility at a hearing then scheduled for May 6, 2014.

11. At the May 1, 2014, meeting, San Mateo offered to conduct a comprehensive assessment of Student. Mother wanted Student placed in a residential treatment center immediately, and was unwilling to agree to a comprehensive assessment because of the time it would consume. San Mateo then offered to conduct an ERMHS assessment of Student within two weeks to determine whether she should be placed in a residential treatment center for educational reasons. Mother agreed, insisting on the short time schedule. On May 5, 2014, Mother signed an assessment plan agreeing to an "[a]ssessment to determine appropriate placement (Record review, observation and interviews)." In a comment section she added: "The decision on [Student's] placement to be made at or immediately following the IEP team meeting which is to take place on May 13 or 14." The CPS proceeding in the juvenile court was continued to June 20, 2014.

#### THE EMPLOYMENT OF DR. MILLS

12. On or about May 5, 2014, John Bartfield, San Mateo's Director of Special Education, sought a qualified assessor who could conduct an ERMHS assessment in time for it to be used at an IEP team meeting for Student on May 14, 2014. Mr. Bartfield explained the urgency of Student's situation to Dr. Mills, and obtained her agreement to do the assessment and to report on it at the May 14, 2014 meeting.

13. Dr. Mills was well qualified for the task of assessing Student. She has a master's degree in education, doctorates in clinical psychology and counseling

psychology, and certification in neuropsychological assessment. She has lifetime California credentials for teaching and counseling, and school psychologist and administrative services credentials.<sup>2</sup> She belongs to the American Psychological Association, the National Academy of Neuropsychology, and other professional organizations and is licensed by the State both as a clinical psychologist and an educational psychologist. Dr. Mills taught for about 15 years, and then worked as a school psychologist at San Francisco Unified School District. From 1991 to 1997 she was the lead school psychologist for that district, supervising the district's other school psychologists, consulting with them on assessments as well as classroom and crisis intervention. From 1997 to 2009, Dr. Mills was the Supervisor and Program Administrator for Screening and Assessment for the district. In 2009 she was appointed the interim director of the district's special education department while a permanent director was sought. She has administered and consulted on many special education assessments. She is now a psychologist and educational consultant in private practice working with school districts and parents.

14. Dr. Mills was San Mateo's principal witness at the hearing. Her testimony was detailed and logical, based on substantial training and experience in assessing and evaluating students for special education, and was undamaged on cross-examination. It was credible throughout and is entitled to substantial weight here.

15. On or about May 6, 2014, Mr. Bartfield employed Dr. Mills to conduct an ERMHS assessment of Student. The assignment was conditioned on her promise to complete it in time to report to the IEP team on May 14, 2014. That meant that she essentially had five business days to complete the entire assessment. Mr. Bartfield

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<sup>2</sup> These are all credentials issued by the California Commission on Teacher Credentialing.

explained to her that the sole purpose of the assessment – the “referral question” -- was to assist the IEP team in determining whether Student could receive educational benefit in her current placement at Edgewood, or whether she needed residential placement to access her education.

16. The ERMHS assessment is an instrument created in response to the repeal of many of the provisions of Chapter 26.5 of the Government Code, which formerly imposed on county mental health agencies the duty of assessing special education students to determine whether they required residential placement. In the aftermath of that legal change, Dr. Mills worked with San Francisco’s Department of Mental Health to develop the ERMHS assessment that the San Francisco Unified School District would henceforth use. As a result, she was able to testify knowledgeably about the requirements and methodology for an ERMHS assessment. The scope of an ERMHS assessment is governed by its referral question. It requires the assessor to gather the child’s history and interview educational staff, the child’s therapist, if any, parents, and others. It requires an observation of the child in her educational environment. Then the assessor must write a report identifying what symptoms the child exhibits that may be interfering with her access to education, and make a suggestion to the child’s IEP team about placement.

17. Dr. Mills established that accuracy and completeness are particularly important in an ERMHS assessment, especially in describing the child’s behaviors. Those who work with the child must understand her presenting problems in order to help her. They must have a clear picture of the child in order to provide adequate supports. If any significant behaviors are not revealed to a facility that is assisting or considering assisting the child, the facility may not be able to help her or know why previously used methods have not been effective in curbing these behaviors. In addition, an agency considering accepting the child for treatment needs to know whether it can handle the

child, whether its staff has the skills to support the child, and whether the child would blend in with other patients.

18. To conduct her assessment, Dr. Mills gathered and examined Student's educational history from San Mateo and from Edgewood. This history included Student's IEP's, the 2013 psychoeducational and behavior assessments and the occupational therapy report from her previous school district, and the John Muir Hospital Intake Evaluation and Discharge Summary. Dr. Mills interviewed Mother, the CPS case worker, and four Edgewood staff members.

19. Edgewood staff consistently reported to Dr. Mills that they could not control Student. She could not safely be taken to the second floor of the facility because she has attempted to jump off the second story landing. Edgewood also has a residential program, but Student could not be accommodated there because the facility is not physically contained and she could run out into traffic on the street. Student has a high level of energy, has difficulty sitting still, and is frequently anxious. Her misbehavior escalated over the 2013-2014 school year, especially after the winter break. She had thrown herself into walls and down stairs, and punched staff. She had engaged in highly sexualized behaviors. At one point she disrobed and attempted to eat her underwear during a therapy session. It became necessary for Edgewood staff to have a second person in the room during therapy sessions.

20. Dr. Mills observed Student in her educational environment at Edgewood. Student came to class and immediately got into a verbal confrontation with another student. She was then seated in an old-fashioned school desk with an exit only on the left of the chair. The right side was pushed up against a wall, and an Edgewood staffer sat on the left side to keep her from escaping. Nonetheless, Student crawled out from under the desk and escaped four times in a single 15-minute period. Although she occasionally behaved appropriately for brief periods, she misbehaved most of the time.



When denied a toy she wanted, she ran out of the room and out of the building. Taken to a sensory room, Student spoke to Dr. Mills while standing upside down on her hands, then bounced on a large ball. She was in constant motion and rarely stopped talking to anyone around. She did no school work at all. Dr. Mills concluded that Student was not a bad child; she was simply overwhelmed by her emotions.

21. Dr. Mills then wrote a draft report recommending that Student be placed in a residential treatment center to access her education. It described in detail Student's psychological, educational, and behavioral history (as summarized above), the information Dr. Mills obtained from interviews, and her observation of Student at Edgewood. Dr. Mills attended the May 14, 2014 IEP team meeting, distributed copies of the draft report, presented it orally, and answered all questions put to her. She then collected the draft reports, and after the meeting put the report in final form, editing it for typographical and spelling errors, and sent it within the next day or so to San Mateo for redistribution to the IEP team members.

#### ALLEGED INACCURACIES IN THE ASSESSMENT

##### Student's Behavior At Edgewood

22. Mother contends that the combined efforts of the parties to find a residential placement for Student have been frustrated because prospective residential treatment centers have been influenced to reject Student by inaccuracies in Dr. Mills's assessment. Mother views the most serious of these as Dr. Mills's alleged exaggeration of Student's behavior at Edgewood, and in particular her sexualized behavior.

23. The passage in the assessment to which Mother most objects is as follows:

Based on her most recent IEP, [Student] continues to struggle with attention, aggression, and elopement. She will leave the designated area approximately twenty to thirty

times a day. She hits, kicks, bites, scratches, and stabs herself or others approximately one to ten times daily. It is reported that her behavioral challenges preclude her from receiving academic benefit from her school environment and she is currently spending an average of ten percent of the day in class and ninety percent of the day out of class. [Student] is reported to be very anxious. She will throw her body against the wall and will attempt to kick, pinch, and bite the classroom staff. Additionally, [Student] has disrobed and has engaged in sexually provocative behaviors in front of peers. Sexualized behavior occurs one to two times a day.

24. San Mateo proved at hearing that this paragraph is accurate by introducing the "most recent IEP" to which Dr. Mills referred. At the May 1, 2014 IEP team meeting, Student's present levels of performance were presented by Edgewood staffers Keri Kirby, Carly Earnshaw, and Jessica Colangelo. Those present levels of performance contain every assertion made in the paragraph of Dr. Mills's report quoted above. Dr. Mills also established that her interviews of Ms. Kirby and other Edgewood staff confirmed those descriptions. Dr. Mills's assessment accurately attributed to Edgewood staff "concerns about sexualized behaviors that include [Student] rubbing herself inappropriately against adults and other behaviors that a child of that age should not be aware." Ms. Colangelo, Student's teacher at Edgewood, established at hearing that those behaviors included sitting on adults' laps, sometimes reaching for their genitals, and shouting vulgar sexual invitations in class.

## Student's Experience at John Muir Hospital

25. Three paragraphs of Dr. Mills's assessment summarize the Intake Evaluation and Discharge Summary produced by the staff who treated Student during her 10-day stay in John Muir Hospital's psychiatric ward. From those documents Dr. Mills reported that Student required one-on-one nursing support in the hospital but did not follow directions. She yelled, cursed the staff, and was unable to focus or participate in group activities. She was self-abusive; for example, she banged her head on the wall. She yelled at and kicked Mother. She threw a book and food at staff and ran naked down the hallway. Dr. Mills did not attach the John Muir documents to her assessment, which was not intended or expected to be the only document distributed to its readers. The prospective non-public schools received the assessment as part of a larger "referral package" that apparently included the John Muir documents, Student's IEP's, and other materials.

26. The John Muir Admissions Evaluation reported that Student admitted to having hallucinations, including some about chickens. At the time Mother confirmed that Student talked to animals and claimed that the chickens fought with her and called her names. According to the Discharge Summary, by the day of her discharge Student was denying she had hallucinations.

27. As part of Student's discharge, John Muir staff diagnosed Student as having Bipolar Disorder, Manic Type; Cyclothymic Disorder; Intermittent Explosive Disorder; and Attention Deficit Hyperactivity Disorder (ADHD), Combined Type. Years earlier, probably while she attended preschool, Student was diagnosed somewhat differently by a doctor at the Children's Health Council as having ADHD, Disruptive Behavior Disorder Not Otherwise Specified, and Night Terrors. Dr. Mills accurately described both diagnoses in her report.

28. In their Discharge Summary, John Muir staff reported that Student had shown some improvement attributable to the Depakote and Clonidine she was receiving. Dr. Mills accurately reported that statement. Mother testified that Student's behavior did not improve; Student became easier to manage only because she was experiencing drug-induced sleepiness. Dr. Mills accurately reported Mother's differing opinion.

29. The John Muir Discharge Summary states that Student was not eating well and had to be fed by Mother. Mother testified that Student has since improved and now requires only that Mother hold her plate, not physically feed her. Those statements are not inconsistent.

#### Termination of Medications

30. Dr. Mills's assessment reports a controversy over the termination of Student's medications shortly after she left the hospital. The report accurately states that Edgewood staff told Dr. Mills that Mother stopped administering the medications and that Edgewood staff encouraged her to follow the medication regime. Mother told Dr. Mills that it was not she but Student's psychiatrist who ordered the medications discontinued because Student was no longer responding to them, and Dr. Mills accurately reported that claim as well. Then at the end of her assessment, Dr. Mills stated: "There is conflicting information regarding follow-through with medication delivery . . . ." Dr. Mills did not attempt to resolve this conflict; she merely reported it accurately.

#### Alleged Inadequate Interviewing

31. For her assessment, Dr. Mills interviewed Mother; Molly Schembre, now Student's case manager at Edgewood; Alexis Morgan, the CPS case worker; Keri Kirby, then Student's treatment manager at Edgewood; Dan Ecklund, Edgewood's Mental

Health Rehabilitation Services Lead; and Jacob Dillon of Edgewood's classroom support staff.

32. Dr. Mills was unable to interview Jessica Colangelo, Student's teacher at Edgewood. Dr. Mills recalled that she left voicemails for Ms. Colangelo at least twice. At hearing Ms. Colangelo remembered at least one message from Dr. Mills, but stated she was out sick at the time and unable to speak to Dr. Mills. She was also out sick when Dr. Mills visited her class to observe Student.

33. Dr. Mills was also unable to interview Carly Earnshaw, Student's therapist at Edgewood, although she left more than one voicemail for her. At hearing Ms. Earnshaw recalled at least one call from Dr. Mills, but stated that she did not return the call until after Dr. Mills had completed the assessment.

34. Even though Ms. Colangelo and Ms. Earnshaw were unavailable, Dr. Mills was able to learn their views on Student through Ms. Kirby and other Edgewood staff members. Having worked so long in San Francisco, Dr. Mills was familiar with Edgewood. She knew that Edgewood, like most such facilities, held frequent case conferences in which staff involved with a student reported to a case manager and each other on her behavior and progress. Dr. Mills believed that Ms. Kirby, in her role as Student's treatment manager, could adequately recount what she had heard from Ms. Colangelo and Ms. Earnshaw about Student in those case conferences, and the evidence showed this to be true. Ms. Colangelo read Dr. Mills's assessment and agreed with its descriptions of Student's behaviors. Ms. Earnshaw attended the May 14, 2014 IEP team meeting and agreed generally with Dr. Mills's report, but thought at the time that it overstated the frequency of Student's sexualized behaviors. Later, however, she talked to people in the classroom at Edgewood and changed her mind; she now believes the report was accurate in that respect as well.

35. One reason why Dr. Mills did not interview more people with knowledge of Student was that she had only a brief time – five working days – to conduct her assessment. The constricted time schedule for the assessment was a limitation insisted upon by Mother. Another was that the information she was getting from Student’s records, from the interviews she did conduct, and from her observation, was “very consistent” and did not suggest further interviews were necessary.

36. The assessment does not state how long Dr. Mills observed Student at Edgewood, but given the information reported, it was for a substantial period of time. As part of her observation, Dr. Mills accompanied Student to a quiet room, spoke and listened to her there, and reported her impressions of that event in her assessment. She did not interview Student for her assessment, nor did she interview Student’s grandmother, with whom Student sometimes lived and who was involved in her care. There was no evidence that interviews of Student or her Grandmother would have given Dr. Mills any additional or different information beyond what she obtained.

37. Dr. Mills interviewed Mother on the telephone for approximately 15 minutes during Mother’s lunch break at work. Their conversation included such subjects as the challenges Mother was having at home with Student; the bruises on Student’s body; her tendency to try to jump off high places; how Mother could not drive her car with Student in it unless Student was restrained; Mother’s fear that Student would run out into the street; and Student’s attempts to escape into the street from home. In that conversation Dr. Mills also obtained “considerable background” about Student’s medications from Mother. Dr. Mills asked specific questions about Student’s medication, and because Mother is a nurse, Dr. Mills accepted her explanation that a number of medications were not working for Student. Dr. Mills did not believe she needed to interview Mother any longer than she did.

38. Mother testified at hearing that the interview was too brief and not “all-inclusive.” When asked to identify inaccuracies in the assessment report that resulted from the brevity of the interview, she identified two. The first was the statement that Ms. Kirby was Student’s treatment manager. Mother believes that at the time Ms. Kirby was director of the school. Mother also did not think they thoroughly discussed Student’s medications but she did not identify anything significant about Student’s medications that Dr. Mills omitted. There was no evidence that, in a longer interview, Mother would have imparted any information to Dr. Mills about Student’s medications that she did not already have.

39. Because Dr. Mills obtained what she believed was adequate information about Student’s medications from Mother and Student’s records, she did not find it necessary to interview Student’s psychiatrists. An ERMHS assessor is not required to contact a student’s doctors, and they are not often contacted for such an assessment. In Dr. Mills’s experience with children like Student, the psychiatrist concentrates on medication management but the real sources of information are the psychologists or therapists working with the child. This view was not contradicted, and there was no evidence that Dr. Mills would have learned anything significant from Student’s psychiatrists that she did not already know.

#### FAILURE TO PROVIDE FINAL VERSION OF REPORT BY MAY 14, 2014 IEP TEAM MEETING

40. Dr. Mills had advised Mr. Bartfield when she was employed that, due to the short time allotted for her assessment, she would be unable to complete a final report by the time of the May 14, 2014 IEP team meeting. However, Dr. Mills did have a nearly complete draft report by May 14, 2014, which she distributed at the meeting to the IEP team. At the meeting she described her observations and conclusions in detail, and

answered all questions, including those of Mother, who was present, and Uncle, who participated by telephone from Hawaii.

41. Mother testified that she did not recall receiving a draft copy of the report at the May 14, 2014 meeting, but the weight of evidence showed it was distributed there. Dr. Mills, Ms. Colangelo, Ms. Earnshaw, and John Bartfield all testified that the draft report was circulated at the meeting.

42. After the meeting Dr. Mills collected the copies of the draft, and a few days later sent the final report to San Mateo for distribution. For reasons the record does not reveal, Mother and Uncle did not receive the final report until mid-June. There was no substantive difference between the draft and final reports; all Dr. Mills did was correct spelling and typographical errors.

#### MINOR ERRORS IN THE ASSESSMENT REPORT

43. In summarizing her conversation with Mother in her report Dr. Mills may have incorrectly identified Student's current psychiatrist, rather than her previous psychiatrist, as the one Mother said was responsible for terminating Student's medications after Student left John Muir Hospital. There was no evidence that this would have mattered to any professional reading the report.

44. Dr. Mills described Keri Kirby in her assessment as Student's "treatment manager" or sometimes "case manager" at Edgewood. Ms. Colangelo, an employee of Edgewood who likely knew Ms. Kirby's title better than other witnesses, also remembered Ms. Kirby as being Student's "treatment manager" in April or May 2014. According to Mother, Ms. Kirby was not Student's case manager at the time; she was director of the school. Whether Ms. Kirby had either or both of those titles at the time Dr. Mills interviewed her was not clear from the evidence.

45. Dr. Mills's report describes an incident related by Mother in which Student had to be carried out of a public park because her behavior included kicking and biting.



At hearing, Mother described this as inaccurate and stated she had told Dr. Mills that the behavior occurred when the park closed, not “in” the park. There was no evidence this made any difference to the substance of Dr. Mills’s report.

46. Mother also observes that Dr. Mills’s report contains a typographical error: the word “tried” is spelled “tired.”

## LEGAL CONCLUSIONS

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

1. This due process hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. §§ 1400 et. seq.; 34 C.F.R. §§ 300.1 et seq. (2006);<sup>4</sup> Ed. Code, §§ 56000 et seq.; and Cal. Code. Regs., tit. 5, §§ 3000 et seq.)

2. The main purposes of the IDEA are: 1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment, further education, and independent living, and 2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1)(A), (B); Ed. Code, § 56000, subd. (a).)

3. A FAPE means appropriate special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) “Special education” is instruction specially designed to meet the unique needs

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

<sup>4</sup> All references to the Code of Federal Regulations are to the 2006 version.

of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39(a)(1); Ed. Code, § 56031, subd. (a).) “Related services” are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subd. (a).)

#### BURDEN OF PROOF

4. Because San Mateo filed the request for due process hearing, it had the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

#### CONSEQUENCES OF PROCEDURAL ERROR

5. A procedural error does not automatically require a finding that a FAPE was denied. 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 decision making process regarding the provision of a FAPE to the parents’ child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 [*Target Range*].)

#### INDEPENDENT EDUCATIONAL EVALUATION

6. Under certain conditions, a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329].) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1).)

7. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate, or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

#### GENERAL REQUIREMENTS FOR ASSESSMENTS

8. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (34 C.F.R. § 300.301(a); Ed. Code, § 56320.)<sup>5</sup> No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2)(B); Ed. Code, § 56320, subd. (e).)

9. A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the local educational agency." (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).)

10. Tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

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<sup>5</sup> An assessment under California law is equivalent to an evaluation under Federal law. (Ed. Code, § 56303.)

11. The assessment must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304(c)(6).)

#### SELECTION OF ASSESSMENT INSTRUMENTS

12. A district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether he is eligible for special education, and what the content of his program should be. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) An assessment tool must "provide relevant information that directly assists persons in determining the educational needs of the child." (34 C.F.R. § 300.304(c)(7).)

13. In selecting assessment tools, the assessor must do more than pick a generally valid instrument. Tests and other assessment materials must be used "for purposes for which the assessments or measures are valid and reliable." (20 U.S.C. § 1414(a)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessment tools must be "tailored to assess specific areas of educational need . . ." (Ed. Code, § 56320, subd. (c).) "Special attention shall be given to the [child's] unique educational needs . . ." (*Id.*, subd. (g).)

14. Assessors must use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) 'Technically sound instruments' generally refers to assessments that have been shown through research to be valid and reliable." (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46642 (Aug.14, 2006).)

## REQUIREMENT OF OBSERVATION

15. A district must ensure that the child is observed in her learning environment (including the regular classroom setting) to document her academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310(a).)

## ASSISTANCE TO IEP TEAM AND PARENTS

16. It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(iii)(A); 300.306(a)(1). To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subs. (a), (b).) The report must be given to the parent or guardian, though that duty has no fixed time limit. (Ed. Code, § 56329, subd. (c).) Normally, an assessment must be completed within 60 days of the receipt of parental consent for it. (34 C.F.R. § 300.301(c)(1)(i), (ii); see Educ. Code, § 56302.1(a).)

## PARENTAL PARTICIPATION IN THE IEP PROCESS

17. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

18. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP team meeting, expresses her disagreement with 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.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

#### WAS DR. MILLS'S ERMHS ASSESSMENT APPROPRIATE?

19. Dr. Mills's assessment was narrow in scope because it was limited by Mother, as well as San Mateo, to reviewing records, conducting interviews, and observing for the sole purpose of determining whether Student needed a residential placement. Within its limited scope, the assessment complied with all the statutory requirements to the extent they applied. Dr. Mills was knowledgeable about Student's disability and competent to perform the ERMHS assessment. Her methods were not racially, culturally or sexually discriminatory; her contacts with Student were in Student's primary language (English); and her methods were sufficiently comprehensive to identify Student's need for a residential placement. Dr. Mills used a variety of tools, which were all the tools she was given consent to use. The tools and methods Dr. Mills used – record review, interviewing, and observation – were valid for, and tailored to, the intended purpose of the assessment, and provided relevant information that directly assisted the IEP team in its decision-making process. Dr. Mills observed Student in her learning environment. Her assessment adequately addressed the limited referral question and satisfied the professional requirements for an ERMHS assessment.

#### Student's Behavior at Edgewood

20. Dr. Mills's paragraph-long summary of Student's behavior at Edgewood, taken from her most recent IEP, was accurate. Its descriptions of Student's behaviors in general, and sexualized behaviors in particular, were given by three Edgewood staff

members to Student's IEP team on May 1, 2014, as present levels of performance. They were confirmed by Dr. Mills' interviews of Edgewood staff members.

21. Mother faults Dr. Mills's assessment for not determining whether Edgewood's reporting of Student's behavior was factually reliable. However, nothing in special education law required Dr. Mills to investigate the underlying reliability of Edgewood's reports, at least in the absence of information suggesting those reports were inaccurate. To the contrary, the law required Dr. Mills to report accurately on the contents of Edgewood's records and her interviews of Edgewood staff. Education Code section 49070 provides a separate procedure for challenging student records on the grounds that they are inaccurate or misleading, but that procedure is not involved here.

22. Mother further argues that no time frame is attached to Dr. Mills's description of Student's behavior at Edgewood. However, the purpose of Dr. Mills's assessment, as well as the IEP team's statement of Student's present levels of performance, was to determine her condition in the present. Mother claims that a few incidents of disrobing do not amount to sexualized behavior once or twice a day. Testimony of Edgewood staff confirmed that Student's sexualized behavior included more than disrobing. The descriptions of Student's behaviors at Edgewood are unavoidably troubling to a loving parent, but Dr. Mills's statement of them was accurate and consistent with her duties as an assessor.

#### The John Muir Information

23. Mother argues that some of the specific John Muir information that Dr. Mills summarized in her assessment was inaccurate or unreliable, and that she should have attempted to corroborate that information. For example, Dr. Mills accurately reported that John Muir staff wrote that Student admitted to having hallucinations, but Mother testified at hearing that Student does not know what "hallucinating" means. A passage in the Discharge Summary shows that, on the day of her discharge, Student no

longer admitted to having hallucinations and also shows that staff was skeptical of that denial. It does not show, as Mother now claims, that she did not in fact have hallucinations. Dr. Mills established in her testimony, which was not contradicted by any knowledgeable professional, that it was not considered part of her job, as assessor, to look behind factual assertions in records generated by others. As noted above, the law does not impose that requirement.

24. Mother observes that the assessment report omits any reference to the head injury that caused Student's admission to John Muir Hospital. This, Mother claims, produces an inaccurate picture of Student's behaviors since she was in an extreme condition while hospitalized and probably was not behaving the way she might otherwise. Mother argues that the assessment is inappropriate because it did not describe the emergency. However, the fact of admission to a hospital's psychiatric unit implies an emergency. And since the assessment was not an isolated document but part of a larger package of records that included the John Muir documents, the omission was without consequence, as the professional reader would have that information anyway.

25. Mother argues that Dr. Mills should have attempted to resolve the differences between Student's preschool and John Muir psychiatric diagnoses by making a diagnosis of her own. However, Dr. Mills accurately reported both diagnoses, which were made years apart. She was under no obligation to question the accuracy of either. An ERMHS assessment does not necessarily include such a diagnosis, and engaging in one would have been beyond the scope of the assessment's referral question, outside the terms of Dr. Mills's hiring, beyond the limited authorization to assess signed by Mother, and not possible in the time allotted. Nor was it Dr. Mills's responsibility to resolve the conflicting views of John Muir staff and Mother as to whether Student displayed progress because of her medications, or merely drug-



induced sleepiness, near the end of her hospital stay. The purpose of Dr. Mills's assessment was educational, not psychiatric.

26. Mother argues that the assessment conveys the inaccurate view that she improperly terminated Student's medications after Student left John Muir Hospital. But Dr. Mills accurately attributed that view to Edgewood staff; it was not stated as her own opinion. Except for the name of the psychiatrist, she accurately summarized Mother's disagreement with Edgewood's view, and advised the reader that a controversy existed about responsibility for terminating the medications. Her only expression of a personal view was that "it will be important that [Student] have the opportunity to benefit from whatever is deemed to be helpful."

#### Sufficiency of the Interviews

27. Dr. Mills's assessment is not inappropriate because she failed to interview Student. Dr. Mills's uncontested description of the scope of a proper ERMHS assessment did not include an interview of the student, and Mother cites no authority to suggest that Student should have been interviewed. Dr. Mills observed Student carefully and reported on her observations. No evidence showed anything further would be gained by interviewing Student, whom John Muir staff described as a "fairly poor historian." Nor was there any evidence that anything significant would have been learned from interviewing Student's Grandmother.

28. Dr. Mills's assessment was not inappropriate because she failed to interview Ms. Colangelo and Ms. Earnshaw. She adequately learned of their views through Ms. Kirby and other interviewees, and both Ms. Colangelo and Ms. Earnshaw believe that Dr. Mills's description of Student's behavior at Edgewood is accurate.

29. Dr. Mills's interview of Mother was not too brief to accomplish her purpose. She obtained enough information in the interview to accurately summarize the

information Mother imparted, and there was no evidence that anything significant was left out of the assessment report because of the brevity of the interview.

30. Dr. Mills was not required to interview Student's psychiatrists. The evidence showed that their primary concern was medication management, and Dr. Mills obtained adequate information on that subject from Mother and from various records. There was no evidence that interviews of her psychiatrists would have added anything of significance. Mother does not identify anything Student's psychiatrists could have told Dr. Mills that would have shed additional light on the referral question Dr. Mills answered.

#### Delivery of the Final Version of the Assessment Report

31. The distribution of a draft report at the IEP team meeting of May 14, 2014, and the later sending of the final version of the report, did not violate any special education law. This procedure was caused by the very short time allotted for the assessment, as insisted upon by Mother. Normally a district would have 60 days from receipt of consent to distribute the assessment report at an IEP team meeting (see Educ. Code, § 56302.1(a), and Mother received the final version of the assessment much earlier than permitted by that time limit. San Mateo was under no obligation to provide a draft report to Uncle in Hawaii, or to Uncle at all. The law requires only that the assessment report be given to the parent. Uncle participated in the extensive discussion of the report and knew its contents. His physical absence from the IEP team meeting was not San Mateo's responsibility. Mother has not established that the minor delay in her receipt of the final version of the report was a procedural violation but, if it was, it had no consequence to Student's education or to Mother's participatory rights.

32. Mother received the draft assessment report at the May 14, 2014 IEP team meeting, participated fully in the meeting, and was able to criticize the few portions of the assessment with which she disagreed. A parent's right to participate in the IEP

process does not extend to advance viewing or editing of referral packets sent to non-public schools when a school district is exploring possible placement of a student.

#### Incorrect Factual Claims

33. Student's closing brief sets forth numerous arguments based on factual inaccuracies concerning the record. For example, Dr. Mills stated in her assessment that Student might be given a residential placement by the juvenile court because her "family is unable to keep her safe . . . ." Mother now attacks this statement because the assessment mentions no source for it, and because "such bold statement is unsupported in any other way." However, the John Muir Admission Evaluation states that Student was admitted "for evaluation and management of her dangerousness to self" and that "[p]arents brought patient to ER . . . . Parents fear for her safety." The CPS caseworker informed Dr. Mills that CPS sought an order from the juvenile court removing Student from her home because Student's aggression was "beyond [Mother's] ability to keep her safe."

34. Mother also argues that "no tangible efforts were made by Dr. Mills to interview Student's special education teacher [Ms. Colangelo] and her school therapist and case manager [Ms. Earnshaw], the two individuals most familiar with [Student] at Edgewood." However, as shown above, Dr. Mills repeatedly called both Ms. Colangelo and Ms. Earnshaw, and both of them confirmed at hearing that Dr. Mills had called them but that they were unavailable at the time.

35. Mother's closing brief states that "[t]here is nothing in the Report that would indicate that it was prepared by a licensed and otherwise credentialed child psychologist." Every page of Dr. Mills's report contains a footer that describes her as a licensed psychologist and a licensed educational psychologist, and furnishes her license numbers for both credentials. Only the word "child" is not used. Mother makes

numerous similar contentions based on inaccurate or distorted readings of the record that have been considered, but need not be set forth in detail here.

#### Minor Errors in the Report

36. There was no evidence that the minor errors in the assessment report had any impact on Student's education or on Mother's right to participate in the IEP process. Whether Ms. Kirby's proper title was treatment manager or director has no significance because at least functionally, treatment manager and case manager were accurate descriptions of the role she played in Dr. Mills's assessment. Whether Student misbehaved at a public park's closing or "in" the park is insignificant, as is the typographical error in the report. San Mateo was obliged to produce an assessment that was appropriate, not perfect. (See 34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

#### ORDER

Dr. Mills's ERMHS assessment was appropriate, and San Mateo need not provide Mother an IEE at public expense.

#### PREVAILING PARTY

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

#### RIGHT TO APPEAL

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

DATED: December 10, 2014

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CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings