

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

TEHACHAPI UNIFIED SCHOOL  
DISTRICT,

OAH Case No. 2015030954

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TEHACHAPI UNIFIED SCHOOL  
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2015050934

**DECISION**

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on March 20, 2015, naming the Tehachapi Unified School District. On May 22, 2015, District filed a due process hearing request with OAH, naming Student. Student filed an Amended Complaint on June 5, 2015, and the matters were consolidated by order dated June 5, 2015. Student's case was designated the primary case, such that the date of the filing of the Amended Complaint governed the timelines.

Administrative Law Judge Elsa H. Jones heard this matter in Tehachapi, California, on July 30, 2015, and August 4, 5, 6, 11, 12, 13, 18, 19, and 27, 2015.

Student was represented by Andréa Marcus, Attorney at Law, who appeared on all days of hearing, and Kelly Kaeser, Attorney at Law, who appeared on some days of hearing. Vikki Rice, paralegal, and Lindsay DiMaggio were present on various days of hearing to assist Ms. Marcus. Mother appeared on all hearing days, and Father was also present on some hearing days.

District was represented by Darren J. Bogié, Attorney at Law, who appeared on all hearing days. Also present on some days of hearing to represent District with Mr. Bogié were Stacy Inman, Attorney at Law, and Kyle W. Holmes. A District representative appeared on all days of hearing, and this duty was shared throughout the hearing by Heather Richter, Director of Programs for the District, Anthony Botts, District Coordinator of Instruction and Technology, and Regina Green, a District instructional administrator.

Sworn testimony and documentary evidence were received at the hearing. A continuance was granted until September 21, 2015, for the parties to file written closing arguments. The parties timely filed their written closing arguments on September 21, 2015, at which time the record was closed and the matter was submitted for decision.

## ISSUES

### 1. Student's Issues<sup>1</sup>

A. Did District deny Student a free and appropriate public education at the March 22, 2013, March 17, 2014, and December 18, 2014 (as continued to January 22, 2015, and February 3, 2015) individualized education program team meetings by failing to offer appropriate goals, specifically:

- (1) March 22, 2013 IEP: Goals numbers 1 (Communication), 3 (Reading), 4 (Writing), and 6 (Social/Emotional), and lack of goals regarding assistive technology/communication and ability to stay on task;
- (2) March 17, 2014, IEP: Goals numbers 1 (Math), 2 (Reading), 3 (Social/Emotional), 4 (Communication), 5 (Communication), 7 (Social/Emotional), and lack of goals regarding assistive technology/communication and ability to stay on task, and

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<sup>1</sup> Student's Amended Complaint alleged claims under the Americans with Disabilities Act and other civil rights claims. Those claims are dismissed, as OAH has no jurisdiction over them.

Student's Amended Complaint alleged issues that were narrowed, withdrawn, or further defined at the Prehearing Conference held on July 24 and July 27, 2015, and at hearing. Student withdrew Issues 1b and 1c of the Amended Complaint at the PHC. Issue 1a of the Amended Complaint did not specify the IEP's that were issue, or which goals and services were "inappropriate." The specific IEP's at issue, and the specific services at issue, as set forth in this Decision, were defined at the PHC. The goals at issue, as set forth in this Decision, were defined on the second day of hearing.

- (3) December 18, 2014, IEP: Goals numbers 1 (Math), 2 (Communication), 3 (Communication), 4 (Math), 5 (Reading), 6(Social/Emotional), 7 (Communication), 8 (Social/Emotional)?

B. Did District deny Student a FAPE at the March 22, 2013, September 4, 2013, March 17, 2014, May 30, 2014, and December 18, 2014 (as continued to January 22, 2015, and February 3, 2015) IEP team meetings by failing to offer appropriate services in the areas of:

- (1) Behavior support; and/or
- (2) Assistive technology?

C. Did District deny Student a FAPE by significantly impeding Parents' opportunity to participate in the decision making process by failing to provide to Parents appropriate documentation and communication regarding the use of restraints on Student in November 2014, and Student's injuries in connection with the following incidents: (i) the choking of Student in August 2013; (ii) Student's sunburn in 2014; (iii) Student's fat lip in September 2014; and (iv) Student's ingestion of narcotics in fall 2014?

D. Did District deny Student a FAPE at the December 18, 2014 (as continued to January 22, 2015 and February 3, 2015) IEP team meetings by:

- (1) Significantly impeding Parents' opportunity to participate in the decision making process by predetermining placement; and
- (2) Failing to consider placement in the least restrictive environment?

2. District's Issues:

A. Did District conduct an appropriate occupational therapy assessment of Student such that District is not required to provide Student with an independent educational assessment at public expense?

B. Did District conduct an appropriate speech and language assessment of Student such that District is not required to provide Student with an independent educational assessment at public expense?

C. Did District conduct an appropriate adapted<sup>2</sup> physical education assessment of Student such that District is not required to provide Student with an independent educational assessment at public expense?

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<sup>2</sup> Adapted physical education is sometimes referred to as adaptive physical education. For the sake of consistency, this Decision will use the term adapted physical education.

## SUMMARY OF DECISION

This matter involves Student's objections to the placement of Student by Kern County Office of the Superintendent of Schools at Stockdale Elementary School in Bakersfield, which, under District's transportation offer, is an 80 minute drive each way from Student's home. Student also objected to several goals in Student's annual IEP's since March 2013, as well as to the sufficiency of the behavior supports provided in her IEP's, and to the lack of assistive technology support for communication. This Decision finds that Student's objections to the IEP goals and to the lack of assistive technology support are unmeritorious, and that District offered sufficient behavior support, except with respect to the March 17, 2014 IEP. Additionally, District's offer of placement at Stockdale with transportation was procedurally and substantively appropriate and did not deprive Student of a FAPE in the least restrictive environment. This Decision also finds that District did not provide sufficient behavior support to Student in her annual IEP in March 2014, when she was in first grade, until approximately November 2014, after the annual IEP was amended. As a result, Student is entitled to compensatory education in the form of transition and behavior services pertaining to her travel to and from Stockdale and while at Stockdale.

District's Complaint involves whether the speech and language, occupational therapy, and adapted physical education assessments conducted by District were appropriate. This Decision finds that they were, such that District is not required to provide Student independent educational assessments in these areas at public expense.

## FACTUAL FINDINGS

### *General Background and Jurisdictional Matters*

1. Student is an eight-year-old girl who has lived with her Parents in the District at all relevant times. She has been eligible for special education as a student with autism since she was in preschool. At all relevant times, Student resided with her Parents in a remote hillside location outside of the boundaries of the city of Tehachapi, and which is approximately a 20-minute drive from downtown Tehachapi.

2. Student has attended Cummings Valley Elementary School in the District since the 2012-2013 school year, when she was in kindergarten. Parents removed her from Cummings Valley in approximately March 2015, when she was in second grade and she has not attended any school since then through the time of the hearing.

3. Student's autism has severely impacted her speech and language development and her behavior. In the classroom, she has difficulties with attention, she elopes, and she hits, bites, kicks, pushes, throws objects, screams, and whines.

### *Student's Kindergarten Year*

4. Student attended Karlie Stilson's class for kindergarten during the 2012-2013 school year, when Student was five years old. Ms. Stilson's class was a mild/moderate special day class, and its student population of approximately 12 to 14 children had various special education eligibilities. The class met four days per week, for 200 minutes per day. Student's behaviors in Ms. Stilson's class included eloping and screaming. Student was not aggressive in Ms. Stilson's class. Student was mostly nonverbal during her kindergarten year, but she was nevertheless able to make her wants and needs known. Student communicated by way of sign language, and Ms. Stilson also was able to communicate with her verbally. Ms. Stilson used visuals and visual schedules in the classroom, as well as the "first, then" approach to manage Student's behavior.<sup>3</sup>

### *March 22, 2013 IEP*

5. District convened Student's annual IEP team meeting on March 22, 2013. All required members of the IEP team were present, including Parents. The team noted Student's primary eligibility category as autism and her secondary eligibility category as speech or language impairment.

6. Student's greatest need was staying focused, which she was able to do when interested in the task. She had made progress in reading, writing, and math. In the social/emotional area, Student was showing progress in responding to the "if-then" prompt, and listening to and following classroom rules and procedures, but she still needed one-to-one support during transitions and to stay on task. She was communicating better with staff and peers, but continued to need many prompts to vocalize her needs. She had made progress on her speech goals. Cognitively, Student scored in the low average range academically, in motor skills, and in self-help areas. Student's cognition was at a level that those who worked with Student could expect her to achieve more than a child with an intellectual disability.

7. Student's IEP team developed annual goals in all areas of need. These goals included Goal 1, a communication goal which provided that, given a written or verbal prompt, Student would understand and follow one- and two-step oral directions without prompting with 80 percent correct for four out of five trials as measured by work samples and observation records. Goal 3, a reading goal at the kindergarten level, provided that given visual or verbal cues, Student would distinguish the beginning and ending sounds in 10 pictures/words with 80 percent correct for three consecutive trials as measured by teacher recorded data. Goal 4 was a writing goal, which addressed Student's ability to copy/write upper and lower case letters attending to form and spatial alignment. These goals were clear and measurable. They referred to the kindergarten level state standards, and, since Student was in kindergarten at the time of this IEP, they were at her grade level. This annual IEP

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<sup>3</sup> The "first, then approach" involved the child performing a non-preferred task or activity before being allowed to perform a preferred task or activity.

would follow Student into first grade, but these goals still remained appropriate. There was no evidence that it would have been appropriate to modify these goals so that they met first grade level standards.

8. The IEP included two social/emotional goals to address Student's behavior. Goal 6 provided that Student would transition to or from a non-preferred activity without tantrum behavior with no more than one prompt each opportunity as measured by teacher recorded data. The reason for this goal was that Student required verbal prompting to transition between activities. This goal was measurable and appropriate. Goal 7 was a social/emotional goal that required Student to comply with teacher directions with no more than two prompts within one minute.<sup>4</sup> There was no issue as to whether this goal, which involved Student's ability to stay on task, was measurable or appropriate.

9. At the time of this IEP team meeting, Student's behavior impeded her learning and that of others. The IEP team developed behavior goals and classroom accommodations to address Student's behaviors, and the IEP included a one-to-one aide to assist Student in staying on task and transitioning between activities. The IEP team did not develop a behavior support plan. Student's undesirable behaviors in class at the time did not rise to the level at which a behavior support plan was needed.

10. The accommodations in the IEP that addressed Student's unsuitable behavior included a visual schedule, a warning before transitions, preferential seating, providing privileges and rewards, allowing extra classroom movement, praising for specific behavior, giving verbal encouragement and on-task reminders, visual cues, and using preferred activities for reinforcement. These accommodations addressed Student's behavior needs to attend to task and to transition between activities.

11. The IEP provided that Student would participate in lunch and recess with her general education peers. Student continued to need placement within the mild/moderate special day class with the support of a one-to-one aide. The team discussed using an iPad to familiarize staff with sign language from a specified application, but at the time of the IEP, the IEP team had no information that Student required an iPad or any other assistive technology for communication to continue to make progress on her goals.

12. In addition to the special day class with a one-to-one aide, the IEP offered 40 minutes per week of speech and language services, special education summer school, and transportation. Parents signed their consent to the IEP. They did not ask questions or express concerns at the meeting. At the time of the March 22, 2013 IEP team meeting, the IEP team had no information that Student required any additional behavior supports to

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<sup>4</sup> In her closing brief, Student criticized Goal 7. Goal 7 was not among the goals Student listed either at the time of the PHC or at hearing as a goal that was at issue in this case. Consequently, issues pertaining to Goal 7 will not be considered in this Decision. (Ed. Code, § 56502, subd. (i).)

progress in Ms. Stilson's class other than the accommodations, the social/emotional goals, and the one-to-one aide provided in the IEP.

13. Mother wanted Student to use an iPad at school because Student used it successfully at home. Student was permitted to bring an iPad to school, but Student did not use it at school for communication. It was not beneficial for Student in the classroom; it was more of a play object. Ms. Stilson recommended to Mother that Student not use the iPad at school. Mother agreed to remove the iPad from the classroom.

14. Towards the end of Student's kindergarten year, Cynthia Isbell became Student's one-to-one aide in that class. Ms. Isbell's duties included accompanying Student at lunch and on the playground, helping with academics and redirecting Student. Ms. Isbell did not have any specific training in behavior modification at the time, but she had been a special education classroom aide since prior to 2000, and had been a one-to-one aide for a child with Asperger's syndrome in a class for emotionally disturbed children from 2000 to 2006.

#### *Student's First Grade Year (2013-2014)*

15. Student entered first grade in August 2013, when she was six years old. Her class was a mild/moderate special day class with children that had a variety of special education eligibilities. Student's first grade teacher left her employment in the early part of the school year. Thereafter, until October 2013, Student's class was taught by a succession of substitutes. Student had a one-to-one full time District aide throughout first grade. Ms. Isbell was her aide until towards the end of the first grade year, when Student's aide became Holly Reddig. Ms. Isbell performed the same tasks for Student as she had in kindergarten.

16. On August 23, 2013, another student in the class placed his hands around Student's neck to choke her. He was angry that Student reached for one of his toys that the other child's mother had brought to school and was holding. Student was not physically harmed during the incident, as an aide or the child's mother was able to remove Student from the other child's grasp. The incident happened at 9:50 a.m., and the teacher notified Parents by telephone about the incident at 12:40 p.m. Witnesses to the incident prepared reports of the incident, which were provided to Parents a few days prior to the September 4, 2013 IEP team meeting described below. The reports varied on the details of the incident, but they all stated the same basic facts about the event.

#### *September 4, 2013 IEP*

17. Parents requested that District convene this IEP team meeting to discuss the August 23, 2013 incident. All required participants were present at the meeting, including Parents, two school psychologists, and Student's speech and language pathologist. A District occupational therapist who witnessed the incident was present. Two representatives of Multilevel Application and Positive Support Services, Student's home provider of applied behavior analysis services through the regional center, were also present.

18. The District occupational therapist, Ms. Doue, who was in the classroom at the time, described the incident. Parents were concerned because they had received conflicting reports of the specifics of the incident. They were also concerned because, since the incident, Student began to express fear and anxiety, and was resisting going to school. In addition, Parents were troubled by their perception that there was a lack of consistency and structure in the classroom due to the succession of substitute teachers. Kathleen Siciliani, the District Director of Student Services, stated that she was working with the current substitute to implement structure in the classroom, as well as a positive discipline routine.<sup>5</sup> One of the school psychologists encouraged Mother to discuss these issues with the substitute teacher.

19. Parents were concerned about lack of communication between school and home. Parents requested daily communication, in whatever form the teacher wished to provide it. Mother mentioned Student's use of the iPad and sign language to communicate at home, and that Student had a duplicate iPad she could bring to school to be used solely as needed for communication. Parents also referenced Student's aides having knowledge of American Sign Language.

20. Before the meeting ended, District asked Parents if they had further concerns or questions, but Parents did not express any. At hearing, Mother stated she did not express any further concerns because she did not believe District would be responsive to them.

#### *Student's First Grade Year After September 4, 2013 IEP Meeting*

21. In October 2014, District hired Richard Stanley as a permanent teacher to teach Student's first grade class. Mr. Stanley's classroom had some behavioral supports, such as a visual schedule, which was not kept updated, and a token economy. Students worked in centers, and staff would give verbal warnings to students when it was time to transition to another center.

22. Both Student's aide and Mother noticed that Student's behavior had deteriorated after the choking incident. She was anxious and fearful. She was reluctant to attend school, and would not go inside the classroom if the student who had choked her was present. That child was transferred to another classroom at some point, which made Student more comfortable at school, but her behavior did not improve. She began to engage in aggressive behaviors, such as hitting and kicking, and she continued to elope. Her aide would follow her outside when she eloped, and would work with her in another classroom.

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<sup>5</sup> Ms. Siciliani received her bachelor of arts degree in applied arts and science from San Diego State University, and her master's degree in special education with an emphasis in special education from the same institution. She holds an administrative credential, a cleared multiple subject credential, a cleared special education credential-learning handicapped, and a certificate in behavior intervention case management. She is a Crisis Prevention Intervention instructor. She has been Director of Student Services in District since 2013, and from 2010 to 2013 she was a Vice-Principal in District.

Student was mainstreamed into an arts and crafts class, which she enjoyed. Her aide accompanied her to that class, and Student would stay for as long as she could attend to task.

23. District reported Student's progress on her goals on October 17, 2013. Student was making progress on Goal 1 (Communication: following one-and two-step oral directions); Goal 2 (Communication: verbalizing need for assistance); Goal 3 (Reading), Goal 6 (Social/Emotional: transition between activities), and Goal 7 (Social/Emotional: complying with teacher's directions). She had met Goal 4 (Writing), and Goal 5 (Math).

24. Mother occasionally communicated with Student's teacher and other District staff regarding behavior strategies that could be used in Student's class, and of the behavior strategies that were used by Multilevel Services. In December 2013, Student began to verbally communicate much more. On January 10, 2014, District sent Parents a progress report describing Student's progress on her goals. She was making progress on her two communication goals, her reading goal, her writing goal (on which she met the latest benchmark), her math goal (on which she met the latest benchmark), and her two social/emotional goals. On January 31, 2014, Mr. Stanley sent Mother an e-mail, in which he advised Mother that her visits and ideas were helpful, that Student had made progress since October, and that she was talking much more.

25. On her first quarter report card for first grade, Student received 1's (insufficient progress toward standard) in all areas of reading. The only area of math in which she was evaluated was computation-addition, on which she scored a 1. The teacher comments stated that attempts were made to assess Student in the areas of phonemic awareness, letter identification, sight words, days of the week, months of the year, shape identification, printing numbers to five, and one to one correspondence to ten. Most of these tasks were difficult for Student and frustrated her, but teacher would continue to make efforts in these areas. No second quarter report card was offered into evidence.

26. On her third quarter report card for first grade, from January 6, 2014, through March 13, 2014, Student received 1's in all nine areas of reading and math in which she was evaluated, except for computation-addition, in which she received a 2 (progressing toward standard.) The teacher comments stated that the report was misleading "a bit." Student knew her alphabet and sounds, and was performing addition problems to 10. The report card described Student' achievement and effort as "Satisfactory" in several areas.

#### *March 17, 2014 IEP*

27. On March 17, 2014, District convened Student's annual IEP team meeting. All required team members were present, including Parents. The team noted Student's primary eligibility of autism, and secondary eligibility of speech or language impairment. The team discussed Student's present levels of performance, and her progress on goals. She had achieved her communication, reading, and math goals. It revised her writing goal, and continued and expanded upon her social/emotional goal regarding transitions.

28. The team developed several new annual goals. Goal 1 was a new annual math goal, which required Student to use manipulatives to perform basic subtraction of numbers under 10, with 80 percent correct each opportunity as measured by work samples and observation records. This goal was based on a first grade standard. Goal 2 was a new annual reading goal, by which Student would decode 80 high frequency words at the first grade level with 80 percent correct for three consecutive trials as measured by teacher recorded data. This goal was based on a kindergarten standard, but used first grade words. Goal 3 was a social/emotional goal which provided that, when asked to perform a non-preferred activity, Student would transition to and from an activity without tantrum behavior and during the non-preferred activity with no more than one prompt, including performing the non-preferred activity, as measured by teacher-recorded data. Goal 4 was a communication goal which provided that Student would understand and follow two- and three-step oral directions with 80 percent correct in four out of five trials as measured by work samples and observation records. This goal was based on a kindergarten standard. Goal 5 was another communication goal, which provided that Student would recognize pictures when named or given a choice by vocalizing words and multi-word phrases, with 80 percent correct for four out of five trials as measured by work samples and observation records. This goal was based on a kindergarten standard. Goal 7 was another social/emotional goal which provided that with direct verbal prompts, Student would initiate a verbal/ nonverbal response that was appropriate to the social context with a rating of “satisfactory” or better for four days as measured by teacher recorded data. Another annual social/emotional goal provided that, with direct verbal prompts, Student would use an appropriate greeting with adults and peers.

29. Student presented no specific evidence that any of goals numbers 1, 2, 3, 4, 5, or 7 were inappropriate for her. Student presented no specific evidence that the goals that were based on kindergarten standards did not address skills that Student needed to learn, or that grade level goals in those areas would have been appropriate for Student. Rather, these goals were based upon Student’s present levels of performance.

30. The IEP provided accommodations similar to those in Student’s March 22, 2013 IEP. These included warnings before transitions; a visual schedule; preferential seating away from distractions and noise; a one-to-one aide; simple, repetitive directions given one at a time; allowing extra classroom movement; positive reinforcements; on-task reminders; visual cues; use of manipulatives; increased verbal response time; and visual cues. Student’s behavior impeded her learning and that of others, and the IEP included behavior goals to address transitions and performance of non-preferred activities. The IEP did not include a behavior support plan. However, as is further discussed below in the Legal Conclusions, the IEP was defective because Students’ behaviors had deteriorated since the beginning of the school year, as she had become aggressive. She continued to elope. These behaviors had not improved as the school year progressed, and District was aware of these circumstances as of the IEP meeting. Therefore, District should have offered to conduct a functional analysis assessment to assist in considering services, techniques, and strategies to address Student’s serious problem behaviors. Those elements should then have been included in the May 30, 2014 IEP described below.

31. The IEP did not provide for any assistive technology for communication, such as an iPad, and there was no evidence that it was necessary. Student could communicate and make her wants and needs known, and her language skills had been improving since late 2013 or early 2014.

32. Based upon the first-grade general education teacher's report, the IEP provided that Student would attend the general education first grade class 30 minutes weekly for exposure and socialization, accompanied by her one-to-one aide. The IEP offered placement in a special day class, a one-to-one aide, and 40 minutes of speech services weekly. The IEP also offered special education summer school, and door-to-door transportation. Parents signed their consent to the IEP.

*May 30, 2014 IEP*

33. On May 30, 2014, District convened an IEP meeting at Mother's request. Mother wanted to discuss Student's academic status and how to prepare Student over the summer for second grade. The meeting included Mother, Ms. Siciliani, the school principal, the special education teacher, and Michelle Flores (an employee of Multilevel Services). Mother waived the presence of the general education teacher at the meeting.

34. The special education teacher had performed some curriculum-based testing of Student to assess her academic skills, and provided the team with a written report of Student's approximate present levels regarding an assortment of academic tasks. Based on the testing, the team recommended a variety of ways Mother could assist Student in improving Student's academic performance. The team did not review present levels of performance, develop new goals, or modify Student's existing goals, as this meeting was essentially an informational meeting to discuss how Mother could assist Student to prepare for second grade over the summer.

35. When asked at the end of the meeting whether District had answered all of her questions and addressed all of her concerns, Mother answered in the affirmative and expressed no other questions or concerns.

36. District issued a progress report on Student's annual goals as of June 4, 2014. Student was making progress on Goal 1 (Math), Goal 6 (Social/Emotional--use of appropriate greetings), and Goal 7 (Social/Emotional--initiating appropriate verbal/non-verbal responses). She met her objectives on Goal 2 (Reading), Goal 3 (Social/Emotional transitioning regarding non-preferred activities), and Goal 4 (Communication-- following two and three step oral directions. She had exceeded the objective on Goal 5 (Communication-- recognizing pictures by vocalizing).

*Student's Second Grade Year (2014-2015)*

37. Student entered second grade in August 2014, when she was seven years old. Her second-grade class was a mild/moderate special day class with approximately

10 children, taught by Nancy Piercy. As with Student's previous classes, the children in the class fell into a variety of special education eligibility categories. Student did not have a permanent one-to-one aide assigned to her immediately; rather she had a succession of substitute aides. Parents were concerned that Student did not have an aide consistently assigned to her. By e-mail dated August 16, 2014, to Ms. Siciliani, Mother requested that District contract with Multilevel Services to provide Student a one-to-one aide until a permanent aide was acquired, and for Multilevel Services to continue for up to six months to provide appropriate training for the newly assigned aide. In the e-mail, Mother praised the structured, thoughtful, scheduled, positive, and disciplined setting in Ms. Stilson's kindergarten class, how well Student sat and attended in that class, and how Student "blossomed" and progressed in that class, in contrast to Student's first grade year, which began precariously due to the choking incident and the succession of substitutes. Ms. Siciliani responded that the aide issue was a priority, and, that she would contact the Kern County Special Education Local Plan Area, and meet with people in the District office. On August 22, 2014, Mother met with the District Superintendent and other District administrators regarding her concerns about Student's education and request that Multilevel Services provide applied behavior analysis services in Student's classroom. As is further described below, Ms. Siciliani referred Parents' request for a Multilevel Services aide to the County Special Education Local Plan Area.

38. Eventually, District assigned Holly Reddig as Student's permanent one-to-one aide. Student continued to have behavioral issues in class, and she tended to be self-directed rather than fully integrated into the class. She also endured several incidents towards the beginning of the school year. On August 29, 2014, the class had a pool party, and then stayed outside for recess. The class also had lunch and afternoon recess outside. When Student arrived home, Mother noticed that Student had a severe sunburn. Mother reported the sunburn to the school on September 3, 2014. Nobody at school had noticed the sunburn on the day of the pool party. After Mother reported the sunburn, Ms. Piercy and other staff members wrote accounts of the day's events. The accounts of the events varied on certain details, such as to how long Student was outside. However, the basic facts that the sunburn occurred because Student was outside for a period of time due to the pool party, lunch, and recess, and that staff had not noticed that Student was in the sun too long, were consistent among the reports. The sunburn incident was the subject of several e-mails between Mother and school staff.

39. On September 10, 2014, Student fell on the sidewalk at school and sustained a swollen lip. District immediately informed Father about the incident. Ms. Piercy wrote a report of the incident on the same day. Mother noticed that Student seemed to have marks on her elbow, but not on her knees, which Mother found confusing. Mother was also concerned that Ms. Piercy, who did not witness the incident, wrote the incident report, rather than the substitute aide who should have been with Student. Mother corresponded with school staff about the incident. After this event, Parents worried about whether Student had injured her teeth, and Mother took Student to the University of California, Los Angeles, for a dental examination. Student received her dental services there, because dentists at the University in Los Angeles had the expertise necessary to perform dental examinations on children with

autism. There was no evidence that Student had any difficulties in making such trips to Los Angeles.

40. On September 16, 2014, Parents, through their attorney, requested that District advance the schedule for Student's upcoming triennial assessments, and that a functional behavior assessment be completed as soon as possible. District agreed to these requests.

41. On October 6, 2014, District received Mother's signed consent to triennial assessments in the areas of academics, self-help/social and emotional status, motor abilities, language and speech, general ability, and adapted physical education. Ms. Siciliani decided that the Kern County Superintendent of Schools should perform the assessments, because she was concerned that Parents did not trust the District.

42. On October 7, 2014, another child's seizure medication, Diastat, was left within Student's reach at a lunch table, and an aide noticed that Student had opened one of the vials and had handled the medication. The aide immediately wiped Student's hands and the table. School personnel called 911 and Mother, and Mother arrived as the emergency medical technicians were treating Student. Mother drove Student to the emergency room. Student suffered no ill effects from this incident. Various staff members wrote reports of the incident that same day. They varied on details, but related the same basic facts as to how the incident happened. Mother and school staff corresponded by e-mail regarding the incident.

43. After this incident, Parents removed Student from school. Additionally, Parents provided District with a 10-day notice pursuant to 34 Code of Federal Regulations part 300.148 (d)(1)(ii) (2006) that they would be placing Student in a private school and seeking reimbursement from the District unless District provided Student with a one-to-one behavior aide from Multilevel Services. Ms. Siciliani referred the request regarding Multilevel Services to the Kern County Special Education Local Plan Area, because the County Special Education Local Plan Area was responsible for entering into contracts with nonpublic agencies, such as Multilevel Services.

#### *October 9, 2014 IEP*

44. District convened an IEP team meeting on October 9, 2014, in response to Parents' 10-day notice, the incidents described above that occurred from August to October 2014, as well as due to a separate incident when Student eloped from class unnoticed and interrupted a meeting elsewhere on campus. The IEP team included Troy Tickle, Coordinator of the County Special Education Local Plan Area; District's counsel, Ms. Siciliani; Student's counsel; and Parents. Parents and District agreed to waive the IEP notice requirements and timelines, and Parents agreed to waive the presence of a general education teacher, speech pathologist, and special education teacher.

45. At the meeting, District agreed to contract with Multilevel Services to provide a full-time one-to-one aide for eight weeks. District agreed that it would not require Student to return to school until the Multilevel Services aide was in place.

46. The team discussed mainstreaming to socialize Student into a general education classroom. The team agreed that Student would be mainstreamed consistently up to 20 minutes each day, based upon Student's tolerance.

47. The team decided that Multilevel Services would be retained to conduct a functional behavioral assessment. The team anticipated that this assessment, including the triennial assessments being performed by the County Schools Superintendent, would be completed in eight weeks, at which time the team would reconvene to review the assessments and develop a program for Student. The team reviewed Student's social/emotional goal, and determined that the goal would be continued during the eight week period that Multilevel Services would be providing services to Student. Multilevel Services would be added to support the goal. The team did not change any of the IEP goals because of this meeting. Until the functional behavior assessment was completed, District did not have sufficient information as to what changes to the goals might be necessary.<sup>6</sup> The meeting was continued to October 23, 2014, to further discuss Multilevel Services' involvement and to define its role.

48. On October 10, 2014, prior to the continued IEP meeting, District reported on Student's progress toward her IEP goals. Student made progress on Goal 1 (Math), but she did not meet the objective. She made progress on Goal 3 (Social/Emotional--transition between activities). She met the benchmark on Goal 4 (Communication--following two- and three- step oral directions). She made progress on Goal 5 (Communication-- recognizing pictures by vocalizing), Goal 6 (Social/Emotional--using appropriate greetings), and Goal 7 (Social/Emotional--initiating a verbal/non-verbal response). She had regressed on Goal 2 (Reading), and the comment stated that Student's behavior interfered with learning.

49. Incident reports and supporting documentation for all of the incidents described above were sent to Parents on October 23 2014. Also on October 23, 2014, the IEP team reconvened to discuss the role and tasks of Multilevel Services.

50. Multilevel Services would conduct a functional behavioral assessment, and a treatment plan and services would be determined after it completed the assessment. The functional behavioral assessment would begin on October 24, direct observations at school would begin on October 27, and the results of the assessment would be presented at the same IEP team meeting at which the County School Superintendent's assessors would present their reports. The team agreed that Student would continue to have her one-to-one District aide while Multilevel Services conducted its assessment, but there was no plan at that time for Multilevel Services to provide direct one-to-one aide support to Student. Mother signed her consent to the functional behavioral assessment on October 23, 2014. The team did not develop any new or different IEP goals as a result of this meeting.

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<sup>6</sup> As further discussed in the Legal Conclusions, had District performed a behavior assessment after the March 17, 2014 IEP meeting, there likely would have been different goals to review at this IEP meeting.

51. On November 4, 2015, District generated an IEP addendum to provide more time for Multilevel Services to complete the functional behavior assessment, and for a behavioral therapist from Multilevel Services to train Student's aide to support Student in the classroom using the principles of applied behavior analysis. While the functional behavioral assessment was being finalized, Multilevel Services would also provide one-to-one aide services for Student at a level of 230 minutes per day on Mondays and Wednesdays, to eventually increase to a full day, and 317 minutes per day (a full day) on Tuesdays, Thursdays, and Fridays. The services were to begin on November 4, 2015. Parents signed their agreement to this addendum.

52. Student returned to school in early November 2015, when the Multilevel Services one-to-one aide began to render behavior services to Student at school. Student received the services of Ms. Reddig, District's one-to-one aide, in conjunction with the Multilevel Services aide.

### *Speech and Language Assessment*

53. On October 18, 2014, Jennifer Faulk, a speech and language pathologist, conducted a speech and language assessment of Student. She wrote a report dated November 24, 2014. Ms. Faulk received her bachelor's degree, *summa cum laude*, in speech and hearing disorders from Elmira College, and her master's degree in communication disorders from Bowling Green State University. She holds a California School Services Credential, a California license in Speech and Language Pathology, and a Certificate of Clinical Competence from the American Speech-Language-Hearing Association. She has been employed by the Kern County Office of Education as an assessment speech pathologist since 2004, and prior to that served as an itinerant speech and language pathologist with that office. She has presented at several national conferences regarding the use of assistive technology and augmentative communication systems with children. Since 2004, she has performed approximately 100 speech and language assessments per year.

54. In her assessment report, Ms. Faulk provided background information regarding Student, as well as a summary of her discussion with Student's school speech and language pathologist, Lyndi Cyr. Student had made significant progress toward her speech and language goals. She began using speech to communicate a few months previously, and would express simple requests and label familiar objects. She was developing the ability to use modifiers during structured activities and followed two-step verbal directions during preferred activities. Student needed frequent re-direction and prompts during non-preferred activities and had difficulty transitioning from one activity to another. Student engaged in hitting, pushing, screaming, and other maladaptive behaviors when it was time to leave the speech room.

55. Ms. Faulk received additional information about Student's communication skills by interviewing Student's teacher, aides, and Mother, and by reviewing her educational records. Student's expressive verbal skills suddenly began to improve in January 2014. Until then, Student had used manual signs and gestures to communicate her wants and needs.

She talked a lot at home, but continued to use manual signs when speaking was difficult for her. She was beginning to take turns in brief verbal exchanges with family members. She used greetings and initiated playful interactions at home. Her favorite activities at home included iPad applications, and watching favorite movies and television shows. Student's behaviors, including a high activity level, short attention for directed tasks, preoccupation with preferred objects/tasks, ignoring/refusing, loud outbursts, and attempting to leave her seat limited her ability to participate in classroom activities without constant one-to-one assistance.

56. Ms. Faulk used the following assessment instruments: Preschool Language Scale-5, Peabody Picture Vocabulary Test -4, Speech Mechanism Examination, informal speech tasks, Expressive Language Sample, and informal pragmatic language checklists. Ms. Faulk's report noted that she also used alternative assessment instruments, including language sampling; informal assessment; observation of communication interactions; search of educational records; interviews with caregivers; and interpretation of standardized test results in non-standard ways.

57. Ms. Faulk conducted the assessment in Student's classroom and the speech therapy room at Cummings Valley. The Multilevel Services aide accompanied Student throughout the assessment. Prior to administering the formal testing, Ms. Faulk observed Student in her classroom for approximately 45 minutes and at outdoor recess for approximately 15 minutes. During the classroom observation, Student worked with her aides at her desk. At the same time, the other students sat on the floor for a group activity and then transitioned to table-time small group activities. Student eventually participated in the table time activities and in a floor-time turn-taking activity with another student. At recess, she stayed on the swings with both of her aides at her side.

58. After recess, Ms. Faulk began the formal assessment in the speech therapy room. Student needed many reinforcers and tangible rewards to attend to test tasks. When the formal testing was completed, Ms. Faulk attempt to obtain an additional language sample and informally observe Student's literacy skills by engaging Student in a story re-tell activity. Student demonstrated only a short attention span, however. She was not able to re-tell a story from pictures, but she did attempt to echo some of the story phrases. When the testing was completed, Student did not transition well from the speech room to her classroom. She engaged in screaming, crying, pushing, throwing objects, and running away from staff while they attempted to help her to step out of the speech room, and she kept trying to escape from them to get back into the speech room. Eventually, Student's two aides were able to walk her to her classroom.

59. Ms. Faulk administered the "Articulation Screener" portion of the Preschool Language Scale-4 to assess Student's ability to imitate English consonant sounds in the initial and final positions of one syllable words. Ms. Faulk's report explained that, because Student's chronological age of 7 years, 11 months, was above the upper age limit of the screener such that standard scores were not applicable, she used the screener only as background information, to provide broad information about the accuracy of Student's

single-word articulation skills and to ascertain whether a more in-depth articulation assessment was needed. Student's scores were in the expected range for a preschool aged child, but inappropriate for her chronological age.

60. Ms. Faulk obtained a 60-utterance word sample of Student's spontaneous speech during her classroom observation of Student. Student obtained an intelligibility index of 57 percent, which fell significantly below the expected range of at least 90-95 percent intelligibility for her chronological age, and which was within the expected range for a typically developing two-year-old. Ms. Faulk also analyzed the sample with respect to average utterance length of words and morphemes, and considered Student's overall level of expressive language to be at the 24 month old level in terms of the length, content, and linguistic structure of her utterances.

61. Ms. Faulk examined the structure and functions of Student's lips, teeth, tongue, jaw, and hard/soft palate to determine their adequacy to support normal speech sound production. The structures of these mouth parts were adequate for speech, but from the functional standpoint Student demonstrated a mild/moderate oral motor planning deficit. Student also demonstrated oral sensory-seeking behaviors that could indicate an oral sensory integration deficit. Student's voice was appropriate in terms of pitch, volume, resonance, and quality.

62. Ms. Faulk administered the Preschool Language Scale-5, which is a standardized test of early language comprehension and expression. She administered both portions of the test: the Auditory Comprehension portion, to evaluate how much language Student understood; and the expressive Communication portion to determine how well she communicated with others. Student did not achieve a sufficient ceiling score before she appeared to become fatigued and began to refuse to attempt any further items on the Auditory Comprehension portion of the test. Without a ceiling score standardized scores were not applicable, so Ms. Faulk scored this part of the test as a criterion-referenced measure.<sup>7</sup> Student obtained a raw score of 42 and an age-equivalent score of three years, seven months, which reflected that Student's auditory comprehension skills were significantly delayed for her chronological age. On the Expressive Communication portion, Student obtained a standard score of 50, which represented a percentile rank of 1, and an age-equivalent score of two years, 10 months.<sup>8</sup> These results also reflected severely delayed skills for Student's age.

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<sup>7</sup> A criterion-referenced test is an informal test to determine whether a child has reached a performance standard.

<sup>8</sup> The score table included in Ms. Faulk's report lists an age-equivalent score of two years, 10 months, and the test protocol also states an age-equivalent score of two years, 10 months, but the text of Ms. Faulk's report erroneously lists an age-equivalent score of two years, 11 months.

63. Ms. Faulk administered the Peabody Picture Vocabulary Test, Fourth Edition, Form B, to provide a standardized measure of Student's receptive vocabulary developments. Student obtained a standard score of 72, a percentile of 3, an age-equivalent score of 4.10 years, and a grade equivalent score of below-kindergarten. Student's performance reflected significantly delayed receptive vocabulary skills for her age and suggested a significant delay in her overall language skills.

64. Ms. Faulk obtained a 67-utterance sample of Student's spontaneous speech during the approximately 60-minute testing session in the speech therapy room. Student's utterances averaged 1.3 words or 1.67 morphemes, with an upper bound of 5 words. Most of her utterances were labels and requests. She combined a noun and a verb in a subject-predicate relationship one time. She did not ask "wh" questions or engage in reciprocal verbal interactions during this sample. Student demonstrated expressive skills at the 24-month old level in terms of the length, content, and linguistic structure of her utterances.

65. Ms. Faulk also analyzed Student's expressive language samples by using the informal Pragmatic Language Observation Form to determine Student's ability to use verbal language effectively. Student demonstrated 11 of the 34 pragmatic language behaviors for school age children on the form. Student demonstrated significant weakness in overall social-pragmatic language skills during both of the language samples Ms. Faulk obtained during her assessment.

66. Ms. Faulk used information from the parent and teacher interviews to complete the Pragmatics Profile portion of the Clinical Evaluation of Language Fundamentals, Fourth Edition, for ages four to eight years. Student's score of 67 on the criterion-referenced checklist converted to a criterion score of -12.5 for her chronological age. Scores that fall below the age-level criterion indicate inadequate communication abilities in context, according to the test authors. She was not able to use the language of her peer group or to take turn in conversations in a one-to-one situation or in small groups. Her nonverbal communication skills appeared to be an area of relative strength.

67. Ms. Faulk concluded that Student was functioning with severe deficits in all areas of communication secondary to her diagnosis of autism, although she had made significant progress since her last assessment in 2012. Ms. Faulk determined that Student qualified for special education services under the regulatory criteria of Language Disorder, because Student scored below the 7th percentile on two standardized tests of language development and analysis of two samples of her spontaneous language revealed significantly limited usage of expressive language for her age.

68. Based on the assessment, Ms. Faulk recommended a special day class, where Student would have frequent opportunities to develop functional communication skills in the natural context of her daily routine. Ms. Faulk suggested a highly structured classroom and a low student/teacher ratio. She recommended that a speech-language pathologist provide direct services, and also be available on a consultation basis to assist the parent-educational team in developing and implementing a functional classroom communication program for

Student. Ms. Faulk suggested several communication goals, to include following simple four to six word verbal directions that contained pronouns; pointing to the correct picture from a set of three pictures in response to sentences containing two critical elements; pointing to the correct picture from a pair of pictures depicting spoken words that differed in only one sound in response to the target word spoken by the trainer; and using intelligible four to five word sentences to talk about actions in pictures in reading books.

69. Ms. Faulk was trained and experienced in administering the test instruments she administered. Except for her administration of the “Articulation Screener,” described above, and the informal use of which she explained in her report, Ms. Faulk administered the test instruments in accordance with the test producer’s instructions, the instruments were valid for the specific purpose for which she used them, they accurately reflected the factors they purported to measure, selected and administered so as not to be racially, culturally, or sexually discriminatory, and were administered in English, Student’s dominant language. The assessment was appropriate. Ms. Faulk’s limited use of the “Articulation Screener” did not render Ms. Faulk’s assessment inappropriate. Student presented no evidence that Ms. Faulk’s assessment was not appropriate.

70. Ms. Faulk did not recommend that Student use assistive technology or have an augmentative communication assessment, because Student used speaking and listening as her primary modes of communication in the classroom. She did not think it would be worthwhile to assess Student for augmentative communication, because such communication devices were for replacement of spoken communication when a student was unwilling or unable to use spoken language. Ms. Faulk distinguished such technology from assistive communication tools that could be used to supplement areas of communication that Student was not able to access, or chose not to access, such as picture communication systems and visual schedules. A visual schedule was included in Student’s IEP.

71. Ms. Faulk demonstrated knowledge and understanding about her field. She clearly explained her assessment results, why she made the recommendations that she did, her philosophy of her role of a speech and language therapist, and the purpose of the goals she proposed for Student’s IEP. She demonstrated no bias, and her testimony and assessment results were uncontradicted. These factors made her a credible witness.

### *Occupational Therapy Assessment*

72. Deborah Wakeen performed Student’s occupational therapy assessment on December 5, 2014. She received her bachelor’s degree in occupational therapy from the College of Saint Catherine in St. Paul, Minnesota, and has been an occupational therapist in California since 1998. She has been employed as a registered occupational therapist by the County Schools Superintendent since 2008. In that capacity, she has conducted approximately 300 assessments. She had 800 hours of continuing education regarding autism as it related to occupational therapy. Most of the children she evaluated had autism or were on the autistic spectrum.

73. Ms. Wakeen used the following instruments to assess Student: the Beery-Buktenica Developmental Test of Visual-Motor Integration; the Bruininks-Oseretsky Test of Motor Proficiency, 2nd Edition; clinical observation for an entire school day (classroom, recess, mealtime, transitions); short Sensory Profile completed by parent/teacher; records review; and interviews with Mother, Ms. Piercy, and two Multilevel Services behavior aides, Abby Keilpinski and Susie Munoz. Ms. Wakeen also interviewed Student's classroom aide, but did not state that in the report. Ms. Wakeen's assessment focused on fine motor skills, as she had observed the adapted physical education specialist assessing Student's gross motor skills. There was no need for Ms. Wakeen to assess Student's gross motor skills, as those were the subject of Ms. Steele's assessment, discussed later.

74. Student could take care of her primary self-care needs with occasional assistance while in the academic setting. She fed herself independently and used the restroom independently. She managed her backpack and belongings with verbal cueing. She could dress herself; however, she required assistance in putting on shoes and socks and in tying her shoes.

75. In the area of Motor Skills, Student was able to move through her classroom and school environment without difficulty. She opened doors independently. During gross-motor class activity, Student demonstrated adequate motor planning. She demonstrated adequate coordination and eye hand coordination when throwing and catching a ball. During recess, she could swing and she climbed up steps with reciprocal gait.

76. Ms. Wakeen administered the Test of Motor Proficiency to test Student's fine motor skills. She administered the Fine Motor Precision subtest, on which Student obtained 17 points, for a scale score of 4 and an age-equivalent score of 4.6-4.7, which placed her in the well below average range. On the Fine Motor Integration subtest, Student achieved a point score of 15, for a scale score of 5, and an age-equivalent score of 4.10-4.11, which placed her in the well below average range. On the Manual Dexterity subtest, Student received a point score of 18, for a scale score of 8, and an age-equivalent score of 5.6-5.7, which placed her in the below average range. Student obtained a composite standard score of 26, which corresponded to a percentile rank of 1, in the well below average range. Ms. Wakeen observed that Student had a fine pincer grasp when she picked up small objects, she had difficulty with bilateral coordination tasks such as folding paper on a line and transferring pennies from her dominant (right) to non-dominant (left) hand and placing them in the container. She could correctly place her hands on scissors when cutting, and cut out a two-inch circle with occasional error. She could draw lines through crooked and curved paths and connect dots with occasional deviation.

77. Ms. Wakeen administered the test of Visual-Motor Integration. Ms. Wakeen could not administer the two subtests of visual perception and motor coordination, due to Student's distractibility. However, it was in accordance with the test instructions to only use the visual-motor integration test, and thus her inability to administer the two subtests did not invalidate the test. Student obtained a standard score of 79 and an age-equivalent score of five years, six months, which placed her in the 8th percentile and the low range.

78. Student used a quadruped grasp with thumb wrapped over index finger when writing. She used light pressure on the paper, and required occasional verbal prompts to stabilize her paper. She could copy words, form a sentence, and copy numbers 1 to 10 with fair legibility. She could print a sentence, but had difficulty forming letters that contained diagonals. She also had difficulty with letter sizing, placement of letters on the baseline, and spacing between words.

79. Ms. Wakeen's report included a summary of her observations of Student's assessment behaviors. Student was accompanied at the assessment by her two aides. She was able to complete test items when given frequent breaks and reinforcements, such as tactile activity and use of an iPad. Student required frequent verbal redirection to complete the various assessment tasks, and she had difficulty at times complying with directions. She had difficulty attending to tasks when requested to complete non-preferred activities. Student needed frequent reminders to slow her pace. She would occasionally scream and push items away, which Ms. Wakeen attributed to possible fatigue, as this portion of the assessment was completed in the afternoon, and Student had completed her adapted physical education assessment earlier in the day.

80. Ms. Wakeen assessed Student's sensory processing ability by giving the short form Sensory Profile rating scales to Mother and Ms. Piercy. The Sensory Profile considered sensory processing skills in the areas of auditory, visual, vestibular, oral, and multi-sensory processing. Student had significant difficulties in the following areas: taste/smell sensitivity at home, under-responsive and sought sensation at school and home, auditory filtering at school, low energy/weak at home, and visual auditory sensitivity at school. The profile ratings reflected that Student did not have problems with movement sensitivity or visual auditory sensitivity at home. Student had mild to moderate difficulties with tactile/touch sensitivity at home, auditory filtering at home, and low energy/weak at school.

81. Student appeared to have difficulty paying attention at times, especially during non-preferred activities. She demonstrated improved participation when using the token economy systems. She seemed to enjoy tactile activities and movement activities, and seemed to benefit from frequent movement breaks throughout her day. She used headphones in the classroom as needed.

82. Ms. Wakeen's report summarized her results. Student had delays in fine and visual motor skills, and her scores indicated that she was currently performing at the four years, six months to five years, seven months age level. In her opinion, standardized testing revealed that Student's skill level was commensurate with her cognitive age level according to the results of the recent psychoeducational assessment. However, Student's cognitive level was only a small part of Ms. Wakeen's analysis. Based on reports from educational staff, Student was making progress in areas of fine and visual motor skills and practice in these skills were embedded into her classroom curriculum. She also had opportunities for sensory breaks in school, and was making progress on her goals. Educational staff was able to successfully assist Student in areas of need addressed in the occupational therapy assessment. Student had some difficulties with sensory processing, however, the identified

concerns did not significantly impact her ability to be successful in the classroom environment with the current strategies in place.

83. Ms. Wakeen's report identified Student's strengths and needs. Student's strengths were her independence in primary self-care skills at school, her functional mobility skills, she was easily redirected to task, she correctly grasped a writing utensil, and she could form letters and numbers and print a sentence. Student needed to continue to work on bilateral coordination skills, such as cutting and folding paper; fine-motor strengthening activities, such as opening food packaging; using clothing fasteners; writing on carbon paper/sandpaper to encourage her to increase pressure on the paper when writing; visual-motor skills; and using highlighter or highlighted paper as a visual cue for sizing of letters and to adhere to baseline. She should have the opportunity for sensory breaks throughout the day, including tactile, movement, and work activities.

84. Ms. Wakeen was trained and experienced in administering the test instruments she administered. She administered them in accordance with the test producer's instructions, the instruments were valid for the specific purpose for which she used them, they accurately reflected the factors they purported to measure, and were selected and administered so as not to be racially, culturally, or sexually discriminatory. Ms. Wakeen conducted the assessments in English, Student's dominant language. Ms. Wakeen's assessment was appropriate.

85. Ms. Wakeen was very knowledgeable about her field, and she clearly explained the reasoning behind her recommendations and the multiple elements she considered in arriving at her conclusions in her assessment report. There was no credible evidence that her choice of assessment instruments was inappropriate, or that Student's scores on them were inaccurate or invalid. She demonstrated no bias. As a result, her testimony was credible.

86. Student's expert, Dr. Gilbertson, criticized Ms. Wakeen's assessment in his report of his psychoeducational assessment, discussed below. Dr. Gilbertson believed that Ms. Wakeen should have recommended occupational therapy services in view of Student's low scores on Ms. Wakeen's assessment. He specifically criticized Ms. Wakeen's assessment because he assumed she concluded that Student was not eligible for services due to her misunderstanding that Student's cognition was low, and thus commensurate with Student's low scores on Ms. Wakeen's assessment. As is further discussed below, Dr. Gilbertson was not qualified to render any opinion regarding Ms. Wakeen's assessment. Moreover, as was mentioned above, Student's cognitive level was only a small part of the reason for Ms. Wakeen's recommendation that Student not receive occupational therapy. Significantly, Student produced no credible evidence that Ms. Wakeen's assessment itself was invalid or inappropriate.

#### *Physical Education Assessment*

87. Maria Steele, the adapted physical education specialist for Kern County, assessed Student in adapted physical education on December 5, 2014. Ms. Steele received

her bachelor of arts degree from University of the Pacific, and her master of arts in special education in 1989 from California State University, Bakersfield. She holds an adapted physical education specialist credential; a multiple subjects credential; a severely handicapped credential; an administrative credential; and a cross-cultural, language and academic development certificate. She has been an adapted physical education specialist with the County Schools Superintendent since 1985. She has performed approximately 500 assessments during her career. Approximately 200 of those assessments were of children with autism or autistic-like behaviors.

88. The assessment was performed at Cummings Valley. Student was accompanied by her two aides, who assisted in keeping Student on task. Student required frequent breaks and other rewards for on-task behavior during the assessment. These factors did not violate the test standardization requirements.

89. Ms. Steele observed Student for more than 20 minutes before class and during gross motor skills activities with the rest of her class in the occupational therapy room. Student was accompanied by her two aides. Student participated in the two motor activity centers: catch/throw a playground ball to a partner, and an obstacle course. She participated with verbal prompts and completed the activities without difficulty.

90. Ms. Steele administered the Motor Skills Screening Checklist, and the Ulrich Test of Gross Motor Development-2. She noted the behaviors she observed during the evaluation. Student had good motivation/effort, fair attention, and fair response time.

91. Ms. Steele was trained and experienced in administering the test instruments she used. Tests and assessment materials used for the assessment were selected and administered so as not to be racially, culturally, or sexually discriminatory. Student's dominant language, English, was used in the assessment. Tests were validated for the specific purpose for which they were used, and were selected to assess specific areas of educational needs. The assessment results accurately reflected the facts the test purported to measure and not Student's impaired sensory, manual, or speaking skills.

92. The Ulrich Test is a standardized measure of whether a child is able to perform a gross motor task. It is separated into two sections: (1) locomotor, and (2) object control. On the locomotor portion, Student was able to run, gallop, and slide-step. Student attempted all motor tasks requested. She could jump horizontally with both feet simultaneously, but did not perform preparatory movements. She had difficulty leaping. She obtained a standard score of 4, and an age-equivalent score of four years, three months. Her score fell in the below average range compared to other children her age, but Student demonstrated basic concepts. She did not consistently display form, opposition, and reciprocal movements.

93. On the object control portion of the Ulrich test, Student could bat off of a tee, catch a ball using her hands only for control from five feet, kick a stationary ball, roll underhand, and throw overhand to a target. She could dribble a ball with one hand for two consecutive bounces rather than the required four. She obtained a standard score of 6, and an

age-equivalent score of five years, nine months, which placed her in the below average range compared to other children her age. She demonstrated basic motor concepts, but was not consistent in form, alignment, force, opposition, hip/spine rotation, weight transferences, and/or follow-through. Student could walk up and down stairs with rail support. She could alternate feet going up stairs. She could rise to stand from the floor, and could walk forward and backward.

94. Ms. Steele used the Screening Checklist to evaluate Student's ability in motor performance tasks. This is not a standardized test, but rather an informal observational tool to determine whether Student could perform a variety of gross motor tasks, to support formal assessment results. Ms. Steele has used it about 300 times, and it was her general practice to use it. Student performed 24 of 28 motor tasks requested on the checklist. Ms. Steele did not ask Student to perform some of the tasks on the checklist, primarily because she had already observed that Student could perform them, or had observed that Student could not perform them, or the assessment environment at Cummings Valley did not have the equipment or materials the particular task required.

95. After the formal assessment, Ms. Steele observed Student at recess. Student demonstrated age-appropriate use of the play structure, such as climbing the steps, displaying alternate use of feet ascending, but not descending, jumping off the play structure curb, and maintaining balance using the slide and swinging.

96. Ms. Steele summarized her assessment. Student's locomotor and object control skills fell in the below average range, but Student could display a variety of motor tasks and concepts. These skills reflected that she had the physical ability to participate in a physical education class with her classroom peers. She displayed a variety of emerging skills. She displayed frequent off-task behaviors that might interfere with her ability to participate in various tasks but she had the ability to perform the tasks. Ms. Steele referred to the criteria in the Education Code and the California Code of Regulations for adapted physical education, and concluded that Student did not meet the criteria for participation in an adapted physical education program. Student would benefit from participation in specially designed physical education with her class.

97. At hearing, Ms. Steele addressed why she did not recommend that Student have adapted physical education. She described the four types of physical education, ranging from general education physical education, which was the least restrictive, to modified general education physical education, specially designed physical education, and adapted physical education, which was the most restrictive. Adapted physical education did not address gross motor skills in general. Rather, it was to remediate skills or to teach the student necessary skills that were non-existent, on a one-to-one basis, so a student could participate in physical education in a less restrictive setting. In her opinion, Student had sufficient skills to participate in specially designed physical education with her special day class, and did not need adapted physical education. Ms. Steele's assessment was appropriate.

98. Ms. Steele was very knowledgeable about her field, and able to clearly explain the purposes of her assessment, the results of her assessment, and the reasons for her recommendations. Her testimony was uncontradicted, and she displayed no bias. These factors made her testimony credible.

99. In his psychoeducational assessment report discussed below, Dr. Gilbertson, Student's expert, recommended an independent assessment in adapted physical therapy because he believed that Student's performance on Ms. Steele's assessment was so low that Student must need those services. Dr. Gilbertson had no qualifications to render such an opinion, and Ms. Steele expressed her opinion that Dr. Gilbertson had no understanding of the purpose of adapted physical education. Student offered no credible evidence that Ms. Steele's assessment was invalid or inappropriate.

### *Psychoeducational Assessment*

100. On December 10, 2014, Barry Lillie, school psychologist for the County Schools Superintendent, performed a psychoeducational assessment of Student. He wrote a report of the assessment dated December 10, 2014. Mr. Lillie has been a school psychologist for the County Schools Superintendent for 21 years. He received a bachelor's degree in economics from the University of Arizona, and he received master's degree in counseling from Arizona State University. He attended a Ph.D. program in school psychology for two years at Arizona State University. He holds a pupil personnel services credential in school psychology. Prior to his assessment of Student in December 2014, he had performed approximately 2000 psychoeducational assessments. Mr. Lillie had previously assessed Student in 2009, when she was transitioning from an infant program to pre-school.

101. Mr. Lillie's assessment included background information, which was not entirely accurate. He noted that Student's previous psychoeducational assessment, in 2012, reflected that Student's cognitive skills fell somewhere above the mildly delayed range, but then he erroneously stated that Student had previously been eligible for special education under the category of intellectual disability. He also erroneously stated that Student had previously been in a moderate to severe classroom, which was untrue, at least from Ms. Stilson's kindergarten class onward. His report accurately noted that, at the time of his assessment, Student was eligible for special education under the primary category of autism and the secondary category of speech and language impairment.

102. Mr. Lillie observed Student in class during two visits to Cummings Valley. One or both of her aides were present during the observations and testing. On the first observation, which lasted one and one-half hours, he observed her working for brief periods without needing some type of reinforcement. She was not always compliant, she had difficulty with transitions, and at times had difficulty maintaining focus. During recess, Student was always in close proximity to her aides. During a classroom observation for one hour on a different day, Student needed frequent prompts from her aide while working on a writing task, and assistance from her aide in other tasks.

103. Mr. Lillie performed formal assessments on Student over two days at Cummings Valley. Since Student had not been at school for some time prior to the assessment, he was not sure how comfortable she was with the testing environment. On the first testing day, at which both aides were present, Student was able to complete a variety of tasks, but had significant problems with intermittent noncompliance. On the second day, which focused more on educational testing, Student seemed more compliant and more familiar with the tasks. She required frequent breaks, during which she had access to several different reinforcers.

104. Mr. Lillie assessed Student's intellectual functioning by administering the Developmental Test of Visual-Motor Integration, the Differential Ability Scales, Second Edition, and the Developmental Profile-III Cognitive subtest.

105. On the Visual-Motor Integration Test, Student obtained a standard score of 72, with an age-equivalent score of five years, two months. Mr. Lillie administered both the nonverbal and verbal portions of the Ability Scales. Her standard scores ranged from 72-74, with an age-equivalent score of five years, two months. He considered this score to be in the borderline intellectual disability range. Student's scores diverged on the verbal portion of this test. On the verbal comprehension subtest, her standard score was within the intellectual disability range. On the naming vocabulary subtest, her standard score was in the average range. Mr. Lillie considered this score to overstate her verbal skills and to reflect practice in labeling, but it highlighted that Student had verbal skills and could learn verbal tasks.

106. Mother was the informant for the Developmental Profile Cognitive subtest, which addressed both verbal and non-verbal reasoning tasks. Student obtained a standard score of 60 and an age-equivalent score of four years, five months, which reflected Student's challenges in acquiring age-appropriate verbal skills. Mr. Lillie concluded that Student's verbal skills overall probably fell within the range of intellectual disability. However, Mr. Lillie also concluded that Student's nonverbal reasoning, which may be the fairest measure of her cognitive skills, fell at the lower end of the broad "normal" range.

107. Mr. Lillie administered the Kaufman Test of Educational Achievement-Second Edition, to assess Student's academic functioning. Mr. Lillie felt these scores closely correlated to Student's underlying cognitive skills, and his report elaborated on her reading, math, and spelling skills. For example, her reading skills appeared to fall in the second half of the kindergarten range. She could not decode any three or four-letter words, and she was able to comprehend three-letter words, but was unsuccessful with longer words or more difficult comprehension tasks. On the spelling measure, Student could put beginning letters on words, and ending letters on some words. She could spell some consonant-vowel-consonant words, but had difficulty spelling words which began with blends. Mr. Lillie concluded that Student's academic skills were similar to a child in the kindergarten to early first grade range.

108. Mr. Lillie administered the Autism Mental Status Examination, which confirmed that Student was a student with autism. He also administered the Developmental

Profile-III, for which Mother provided the information. Student's standard scores on the Profile ranged from a delayed functional level in Social/Emotional, to well below average functional levels in Physical and Adaptive Behavior. Student's General Developmental reflected a delayed functional level. Mr. Lillie considered Student's higher scores in physical and adaptive skills in contrast to her lower scores in social\emotional and communications areas as reflecting a classic profile for children with autism.

109. Mr. Lillie also administered the Scales of Independent Behavior-Revised to Mother, as a measure of overall adaptive behavior. Student's composite standard score reflected a delayed functional level.

110. Mr. Lillie concluded that Student was eligible for special education under the category of autism. He determined that her cognitive skills fell in the borderline range, and that she had real strengths in her vocabulary skills. He believed that she benefitted from her current placement, which was a good fit for her cognitive and academic skills, but noted she did not quite fit there due to her behaviors, which required her to have two aides, frequent breaks, and tangible reinforcements in class. His report suggested possible educational placements for her, but he did not recommend a placement. He determined Student's greatest needs were to improve her compliance, decrease her inappropriate behaviors, and lengthen the period that she worked between breaks and reinforcements.

#### *Functional Behavior Assessment and Behavior Support Plan*

111. Melissa Tomberlin Patton, a board certified behavior analyst from Multilevel Services, performed a functional behavior analysis of Student commencing in November 2014.<sup>9</sup> Ms. Tomberlin received her bachelor's degree in psychology from California State University, Bakersfield, and her master's degree in psychology with an emphasis in applied behavior analysis from California State University, Los Angeles. She holds a certificate in autism. Ms. Tomberlin has been employed by Multilevel Services as a board certified behavior analyst since March 2014, and employed by another agency as a board certified behavior analyst from July 2010 to April 2013.

112. Ms. Tomberlin's assessment consisted of a file review, collecting data pursuant to the Questions About Behavior Function, teacher and staff interviews, behavior recording by direct observation in the school setting, narrative recording by direct observation in the school setting, and a Functional Behavior Assessment Interview.

113. Student's challenging behaviors included aggression towards others, elopement, verbal protest ("no"), and whining and screaming. The assessment focused on aggression, elopement, and whining and screaming. Ms. Tomberlin defined aggression as

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<sup>9</sup> At all relevant times in this matter prior to hearing, Ms. Patton was known as Melissa Tomberlin, and she was so referred to by witnesses and in documents. To avoid confusion, she is referred to in this Decision as Melissa Tomberlin, or Ms. Tomberlin.

hitting (with an open or closed hand), pushing (with hands or body), biting, pinching, kicking, slapping, bending fingers (backwards or sideways), grabbing/pulling clothing, and choking using clothing or items near the neck. It may be paired with, or followed by, dropping to the ground or throwing or dumping items closest to her. It occurred when Student was presented with non-preferred activities or demands, when she was denied access to a preferred item/activity, when she was asked to wait, or when a preferred item/activity was removed. Student's aggression was disruptive and dangerous.

114. The report defined elopement as any attempt to leave, or occurrence of leaving, the designated space by at least one foot. Elopement occurred under the same circumstances as did aggression, and was disruptive and dangerous.

115. The report defined whining and screaming, which occurred under the same circumstances as did aggression or elopement. Student's whining and screaming was disruptive.

116. Ms. Tomberlin reported the results of data collection regarding the frequency and duration of Student's aggressive and eloping behaviors. These behaviors had the primary function of obtaining a desirable object or activity, and a secondary function of escaping a non-desirable function or activity.

117. Ms. Tomberlin observed Student at school on two separate days, and her report included the summarized data she collected regarding the frequency and duration of Student's behaviors during these observations. The first observation occurred from 9:00 a.m. to 12:00 p.m. She observed Student push, hit, scratch, and attempt to bite her one-to-one aide on an occasion when the aide was trying to prevent Student from eloping. Student exhibited aggression toward adults, but not peers, during this observation, and also eloped and whined/screamed. During the second observation, from 12:30 p.m. to 3:30 p.m., Student exhibited aggression towards adults and peers, she eloped, and whined/screamed. During both of these observations, there were minimal to no interactions between Student and teacher. Rather, Student's interactions occurred only with a one-to-one aide. When Student exhibited challenging behaviors, the aide would redirect Student to other preferred items rather than redirecting her back to the class activity.

118. Ms. Tomberlin developed a lengthy list of antecedents which immediately triggered Student's challenging behaviors. They included: 1) transitions from preferred to non-preferred activity, 2) delay in receiving preferred items/activities, 3) removal of preferred access/activities, 4) denial of access to preferred items/activities, 5) peers invading her personal space, trying to play with the item she was playing with, or having something she wanted, 6) being directed to perform a non-preferred task/activity, 7) being asked to participate in small group instruction, 8) changes in routine, 9) being directed to perform tasks that are too difficult or too easy, and 10) exposure to an environment that was too loud or too stimulating. School personnel responded to Student's challenging behaviors. She concluded from her observations, and the staff reports and information, that Student'

challenging behaviors served a primary function of obtaining a desirable object or activity, and a secondary function of escaping a non-desirable function or activity.

119. Ms. Tomberlin's report included a proposed behavior support plan. She suggested 13 goals to address Student's challenging behaviors, replacement behaviors, other skill-related behaviors, and social behaviors. She included a goal for school staff, as well. She also offered a variety of antecedent strategies, preventions skills strategies, reinforcement strategies, de-escalation strategies, and data collection strategies. Ms. Tomberlin's report recommended services and supervision that Multilevel Services would provide to Student and staff at school. Additionally, Ms. Tomberlin recommended that mainstreaming be placed on hold as Student's challenging behavior inhibited her from productively participating in the classroom activities.

120. At hearing, Ms. Tomberlin expanded upon her observations of Student. Student did not interact much with her peers. Staff tried to engage Student, but she was self-directed. She had basic language skills and could ask for things that she wanted or needed.

*December 18, 2014 IEP*

121. County and District convened Student's triennial IEP team meeting on December 18, 2014. The IEP team members included Dawn Roach (District school psychologist and board certified behavior analyst assigned to Cummings Valley), Ms. Cyr (Student's speech and language pathologist), Ms. Doue (District occupational therapist), Sara Boyer (District second grade general education teacher), Ms. Piercy, Ms. Siciliani, Mr. Witcher, Ms. Steele, Ms. Wakeen, Ms. Faulk, Mr. Lillie, Justin Thompson (principal of special education programs for County Schools Superintendent), a County director/facilitator, three representatives from Multilevel Services, Mr. Tickle (Coordinator of the County Special Education Local Plan Area), Parents, Parents' lawyer, and District's lawyer.)

122. District had wanted Mr. Tickle and Mr. Thompson to be present at this meeting and the continued sessions of the meeting discussed below, because District was concerned that Student could not be supported in a District program, and thus may require placement in the County Schools Superintendent's continuum, or perhaps even beyond that resource to a placement elsewhere in the County Special Education Local Plan Area. Approximately a week or two prior to this IEP team meeting, the County Special Education Local Plan Area had referred to the County Schools Superintendent the issue of whether the County Schools Superintendent could provide an appropriate placement for Student. Therefore, Mr. Thompson was present at the meeting to discuss the continuum of placements that the County Schools Superintendent provided.

123. The team discussed present levels of performance, and the psychoeducational, speech and language, occupational therapy, and adapted physical education assessment reports were presented. Parents and their attorney expressed no disagreement with any of the assessment results.

124. The team noted Student's participation in general education earlier in the school year. She participated in general education for school activities, lunch, and recess. She also would accompany her aide into a general education classroom, where she worked on second grade curriculum in social studies, science, and physical education. Student was not required to turn in any assignments in the general education setting. The other students were very receptive to her.

125. Student continued to be eligible under the primary eligibility of autism and the secondary eligibility of speech and language impairment. Parents asked if use of an iPad would help Student in class, and the team agreed that could be explored. Parents requested more time for gross motor/physical education activities particularly after breakfast. The team agreed to explore physical education, whether specially designed or modified.

126. Multilevel Services presented its functional behavior assessment, and recommended goals/strategies to address the areas of aggression, elopement, and whining/screaming. Neither Parents nor their attorney expressed any objections to the assessment. The team agreed that Multilevel Services and Ms. Roach, the District's school psychologist, should collaborate to develop a behavior support plan.

127. The team agreed to meet again to finalize IEP goals and discuss placement options. Multilevel Services would continue to provide services to Student in her classroom until the next meeting, and work on decreasing aggression and increasing on-task behavior until the next meeting, which was set for January 22, 2015.

128. Before the January 22, 2015 continued IEP team meeting, Ms. Roach worked with Pam Garde from Multilevel Services to draft the behavior support plan and behavior goals, so that they could be less clinically-oriented and more useful in the school environment.

#### *January 22, 2015, IEP*

129. The team re-convened on January 22, 2015. The team included most of the same members noted previously. None of the assessors from the County or County Schools Superintendent who had conducted Student's triennial assessments were present, and the County Director/Facilitator was not present.

130. At Parents' request, Ms. Redding, Student's one-to-one classroom aide, was called into the IEP team meeting briefly and asked about her observations in working with Student. She reported that she had witnessed instances when Student attempted to bite and hit. She reported that on a recent occasion when Student refused to leave the speech room, Student pushed an aide into a bookshelf and the bookshelf fell over. Ms. Redding reported that she had not yet observed Student working independently for more than 10 percent of the time, and she had never seen the Multilevel Services aide being able to give Student work and walk away, while Student worked independently. Student had at least one adult with her at all times. Ms. Piercy confirmed Ms. Redding's observations.

131. The team discussed and developed the behavior support plan at the meeting, reviewing every box of the behavior plan form. The team reviewed and revised the new behavioral goals suggested in the behavior support plan. Parents and their attorney did not object to the behavior support plan or the goals, and the team agreed on the new behavioral goals and the behavior intervention plan.

132. The behavior support plan included in the IEP identified the behavior that impeded learning as aggression, which was defined as hitting with an open or closed hand, pushing with hands or body, biting, pinching, kicking, slapping, bending fingers backwards or sideways, and pulling or grabbing clothing. The behavior was followed by Student dropping to the ground or throwing or dumping items close to her. It impeded learning because Student was unavailable for instruction and required full adult attention during the problem behavior. The plan described the behavior as serious, and described its frequency and duration. The predictors for the behavior occurred throughout the school day, under a variety of circumstances, such as when presented with non-preferred activities or demands, and when denied access to preferred items/activities. The environmental factors that supported these behaviors were lack of predictability in the schedule, degree of teacher/staff proximity and attention, staff use of reinforcement, and easy access to tangibles/activities. The environmental changes, structure, and supports needed to remove the Student's need to use these behaviors were schedule consistency, a daily visual schedule, consistency in locking cabinets and doors, consistency in following the reinforcement schedule, and changing the degree of staff proximity and attention.

133. The behavior plan stated the behavior occurred because Student wanted to obtain a desired object/activity, with a secondary function of escape (avoiding/refusing an activity/task). The plan suggested replacement behaviors to include Student being taught to use her words, such as request a break, and to ask for the desired object/activity instead of using aggressive behaviors. The team recommended that Student be taught coping strategies to remain calm, be given simple directions to comply with instructions, and be provided with a token economy. The team recommended reinforcements contingent on using an alternative/replacement behavior for tangible or to escape. The reinforcements would gradually fade, and the expectations before reinforcements were delivered would increase.

134. If the problem behavior occurred again, the plan provided for using verbal redirection and continued instruction. The plan also suggested blocking or stopping the aggressive behavior and then redirecting to an appropriate response, followed by continued instruction. Additionally, the plan recommended that Student be restricted from preferred items or activities when she became aggressive. The plan suggested that Student be positively reinforced when she displayed desirable behaviors after the aggressive behavior ended.

135. The plan included behavior goals directed at Student using her words to obtain desired objects or to participate in desired activities. The plan was to be coordinated with County Schools Superintendent providers, and staff would provide data on the target behavior and desired behavior by weekly e-mails. The plan stated that Parents, Ms. Roach,

Ms. Piercy, Ms. Boyer (the general education teacher), Ms. Siciliani, and two Multilevel Services representatives participated in the plan development. Based upon the information that the IEP team had at the time of this meeting, the plan was appropriate to address Student's behaviors.

136. The team reviewed Student's previous goals, and revised those that were not met. The team agreed on the progress of the previous goals and objectives, and agreed on annual goals in all areas of need. Goal 1, a math goal, provided that Student, would use manipulatives or TouchMath to perform basic subtraction of numbers under 10 with 90 percent correct in four of five trial days as measured by work samples and observation records. This goal was based on a kindergarten standard. Goal 2 was a communication goal regarding following two- and three-step directions, which was repeated from Student's March 17, 2014 IEP. Student had made progress on this goal, but since this triennial IEP meeting took place early, Student had not yet had the full year to complete the goal. At hearing Ms. Faulk, who did not draft this goal, considered it appropriate for Student, if the goal were referring to simple two- and three-step directions. Since Student was making progress on it, it was appropriate to continue with it. She considered Goal 2 to be redundant of Goal 9, which required Student to focus on longer and more complex utterances. Goal 9 required Student to point to the correct picture, from a set of three pictures, in response to sentences containing two critical elements at least four to five times during structured tasks according to the special education teacher's/speech and language pathologist's log of responses.

137. Goal 3 required Student to recognize pictures by vocalizing. Student had made progress on Goal 3, but had not had the full year in which to complete the goal. Ms. Faulk would have modified the goal from labeling to a more elaborate activity, but she also remarked that it was a good vocabulary goal that could be used indefinitely if it required the use of more sophisticated vocabulary over time. Since Student was making progress on the goal, it was appropriate to continue with it. Goal 4 was another math goal, which required Student to learn 70 percent of her numeral additional facts to 10, using flashcards and problem sets, with both number sentences and vertical addition problems, in all relevant contexts, for four out of five trial days, as documented by teacher observation and record keeping. This goal was tied to a second grade state standard which reflected a higher skill of interpreting products of whole numbers, but the IEP did not specifically indicate the grade level for the skills in this goal. Goal 5 was a reading goal which provided that, given note cards or work lists, Student would decode 80 high frequency words at the first and second grade level with 80 percent correct for three consecutive trials as measured by teacher-recorded data.

138. Goal 6 was a communication goal that was carried over from the March 17, 2014 IEP, which addressed Student's ability to initiate a response that was appropriate to the context with a rating of "satisfactory" or better. Student had made progress on this goal. At hearing, Ms. Roach was concerned as to the definition of "satisfactory" regarding measurement of the goal, but noted that the goals had been extensively discussed at the meeting and approved by the team. Goal 7 was a new communication goal, which addressed

Student's use of conventions of English grammar and usage by following four to six word directions that included pronouns at least four to five times during structured activities according to the special education teacher's/speech and language pathologist's log. Goal 8 was a social/emotional goal regarding transitions, which modified Goal 3 in the March 17, 2014 IEP regarding transitioning to a non-preferred activity. The new goal incorporated the use of a visual schedule to transition to a non-preferred activity without tantrum behavior and during the non-preferred activity with no more than one prompt in four of five trials, which included performing the non-preferred activity as measured by teacher recorded data.

139. There was no specific evidence that any of Goals 1 through 8 were inappropriate for Student. Some of them were carried over from the previous IEP, Student was making progress on them, and like all of the other goals in this IEP, they addressed skills that Student needed to master. Some of the goals were based on kindergarten or first grade standards, but there was no specific evidence that grade level goals in these areas would have been appropriate for Student. Rather, the evidence demonstrated that Goals 1 through 8 were appropriate for Student based on her present levels of performance.

140. Parents and their counsel had discussed speech services in detail with Ms. Cyr, Student's speech and language pathologist. The team reviewed accommodations and modifications. They included a visual schedule, warning before transitions, seating away from distractions/noise, a one-to-one aide, an opportunity for movement in the first part of the morning, directions given one at a time, simple and repetitive directions, allowing extra classroom movement, on-task reminders visual cues, use of preferred activities for reinforcement, increased verbal response time, use of manipulatives, visual cue for Student to wait, and a visual schedule.

141. Student was not being mainstreamed due to her behaviors, except 10 percent of the time for passing periods, recess, lunch, and school activities, such as assemblies.

142. The team completed the least restrictive environment form regarding the factors to consider regarding the continuum of placement options, and the continuum of placement options discussed. In determining the least restrictive environment, the team considered the level of Student's educational needs, removal from general education only when the nature of severity of those needs were such that education in general classes with supplementary aides and services could not be achieved satisfactorily, placement with age-appropriate peers and participating with students without disabilities to the maximum extent appropriate in non-academic and extracurricular activities, and any potential harmful effect the least restrictive environment placement would have on Student's social and personal needs, the level of educational functioning, or the quality of service Student needed. Ms. Siciliani explained the continuum of placements in the District, which were general education with special education monitoring, consultation, collaboration, accommodations, or modifications; general education classes with special education services provided in the classroom; general education classes with special education services provided in small groups outside the classroom; special education classes with part-time integrations for academics in the general education classroom; special education classes with integration into

non-academic and/or extracurricular activities; and full-time special classes in a nonpublic school. She advised that District had mild/moderate and moderate/severe special day classes, which included children with a variety of special education eligibilities. Only the moderate/severe special day class had a teacher who was specially trained to teach children with autism. The discussion focused in part on the appropriateness of either of these classes for Student, since Student was currently placed in the mild/moderate special day class, but she required additional supports and services.

143. Mr. Thompson discussed the continuum of placements provided by the Country Schools Superintendent, and informed the IEP team that the County Schools Superintendent had a variety of categorical classrooms for children with autism, including a classroom at Stockdale Elementary, in Bakersfield.<sup>10</sup> It was a kindergarten through third grade, small, behaviorally based classroom. The teacher, Elisa Huot, had a master's degree in special education, and a moderate to severe credential that enabled her to work with students with autism. She had worked with, and been trained by, an applied behavior analysis nonpublic agency. All of the students in the classroom used a visual schedule and token economy system, and applied behavior analysis was embedded into the program, along with discrete trial training. Students in the classroom were verbal, and the speech therapist worked directly in the classroom. There was reverse mainstreaming, which meant that typically developing children attended the class at times. The classroom had a smart-board and was technology enriched. Mr. Thompson stated that the County could implement Student's behavior support plan there. Mr. Thompson recommended that Student attend the Stockdale classroom. District would provide door-to-door round-trip transportation.

144. Mr. Thompson based his recommendation of the Stockdale classroom on all of the information presented at the December 14, 2014 and January 22, 2015 IEP team meetings, including the assessment results and the goals and behavior support plan. These factors persuaded him that the Stockdale classroom would meet Student's needs. The team had discussed Student's need for structure, and the speech and language assessment had also recommended a small structured classroom. The Stockdale classroom was a small structured classroom. The team had discussed Student's emerging speech, and the Stockdale classroom was a language-rich classroom. The functional behavior analysis and behavior support plan had mentioned visual supports, and those were actively in place in the Stockdale classroom. The teacher in the Stockdale classroom had background and knowledge regarding the behavior strategies mentioned in the behavior support plan, and the children in the classroom were working on goals that were similar to those in Student's IEP. Student's goals were tied to common core standards, and the Stockdale classroom was an academic-oriented classroom, with common core curriculum embedded throughout the day. Students in the Stockdale classroom were striving for a less restrictive environment, such as mainstreaming. Stockdale was a general education public school campus. Mainstreaming was available for students in the class if their IEP team agreed, and mainstreaming had occurred for some

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<sup>10</sup> A categorical or homogeneous classroom is a classroom in which all of the children have the same eligibility category, such as autism.

children in the class at their grade level. Other opportunities to participate in a general education environment included recess, lunch, computer lab, and a reading session.

145. Cognitively, some of the students in the Stockdale class were in the average range, and some were in the low average range. Some of them had more typical behaviors than did Student, and could serve as peer models. All of the children had some language impairment, but some of them had better language skills than did Student.

146. Applied behavior analysis and discrete trial training were used throughout the day, as was incidental teaching. The strategies mentioned in the Multilevel Services assessment report were embedded in the classroom environment or could be adjusted to be implemented in the classroom. There was one-to-one, small group, and whole group instruction. An occupational therapist came into the classroom and consulted with the teacher. Sensory needs were individualized, based on the student's need. The occupational therapist and teacher could create a sensory diet if called for in the IEP. The classroom was designed for 8 to 10 students. If there were 8 students, there would be 1 teacher and 3 aides. If there were 10 students, there would be the teacher and 4 aides.

147. Ms. Siciliani believed that District had tried the strategies Parents had wanted, such as providing the aide from Multilevel Services that Mother requested, and providing the services that they could to support Student in a non-categorical classroom. She believed that Student needed more support than District was able to provide.

148. At the IEP team meeting, Mr. Thompson recommended that Parents observe the class. Mother was willing to do so, but expressed her concerns about the travel time from home to Bakersfield, and Student's safety riding the bus. At hearing, Father testified about one of his safety concerns. On October 15, 2014, he followed a District school van number 7, and it was speeding and driving recklessly. Father did not identify the van driver. At the IEP team meeting, Parents were also concerned about the impact of the travel time on Student's free time, and on her home behavioral program from the Regional Center. Regional Center provided Student applied behavioral analysis services two hours per day, Monday through Friday, and four hours per Saturday on two Saturdays per month when she was in school. At least some of her weekday hours were delivered between 4:00 and 6:00 p.m.

149. Mr. Thompson suggested that Student try out the Stockdale placement for 30 days, and then the parties could convene an IEP team meeting to discuss the placement. This would also allow the behavior support plan to be put in place, and any adjustments that might be required to it could also be discussed at the proposed 30-day IEP meeting.

150. The team continued the IEP team meeting and planned that Parents would observe the program before the next meeting. The team kept the one-to-one behavior aide from Multilevel Services in place until the next meeting.

151. After this IEP meeting, Parents arranged with Mr. Thompson to observe the Stockdale classroom, but Parents cancelled the observation due to illness. Parents did not attempt to reschedule the observation prior to the continued IEP team meeting date.

*February 3, 2015 IEP Meeting*

152. The IEP team reconvened for the final session of Student's triennial IEP on February 3, 2015. Parents were present, as was Ms. Siciliani, Ms. Boyer (the District general education teacher), a representative from Multilevel Services, counsel for Student, counsel for District, Ms. Doue (the District occupational therapist), Ms. Cyr, Ms. Roach, Mr. Thompson, Mr. Tickle of the Kern County Special Education Local Plan Area, and Roberta Miller (the District transportation supervisor).

153. Nearly the entire meeting involved a discussion of Student's placement and transportation to the Stockdale program which Parents had not been able to observe. District again reviewed its placement offerings, and noted that they differed from the Stockdale program because District did not have categorical classrooms. Rather, its classrooms had children who had different eligibility categories. District's teacher in the mild/moderate special day class did not have an autism certificate to teach children with autism. The moderate/severe special day class had such a teacher, but the classroom was not categorical, and District members of the team did not feel that it was appropriate for Student. The teacher in the Stockdale program had training in autism and a credential to teach such students. Mr. Thompson again described the Stockdale program. There were eight students in the program at the time of the IEP team meeting, with four instructional aides. A program specialist oversaw the program and had additional training in teaching students with autism.

154. Ms. Miller described the transportation that District would offer. If Student were on the bus with other students, it would take two hours to get home. However, if Student were in a van without other students, the drive would be 80 minutes each way. Student would be picked up at 6:40 a.m. and would arrive home at approximately 3:20 p.m. In answer to Student's counsel's and Mother's questions, Ms. Miller described contingency plans if there were weather issues or accidents, but no District student had ever had to spend the night in Bakersfield due to weather conditions or accidents. Father expressed concern that the bus driver would not have any training regarding children with autism. District offered that the bus driver would be trained to interact with special education students.

155. At hearing, Ms. Miller elaborated on District's transportation program. She has been the District's transportation supervisor since 2011. Prior to that, she was a trainer of school bus drivers, and prior to that she was a school bus driver. She has worked in school transportation since December 1990. Special education children in the District rode buses to school in the District and the trip could take 1 hour and 5 minutes in the morning and 1 hour and 45 minutes in the afternoon. The average transportation time for a student to travel on a District school bus from the District to a Kern County school was 1 hour and 40 minutes each way. In February 2015, there were 11 children transported from the District to a Kern County school.

156. Each of the individual team members was given the opportunity to express their opinions on the Stockdale program, one by one. Ms. Piercy, Ms. Cyr, Ms. Doue, Ms. Roach, Ms. Siciliani, Mr. Tickle, and Ms. Boyer supported the Stockdale placement. Mr. Tickle thought that the Stockdale placement already had many of Multilevel Services recommendations in place. Mother asked for Multilevel Service's opinion. The Multilevel Services representative said that she would like to gather more data. Mother stated that in kindergarten the teacher reported that the mild/moderate class was a good placement, and the March 2014 IEP reported that Student was able to transition. Mother passed out a packet of Student's work and stated that Student was making progress. She expressed that the behavior support plan had not been put into place and tried in a District classroom. Father passed on giving his opinion. He requested that Student's one-to-one speech and language services be increased. Mother asked why a categorical program was better. Mr. Thompson replied that the students have similar needs, and the strategies can be implemented for all students. Student's lawyer expressed her opinion that if the County could provide a program, so could District.

157. The placement discussions at the January 22, 2015 and February 3, 2015 continued IEP team meetings were lengthy and wide-ranging, and everybody present, including Parents and their attorney, had an opportunity to and were invited to participate in the discussions, express their concerns, and state their opinions. There was no evidence that any District or County member of the IEP team was given any directive regarding what their opinion should be regarding Student's placement at any time with respect to any of the three sessions of the triennial IEP meeting.

158. District offered as FAPE the Stockdale program taught by Ms. Huot, with door-to-door transportation in a van without any other children. District offered an aide on the van and offered to train the driver and aide to work with students with special needs. District offered speech and language services of 160 minutes monthly in group with a maximum of three children, including Student, and 80 minutes monthly of individual services. Mr Thompson mentioned that applied behavior analysis was already part of the Stockdale program, and recommended an additional 120 minutes of one-on-one discrete trial training. He also recommended behavioral intervention services for 30 minutes per month on a consultation basis. These recommendations were incorporated into the IEP. No services from Multilevel Services were offered in the IEP.

159. By letter dated February 5, 2015, Ms. Siciliani sent Parents a copy of the IEP, but it had clerical errors, as it did not include correct information as to the services offered and did not include the goals. Nevertheless, on February 13, 2015, Parents e-mailed to Ms. Siciliani nine pages of comments and materials which they requested be attached to the IEP, and stated that they agreed to the implementation of the behavioral goals, services, and the behavior support plan. The e-mail also advised that Parents did not agree with the offer of a FAPE and did not agree with the placement or that District had offered a FAPE. Ms. Siciliani responded to Parents' e-mail by letter dated February 18, 2015, in which she explained that the previous copy of the IEP she had sent had various defects, and enclosed a corrected, complete IEP, including the nine pages of Parents' comments and materials, with

her letter. Ms. Siciliani's letter also requested clarification as to the goals to which Parents agreed, as the copy of the IEP that Ms. Siciliani had previously sent had not contained goals.

160. The Parents' notes to the IEP contained various comments about the details of the IEP, such as when the next annual IEP would occur; as well as Parents' contentions that the IEP team did not discuss the services and supports that would be available if Student were placed in a general education class; Parents' contentions that the behavior support plan should be implemented in a District placement to see whether it would work; their contentions that Student made progress in her District placements; their concern as to whether research supported categorical classrooms; their contention that Student could independently comply with directives in class; and various other corrections, complaints, and comments regarding the IEP meeting.

161. After giving notice to Parents that it would do so, District terminated the services of Multilevel Services on February 20, 2015, because those services were not part of the offer of a FAPE in the triennial IEP. Student's last day of school was February 23, 2015.

162. On February 19, 2015, Parents requested an independent psychoeducational evaluation. Sometime thereafter, Mother arranged to visit the Stockdale placement on March 11, 2015. By e-mail dated March 9, 2015, Mother advised District's counsel that she would be bringing Student's private psychologist with her, and that he would be performing the independent psychoeducational evaluation. By letter dated March 9, 2015, District's counsel advised Ms. Markham that the classroom observation on March 11, 2015, had been set up as a parent visit, as Mr. Thompson had not known the Mother would be accompanied by the psychologist. The letter further advised that a parent visit would be a full observation as an independent assessor would normally receive, and that the District had not yet agreed to an independent assessment, and had not agreed that the psychologist would be permitted such a full observation on March 11.

163. On March 11, 2015, Mother, Student's psychologist, and Student, visited the Stockdale classroom. They were accompanied by Mr. Thompson. The visit began while the class was unexpectedly having indoor recess due to air quality conditions. Indoor recess was followed by a restroom break, and then the students were transitioned into large group instruction. The observation began toward the middle of indoor recess, and the observation included only about 10 minutes of large group instruction.

164. By letter dated March 20, 2015, District agreed to the independent psychoeducational assessment.

#### *Dr. Gilbertson Assessment*

165. David Gilbertson, Ph.D., performed an independent educational evaluation of Student and wrote a report dated April 27, 2015. He received his bachelor's degree in psychology, Phi Beta Kappa, from the College of William and Mary; his master's degree in child clinical psychology from George Mason University, and his Ph.D. in educational

psychology from the University of California at Berkeley. He is a licensed educational psychologist in California, and a licensed marriage and family therapist in California. He holds a California school psychologist/pupil personnel services life credential, and a California clear administrative services credential. He has served as a special education administrator and as a director of a Special Education Local Plan Area. He has not worked in an educational setting since 2010.

166. Dr. Gilbertson's assessment consisted of Parent interview, records review, observations of Student, an observation of Student's second grade District classroom,<sup>11</sup> and administration of the following test instruments: (1) Test of Non Verbal Intelligence, Fourth Edition; (2) Wechsler Individual Achievement Test, Third Edition; (3) Slosson Oral Reading Test-Revised, Third Edition; (4) Childhood Autism Rating Scale, Second Edition-High Functioning Version; (5) Childhood Autism Rating Scale, Second Edition--Standard Version; (6) Behavior Rating Inventory of Executive Functioning; (7) Achenbach Behavior Rating Scale; (8) Conners 3 Behavior Rating Scale-Parent Form; (9) Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition; (10) Beery-Buktenica Developmental Test of Visual Perception, Sixth Edition; (11) Beery-Buktenica Developmental Test of Motor Coordination, Sixth Edition; and (12) Test of Auditory Processing Skills.

167. Dr. Gilbertson interviewed Parents, during which Mother expressed her concern that Student required "more intensive services and programming that were individualized to her disability and educational needs." Dr. Gilbertson reported Student's developmental, health, and educational history. One of Student's strengths was that she liked riding in the car and had enjoyed being in the car on a recent family trip to Michigan. Dr. Gilbertson's summary of Student's educational history was highly critical of District's acts and omissions from the time Student was in preschool, none of which are at issue in this case. The summary of Student's educational history inexplicably omitted any reference to Student's March 22, 2013 annual IEP.

168. In his records review, Dr. Gilbertson focused on a report of a psychoeducational evaluation of Student by Mr. Lillie in November 2009, when Student was not yet three years old. In that report, Mr. Lillie stated his belief that Student had Pervasive Developmental Disorder/Not Otherwise Specified, which was a mild form of autism, and she exhibited a global pattern of cognitive and functional delay consistent with mild mental retardation. Dr. Gilbertson took issue with these findings, which were not included in Student's more recent psychoeducational assessments. Dr. Gilbertson believed that these findings influenced the services and placement District offered Student to the present day, such that her abilities have always been underestimated.

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<sup>11</sup> Student was not present in the classroom during the observation, as Parents had removed her from school. At hearing, the evidence demonstrated that this classroom observation occurred because Dr. Gilbertson was observing the classroom for other reasons.

169. Dr. Gilbertson also noted that District had always qualified Student as eligible for special education as a child with autism. Dr. Gilbertson's report also referenced two subsequent psychoeducational assessments performed by District, one by school psychologist Sharon Owen in March 2012, when Student was five years old, and Mr. Lillie's most recent December 2014 psychoeducational assessment, neither of which referred to Student as being "mildly mentally retarded. Ms. Owens's evaluation report stated that Student should not be considered as a child with an intellectual disability; rather, those who work with Student should expect her to achieve more than a child with an intellectual disability.

170. Student was accompanied to the assessment by Mother and her home behavioral therapists. The assessment was conducted at Student's home and in a local community center.

171. Student presented with significant symptoms of an autism spectrum disorder. During the testing, Student required close adult supervision and redirection to focus her attention on tasks. When tasks became more difficult and/or required sustained mental effort and attention, Student would lose interest in the task and demonstrate "escape" behaviors. At such times it was necessary to use behavioral interventions, modify the demands placed on student, allow short breaks, provide tangible reinforcers/incentives, and give Student opportunities for physical movement.

172. Dr. Gilbertson observed Student in excess of 20 hours at home and in the community. She was comfortable in the home environment, and engaged in numerous activities, such as using the iPad and computer and watching videos. Her receptive language skills appeared relatively more developed than her expressive language skills, and her verbal communication was more from adult to child. She interacted nonverbally with Dr. Gilbertson. She was curious and explored novel objects and settings independently.

173. Dr. Gilbertson described his observation of Student's second grade special day class. The teacher, Ms. Piercy, did not have expertise working specifically with children with autism. The students had a variety of disabilities, diverse individual needs, and significant behavior problems. The majority of students were not students with autism. The class had a high noise level, and the design of the classroom did not emphasize a language-based approach or applied behavior analysis interventions and evidence-based instructional strategies specific to children with learning disabilities due to autism.

174. Dr. Gilbertson described his observation of the proposed Stockdale special day classroom. There were eight students in the classroom during the observation, several of whom demonstrated significant behavioral problems. One child hit an instructional aide and required two aides to intervene to de-escalate his behavior. Another child was screaming, hitting, and crawled under a desk and refused to come out. During a whole group instructional lesson, several children sat in chairs facing a white board and were expected to listen to the teacher and attend to a lesson. Many of the children were inattentive and two of the children were screaming and required one-to-one aide support. The teacher had to speak

using a very high voice volume to be heard. At one point, the teacher left the room unsupervised for approximately five minutes to take one of the children to the bathroom. On cross-examination, Dr. Gilbertson acknowledged that he observed during indoor recess, and did not observe during that portion of the day when there was individual instruction. He knew that the indoor recess was not typical. He did not know whether students were being mainstreamed into general education at grade level. Mr. Thompson had described the program during the observation, but he did not include much of the information provided by the principal into his report. Dr. Gilbertson did not request another opportunity to observe the class.

175. Dr. Gilbertson assessed Student's cognitive functioning with the Nonverbal Intelligence Test, a standardized measure of nonverbal intelligence. Student obtained a composite score of 92, which fell in the average range, and which Dr. Gilbertson concluded meant that Student's cognition was in the normal range. Dr. Gilbertson considered this test to be a valid measure of Student's general intellectual ability, controlling for Student's known deficits in receptive and expressive language, verbal comprehension, and verbal expression.

176. Dr. Gilbertson administered the Wechsler and the Slosson to assess Student's academic achievement. He listed all of her subtest scores, which ranged from 41 (low range) in Math Problem Solving to 65 (low range) in Pseudoword Decoding. Her composite standard scores on the Wechsler were 58 in Oral Language, 63 in Basic Reading, and 55 in Math Fluency, all of which were in the low range. Dr. Gilbertson noted that Student's overall achievement in oral language, reading, and math was significantly delayed when compared to her non-disabled same age and grade level peers. In his opinion these were low estimates of Student's achievement skills if a highly structured applied behavior analysis-designed program were implemented.

177. Student's performance on the Slosson resulted in a standard score of 75, and an age-equivalent of 6.4 years. She was unable to read any single words at the second grade level. She read five single words at the first grade level, but Dr. Gilbertson's report did not state how many words were in the first grade word list that Student could not read.

178. Dr. Gilbertson assessed Student's processing skills by administering the Beery Tests. She received standard scores of 76 (age-equivalent of five years, six months) in visual motor integration; 66 (age-equivalent of four years, four months) in visual perception, and > 45 (age-equivalent of three years, three months) in motor coordination. Student's overall visual-motor integration skills were in the borderline range when compared to students of similar age and grade level, with significant delays in visual perception and in her motor coordination skills. These results indicated Student experienced extreme difficulty performing visual-motor tasks in the classroom, especially writing tasks and tasks that required visual perception and motor coordination.

179. Dr. Gilbertson assessed Student's auditory processing skills using the Auditory Processing Skills Test. Student obtained scaled scores ranging from a high of 6 in Word

Memory to a low of 1 in most other subtests. Her highest overall standard score was a 67 in Memory, at the 1st percentile. Dr. Gilbertson concluded that Student's overall auditory processing skills were significantly delayed. He believed that she would have extreme difficulty comprehending instructional materials presented orally or that required auditory memory and reasoning skills.

180. Dr. Gilbertson administered the Executive Functioning Rating Scale to Parents. This instrument assessed several processes that guide, direct, and manage Student's cognitive, emotional, and behavioral patterns particularly during active, novel problem-solving. Their ratings indicated that Student had significant difficulty in the area of Metacognition due to deficits in Working Memory, Planning/Organizing and Monitoring behaviors.

181. Dr. Gilbertson administered the Achenbach and Conners 3 to Parents and two behavior therapists to measure Student social/emotional and behavioral functioning. Throughout his report, Dr. Gilbertson repeatedly mentioned that District refused to allow him to administer these scales to Student's classroom teacher, Ms. Piercy.

182. Mother rated Student on the borderline clinical range on the Attention Deficit/Hyperactivity Problems scale, which suggested to Dr. Gilbertson that Student's behavior met the diagnostic criteria for attention-deficit hyperactivity disorder. Student's behavior therapists rated Student behavior mostly in the normal range. However, one therapist rated Student's competence in school in the clinical range, and the other therapist rated Student's social competence, attention problems, and oppositional defiant problems in the borderline clinical range.

183. On the Conners rating scales, Mother's ratings were elevated, indicating many concerns in the areas of Inattention, Hyperactivity/Impulsivity, Learning Problems, and Peer Relations. Dr. Gilbertson considered these ratings to support his belief that Student had attention deficit hyperactivity disorder in addition to being a child with autism.

184. Parents also completed the high functioning and standard versions of the Childhood Autism Rating Scale. Based on the Parent's ratings on the high-functioning version of the scale, Student demonstrated severe symptoms of autism spectrum disorder, and she was in the average range for a child with high functioning autism. Parents' ratings on the standard version of the scale indicated that Student demonstrated mild to moderate symptoms of autism spectrum disorder. The report did not explain the significance of these differences in the ratings on the two scales.

185. Dr. Gilbertson summarized his results. In his opinion, Student demonstrated ongoing, significant delays in academic functioning, speech/language functioning, pragmatic communication, fine and gross-motor skills, social awareness, social interactions, adaptive behavior, and attentional skills. These delays were compounded by processing deficits in visual-motor coordination, visual perception, motor coordination, auditory/oral comprehension, auditory memory, and executive functioning. This combination of

educational and processing deficits significantly impeded Student's educational growth and progress. Dr. Gilbertson believed that Student was also eligible for special education under the category of Other Health Impaired due to significant behavioral symptoms associated with a diagnosis of attention deficit hyperactivity disorder, hyperactive-impulsive type. He also concluded that there was a severe discrepancy between Student's normal nonverbal cognitive ability and her delayed academic achievement, due to autism-specific learning disabilities with associated auditory and visual processing deficits, as well as deficits in executive functioning. Student also appeared to demonstrate significant difficulties in sensory regulation and sensory integration skills, which impacted her learning and needed to be further assessed.

186. Dr. Gilbertson again criticized District for acting on the misdiagnosis that Student was a child with pervasive developmental delays, not otherwise specified, "global delays," mild mental retardation" and "autistic like symptoms." He asserted that as a result, Student had not had the "benefits of a targeted curriculum focused on her unique needs as a child with autism," such as the need for an intensive language based program, intensive applied behavior analysis services, and specific evidence-based teaching strategies for children with autism. He criticized District for placing Student in generic special day classes with little meaningful access to general education and typical peers, with teachers who had limited experience and expertise working with children with autism, and without appropriate individualized behavioral supervision and instruction. He asserted that Student's programming and services must be individualized and focused on evidence-based practices known to produce effective outcomes for children with autism. He criticized the proposed Stockton placement as a severely handicapped generic special day class.

187. Dr. Gilbertson provided a multi-axial diagnosis of Autism without intellectual impairment, with language impairment, and Attention Deficit/Hyperactivity Disorder, Predominantly Hyperactive Impulsive Type, based on the Diagnostic and Statistical Manual of Mental Disorders, 5th edition.

188. He made 18 recommendations, including the following: (1) special education eligibility in the primary category of autism with a secondary category of other health impaired due to her diagnosis of attention-deficit/hyperactivity disorder; (2) an individual behavior program including one-to-one interventions in applied behavior analysis/discrete trial training up to 25 hours per week, with pivotal response training for one year, and one-hour a day of other behavioral therapies; (3) increased opportunities for mainstreaming with appropriate ancillary support services; (4) a small, self-contained homogeneous classroom with a teacher and two trained behavior aides, and with a maximum of six to eight students with cognitive functioning in the low average to higher range, who demonstrated behavioral characteristics associated with high functioning autism; (5) an intensive language-based curriculum with emphasis on the development of language skills, social interactions, academic, motor skills, and behavior; (6) in excess of 20 evidence-based practices; (7) a one-to-one behavior-trained aide; (8) a detailed positive behavior support plan overseen by a board certified behavior analyst, and a sensory diet; (9) additional hours of applied behavior analysis training in an extended school day in individual and small group settings; and (10)

independent educational assessments in occupational therapy, physical therapy, adapted physical education; assistive technology, augmentative communication; speech and language, and central auditory processing.

189. Dr. Gilbertson did not know whether there was a placement in the District that matched his recommendations regarding the classroom and services for Student. The evidence demonstrated that there was not, and that there was no such placement in Mojave, a community that was closer to Tehachapi than was Bakersfield.

190. At hearing, Dr. Gilbertson elaborated on his assessment, and testified to numerous matters that were not in his report. He criticized the March 22, 2013 IEP for not having goals that met common core grade level standards, but his report did not state that he had reviewed that IEP. He felt that, since Student was of average cognition, her goals in all of her IEP's should be at grade level and they were not. He commented that the Stockdale classroom was so noisy that Student covered her ears; but that information was not included in his report. He believed that the Stockdale classroom was not appropriate for Student because it was a more restrictive setting. Also, the children there were lower functioning than Student, and had more behavior issues. There was less exposure to normal behavior and normal speech and language development. He also criticized District for not conducting an assessment for Student regarding travel to Stockdale. He believed that the travel would adversely impact her, as Student's sensory issues during the transportation would translate to inappropriate behavior in the classroom. Furthermore, because of Student's attention deficit disorder, separate from her autism, she needed movement, and would need the opportunity to move when she exited the bus. None of Dr. Gilbertson's comments about issues relating to Student's transportation to Stockdale were included in his report.

191. Dr. Gilbertson believed that Student should have behavioral therapies in a small, self-contained, homogeneous class so that she could eventually be in a general education setting. He recommended that her annual goals should provide for more than one year's growth so that she could catch up, and aggressive teaching. The recommendations regarding the goals and aggressive teaching were not in his report. He also recommended that there be cameras in the classroom for safety and for the benefit of the behavior specialist, but this recommendation was not in his report.

192. Several witnesses criticized or commented upon Dr. Gilbertson's report. Diana Sevillanos-Myers has been a program specialist for the Kern County Special Education Local Plan Area since July 2013. She received her bachelor's degree in criminal justice, with a minor in political science, from California State University, Bakersfield, and her master's degree in special education from National University Bakersfield. She has been a board certified behavior analyst since 2013. She holds a Level II Education Specialist Instruction Credential, moderate to severe. She has been a special education teacher and a program specialist/program director for Valley Achievement Center, a nonpublic school in Bakersfield.

193. Ms. Sevillanos- Myers criticized Dr. Gilbertson's assessment in that he only observed the Stockdale classroom one time, briefly, during group instruction, which was not an accurate reflection of the program. She observed the Stockdale program twice, once on April 30, 2015, and once on May 5, 2015, and between the two observations she observed the large group instruction, instruction in centers, and individual instruction. She observed that staff used a variety of instructional and behavioral methodologies and techniques, including discrete trial training, visual schedules, functional communication training, and naturalistic teaching. She observed behavioral reinforcement methods.

194. Mr. Lillie and Ms. Roach criticized Dr. Gilbertson for only using the Nonverbal Intelligence Test to assess Student's cognition instead of using a broader range of assessments. Significantly, the evidence revealed that Student's score of 92 on this assessment was consistent with the cognitive level of the other children in the Stockdale placement.

195. Mr. Tickle, Ms. Roach, and Mr. Thompson considered Dr. Gilbertson's recommendations in his assessment report as reflecting a child with a high level of need, for whom a moderate/severe classroom setting would be appropriate, which was a more restrictive setting than the Stockdale classroom. Dr. Gilbertson's recommendations would fundamentally change a mild/moderate classroom, or a general education classroom, in that they required the teacher to devote a substantial amount of time to one student. Further, 25 hours of discrete trial training per week in a mild/moderate class would mean that Student would be off in a corner doing discrete trial training while the other children participated in class activities.

196. Dr. Gilbertson's assessment and testimony were not persuasive, for a variety of reasons. First, his recommendations were beyond the range of his expertise. He was not an expert in the areas of occupational therapy, assistive technology, augmentative communication, speech and language, physical therapy, and adapted physical education, yet he recommended assessments in all of those areas. The lack of foundation for some of his opinions and recommendations was also illustrated by his opinion, which was not included in his report, that Student's sensory issues during the bus ride to Stockdale would harm her by translating to inappropriate behavior in the classroom. He cited to nothing in his assessment that would support this opinion, and there was no other evidence presented at hearing to support this opinion. Indeed, Ms. Wakeen, who performed Student's occupational therapy assessment, did not consider Student's sensory issues to present problems in the classroom with the strategies and supports used in her classroom at Cummings. Sensory supports were available in the Stockdale classroom. Additionally, Dr. Gilbertson's own report stated that Student enjoyed car rides.

197. Second, his opinions and recommendations were internally inconsistent, in that he believed that Student should be in the least restrictive environment possible, including a general education environment, but his recommendations were for a variety of one-to-one and individualized services and therapies, which were more restrictive than the mild/moderate setting which District had offered in the past and continued to offer. It

followed that his recommendations also were not consistent with the mainstreaming and general education opportunities that he advocated for Student. Third, his report was not written in an objective manner. It was replete with irrelevant and gratuitous criticisms of District. Also, Dr. Gilbertson knew that his observation of the Stockdale classroom occurred on an atypical day, but he did not divulge that information in his report, and did not request another opportunity to observe the classroom. He reported that the psychoeducational evaluation performed by Mr. Lillie when Student was transitioning from a toddler program to preschool had tainted Student's entire experience in the District, but his opinion was not supported by any specific evidence, especially since Student's special education eligibility category at all relevant times was autism, not intellectual disability.

198. Fourth, his report referred to the legal terms "free appropriate public education," and "meaningful educational benefit," but he did not explain how any of his recommendations related to those standards.<sup>12</sup> Indeed, his report reflected his unfamiliarity with the IDEA. For example, his recommendation that Student's goals not be annual, but rather that they provide that Student make more than a year's worth of progress in the goal violates the requirement, explained below in Legal Conclusion 6, that goals in IEP's be annual goals. Additionally, he believed that Student's goals should be at her grade level, when, as also explained below in Legal Conclusion 6, the law requires goals to be drafted with regard to a student's functional levels.

199. Finally, his report rejected the Stockdale placement, describing it as a severely handicapped generic special day class, when in fact it contained many of the elements he recommended, including that it was a small, homogeneous, highly structured class with a low student-teacher ratio, behavioral supports, a language-rich environment, and mainstreaming opportunities. For these reasons, Dr. Gilbertson's opinions and assessment report were not persuasive.

#### *Events following Dr. Gilbertson's Assessment*

200. In May 2015, Mother learned from another parent through social media that in November 2014 Ms. Piercy had placed Student in a physical restraint and that the parent had intervened to stop Ms. Piercy. District was unaware that this had ever occurred, and had no documentation of the event. Mother then filed a report of the incident with the County Sheriff. After investigation, the Sheriff's office determined that it had no grounds to proceed. No witness to this incident testified at hearing, and the only documentation pertaining to the incident that was presented at hearing was the police report Mother filed in May 2015.

201. Also in or about May 2015, Student requested independent educational assessments with respect to speech and language, occupational therapy, adapted physical

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<sup>12</sup> As a former special education administrator and director of a Special Education Local Plan Area, Dr. Gilbertson should be aware of the meaning of District's obligation to provide a FAPE, and the significance of the term "meaningful educational benefit."

education, and functional behavior. District agreed to an independent functional behavior assessment. District did not agree to independent assessments in the areas of speech and language, occupational therapy, or adapted physical education.

*Dr. Hayden's Functional Behavioral Assessment*

202. At some point after the triennial IEP, Parents became disillusioned with Multilevel Services, which they had requested District to retain in 2014 to provide services to Student and to provide a functional behavior assessment and a behavior intervention plan. In July 2015, while this action was pending, Jeffery Hayden, Ph.D., conducted an independent functional behavior assessment of Student, and prepared a report dated August 4, 2015.

203. Dr. Hayden received his bachelor's degree in psychology with an emphasis in personality and psychopathology from the University of California at Santa Barbara; his master's degree in education with an emphasis on special education, disability, and risk, from the same institution; and his Ph.D. in education, with an emphasis on special education, disability, and risk, also from the same institution. He is a board certified behavior analyst-doctoral. He has been the President of Hayden Consultation Services since November 2003, a nonpublic agency that provides applied behavior analysis services. He is an adjunct faculty member of National University and California State University, Channel Islands.

204. Dr. Hayden's 21-page report consisted of but four and a half pages of a functional analysis assessment. The majority of the report consisted of a records review, and numerous irrelevant, biased, and uninformed comments and criticisms of District's IEP's and District's conduct, as well as criticisms of the Multilevel Services functional behavior assessment and the behavior support plan developed by Multilevel Services. The functional behavior analysis part of the report consisted of an analysis of Student's aggressive behaviors at home. Dr. Hayden performed no observations of Student in her classroom, as she was not attending school at the time of his assessment. He did not interview Student's teachers in preparing his assessment, and he did not perform an environmental analysis as part of his assessment. His recommendations consisted of providing Student with full time, behaviorally-trained, one-to-one aide support throughout her school day, with a behavior support plan, all overseen by behaviorally trained supervisors, using applied behavior analysis methodology.

205. At hearing, Dr. Hayden criticized District for not having a behavior support plan in Student's annual IEP's of March 22, 2013, and March 17, 2014. Under the theories of applied behavior analysis, behavior support plans were required if a student had behavior issues, so that those who work with the student can know what they have to do and consistently implement the provisions of the plan. Dr. Hayden, however, had no information as to what behavior supports were available in Student's classrooms at the times of those annual IEP's. He criticized the functional behavior analysis of Multilevel Services on the grounds that it collapsed behavior together, when those behaviors might serve different functions or have different antecedents. Dr. Hayden also criticized the Multilevel Services

report because it did not identify functionally equivalent replacement behaviors. He believed that the strategies recommended in the behavior support plan were not sufficiently specific, the proposed interventions were vague, and there was no specific oversight and supervision for the interventions. He found similar deficiencies in the behavior support plan developed by the IEP team as part of the December 18, 2014 IEP.

206. Dr. Hayden agreed with certain of Dr. Gilbertson's recommendations, such as the recommendation that Student have 25 hours per week of one-to-one intensive individualized behavior interventions in the form of applied behavior analysis/discrete trial training, and pivotal response training, and that she be mainstreamed. He also agreed that Student could benefit from a small, self-contained, homogeneous classroom, with an applied behavior analysis program, a one-to-one trained behavior aide, and an extended school day, such as Dr. Gilbertson recommended. Dr. Hayden also believed that the Stockdale classroom was not an appropriate placement for Student, because it did not provide a general education setting, and he did not know of any specific classroom supports to address her needs. Dr. Hayden had never observed the Stockdale classroom, so his opinion of Stockdale was based upon Dr. Gilbertson's report. Dr. Hayden recommended a support plan to transition Student back to school, but no transition plan would have been necessary if Student had attended the Stockdale program after the triennial IEP concluded in February 2015. Dr. Hayden considered himself and his staff qualified and able to perform all behavior services recommended in his report or that Student might require when she returned to school.

207. On cross-examination, Dr. Hayden admitted that one of his children was employed by Student's counsel, and that he and Student's counsel had worked together on 8 or 10 cases. All of his contracts with school districts to provide services have occurred due to his relationship with Student's counsel. He had not observed the Stockdale classroom, and he had no knowledge of the type of training the staff there received.

208. Ms. Sevillanos-Myers criticized Dr. Hayden's assessment with respect to its application in a public school setting. Dr. Hayden did not observe Student in school, which, in her opinion, rendered the assessment invalid for use for educational programming in a public school setting. Further, the assessment did not reflect sufficient observation of Student, and it did not contain enough information. Behavior occurs in a context, and in an environment, and Dr. Hayden's assessment did not contain an environmental analysis, or environmental information regarding the conditions in which the target behavior occurred. The report did not sufficiently analyze behaviors and consequences of behaviors, which was a necessary analysis for use in the school setting, as these factors implicate the function of the behavior, which leads to appropriate interventions. The report included no functionally equivalent replacement behaviors.

209. Dr. Hayden's opinions, report, and recommendations were not persuasive, for several reasons. First, Dr. Hayden's daughter is employed by Student's current attorney, which renders his testimony and report irremediably biased, especially when combined with Dr. Hayden's relationship with Student's counsel such that she is his only source of business

for public school contracts. These circumstances only compound the bias Dr. Hayden displayed in his assessment report. Second, Dr. Hayden's functional behavioral assessment did not include any classroom observation of Student. Ms. Sevillanos-Myers stated that this rendered Dr. Hayden's assessment invalid. At the very least, Dr. Hayden's inability to observe Student in her classroom due to her not being in school at the time renders his assessment incomplete. There was evidence that Student exhibited some of the same types of behaviors at home as in the school setting, but that does not change the fact that the school setting is a completely different environment from the home setting in almost every way: there are different people in school than at home; there are different activities in school than at home; there are different objects, furniture, and other design elements in school than at home; there are different time constraints and schedules in school than at home; and there are different expectations with respect to conduct in school than at home. There was no evidence that the antecedents, frequencies, consequences, functions, and nuances of Student's behaviors were so identical at school and at home that no classroom observations of Student were required to fully assess Student.

210. Third, Dr. Hayden's negative opinion of the Stockdale classroom, which was based only upon his review of Dr. Gilbertson's report, is misplaced. As discussed above, Dr. Gilbertson's report regarding the Stockdale classroom was inaccurate and incomplete. Fourth, Dr. Hayden's criticism that the functional behavior analysis performed by Multilevel Services, and the behavior support plan attached to the functional behavior analysis were defective because they did not identify functionally equivalent replacement behaviors, and were vague and non-specific as to strategies, interventions, and supervision is without foundation.<sup>13</sup> The functional behavior analysis and behavior support plan identified functionally equivalent replacement behaviors and contained a six page detailed discussion of strategies, interventions, and supervision. Fifth, Dr. Hayden's opinions were not tied into the legal requirements of a FAPE, rather, they were based upon his interpretation and application of the principles of applied behavior analysis. For example, Dr. Hayden criticized the District for not providing a behavior support plan for Student in her annual IEP's of March 2013 and March 2014, because her behaviors impeded the learning of herself and others. He also criticized various aspects of the functional behavior analysis and

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<sup>13</sup> It is inappropriate for Student to now contend that the functional behavior assessment performed by Multilevel Services, and the behavior support plan proposed by Multilevel Services that was based on and attached to its assessment, are defective. District retained Multilevel Services to provide services, to conduct a functional behavior assessment, and to draft a behavior support plan at Parents' specific request and, indeed, insistence. Further, Student and Student's then-counsel attended IEP team meetings in which the Multilevel Services' functional behavior assessment and behavior support plan were discussed, and the IEP team developed a behavior support plan based on Multilevel Service's work, and they expressed no objections to these materials at the time. Student now criticizes District for acting as Student requested in retaining Multilevel Services to perform the functional behavior assessment and draft the behavior support plan the assessment spawned. This is only one of the internal inconsistencies in Student's case.

behavior support plan proposed by Multilevel Services and developed with the input of the District's school psychologist and the IEP team. However, as is further set forth below, there is no legal requirement that a District provide a behavior support plan to every student whose behavior impeded that student's learning or the learning of other students, and the behavior support plan provided in Student's December 18, 2014 IEP was appropriate if it provided a FAPE. In short, Dr. Hayden's opinions and report are infected with bias, his report is incomplete, and several of his opinions lack foundation. Under all of these circumstances, Dr. Hayden's opinions and report lack credibility.

## LEGAL CONCLUSIONS

### *Introduction: Legal Framework under the IDEA*<sup>14</sup>

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. The IEP describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

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<sup>14</sup> Introductory paragraphs 1 through 4 are incorporated by this reference into the discussion of every issue in this Decision.

<sup>15</sup> All references to the Code of Federal Regulations are to the 2006 edition.

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to [a child with special needs].” *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, the *Rowley* court decided that the FAPE requirement of the IDEA was met when a child received access to an education that was reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student has the burden of persuasion as to the issues designated “Student’s Issues,” since they were the subject of Student’s Amended Complaint, and District has the burden of persuasion as the issues designated “District’s Issues,” since they were the subject of District’s Complaint

#### *Student’s Issue 1A: Appropriate Goals*

5. Student contends that various of the goals in the March 22, 2013, March 17, 2014, and December 30, 2015 IEP’s are unmeasurable, or they are inappropriate because they are not at grade level. With respect to the March 22, 2013 and March 17, 2014 IEP’s Student contends that the IEP’s should have included goals pertaining to attention to task and assistive technology/communication.

6. An IEP shall include a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved, and make progress, in the general education curriculum, and, when appropriate, benchmarks or short-term objectives, that are based upon the child's present levels of academic achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, and when periodic reports of the child's progress will be issued to the parent. (20 USC § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320.) No information need be included in an IEP beyond what is statutorily required.

7. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Ed.*, *supra*, 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) Additionally, to determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) (*Gregory K.*) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

#### GOALS IN MARCH 22, 2013 IEP

8. The goals that are at issue with respect to this IEP are Goals 1, 3, 4, and 6. There was no specific evidence that Student's Goal 1 (Communication), and academic Goals 3 (Reading) and 4 (Writing) in this IEP were inappropriate for Student at the time they were developed by the IEP team, such that they deprived Student of a FAPE. They were clear and measurable. Student contends that Goal 1 is contradictory, because it mentions giving Student a verbal "prompt," but requires that Student not be prompted in following directions. The "prompt" Student is to be given is a direction, as opposed to being prompted while performing the direction. Student also contends that Goal 4 is vague, because it refers to "attention to form." The goal is not vague; in context it refers to Student's attention to the form of the letters she is to write.

9. The goals were kindergarten level goals, and they were effective during the last part of the year when Student was in kindergarten, as well as during the first part of the year when Student was in first grade. There was no evidence that Student had mastered the skills addressed by the goals, or that the goals were not based upon Student's present levels of academic achievement and functional performance. Dr. Gilbertson testified that Student's goals should be at grade level because, in his opinion, Student was of average cognitive ability, but he did not offer any specific criticism of any of Student's goals in this IEP. Nor did he offer any basis for concluding that, at the time of this IEP, Student was capable of doing academic work at grade level. Furthermore, Dr. Gilbertson's opinion on this point is

contrary to the law. Goals are based upon a Student's present level of academic achievement and functional performance, not on the child's cognitive level.

10. Goal 6 involved transitioning to and from a non-preferred activity. This goal mentions transitioning both to and from the activity without tantrums, with no more than one prompt. The IEP in various places discusses Student's difficulties with transitions, and also states that the reason for this goal is Student's difficulty transitioning between activities without verbal prompting. The goal is clear and it is measurable.

11. As is further discussed below, Student did not meet her burden of demonstrating that she required assistive technology for communication, therefore, there was no need for an assistive technology goal. Student's attention to task was addressed by Goals 1 and 7, which addressed Student's ability to comply with directions, and with the accommodations in the IEP, such as a visual schedule, preferential seating, allowing extra classroom movement, giving on-task reminders, and giving positive reinforcement. The IEP also addressed Student's attention to task by providing her a one-to-one aide.

#### GOALS IN MARCH 17, 2014 IEP

12. The goals that are at issue in this IEP are Goals 1 through 5, and 7. Again, there was no specific evidence that Student's Goal 1 (Math), Goal 2 (Reading), Goal 3 (Social/Emotional), Goal 4 (Communication), Goal 5 (Communication), and Goal 7 (Social/Emotional) were inappropriate for Student, or otherwise defective, at the time they were developed by the IEP team, such that they deprived Student of a FAPE. Goal 1 was a first grade level goal, and Student was in first grade during a portion of the 2013-2014 school year in which this IEP would be effective. Goal 2 was based on a kindergarten level goal, but was focused on first grade level words. Goals 4 and 5 were based on kindergarten standards. There was no evidence that Student had mastered the skills addressed by any of these goals, or that the goals were not based upon Student's present levels of academic achievement and functional performance. As was discussed above, Dr. Gilbertson's opinion that, since Student was of normal cognition, she should have grade level goals is contrary to law, and contrary to the evidence of what Student was capable of achieving at the time of this IEP. Goals are based upon a Student's present level of academic achievement and functional performance, not on the child's cognitive level. Student contends that Goals 3 and 5 simply repeated the prior year's goals (without specifying which goals from the prior year they repeated), but that is not true. Goal 3 added elements that were not in Goal 6 in the March 22, 2013 IEP, and Goal 5 was different from all of the goals in the March 22, 2013 IEP.

13. All of the subject goals were clear and measurable. In this regard, Student focused on Goal 7, which provided that, with direct verbal prompts, Student would initiate a "satisfactory" response that was appropriate to the social context. The term "satisfactory" in Goal 7 may not be as quantitative term as one would prefer, but its use in this goal is not fatal. "Satisfactory" is a term that educators frequently use to evaluate Students. Indeed, it is a term used on District's report cards when a teacher is grading a student on "achievement"

and “effort.” For a social communication goal such as this one, it would not be difficult to determine what a “satisfactory” response to a question was.

14. As is further discussed below, Student did not meet her burden of demonstrating that Student required assistive technology for communication, therefore, there was no need for an assistive technology goal in this IEP. Student’s attention to task was addressed by Goal 4, a communication goal which addressed Student’s ability to comply with directions, and with the accommodations in the IEP, such as a visual schedule, preferential seating, allowing extra classroom movement, giving on-task reminders, and giving positive reinforcement. The IEP also addressed Student’s attention to task by providing her a one-to-one aide.

#### GOALS IN DECEMBER 18, 2014 IEP

15. The goals at issue in this IEP are 1 through 8. There was no specific evidence that Goal 1 (Math), Goal (2) Communication, Goal 3 (Communication), Goal 4 (Math), Goal 5 (Reading), Goal 6 (Social/Emotional), and Goal 7(Social/Emotional) were inappropriate for Student, or otherwise defective, at the time they were developed by the IEP team, such that they deprived Student of a FAPE. The only one of these goals that was specifically designated as a goal that had second grade-level components was Goal 5, a reading goal that incorporated the use of second grade word lists. This IEP would be in force for the remainder of the 2014-2015 school year, which was Student’s second grade year. The other goals that had grade-level components were at the kindergarten or first grade level. There was no evidence that Student had mastered the skills addressed by any of these goals, or that the goals were not based upon Student’s present levels of academic achievement and functional performance. As was discussed above, Dr. Gilbertson’s opinion that, since Student was of normal cognition, she should have grade level goals is contrary to law, and contrary to the evidence of what Student was then capable of achieving. Goals are based upon a Student’s present level of academic achievement and functional performance, not on the child’s cognitive level.

16. All of the subject goals were clear and measurable. Goals 2, 3, and 6 were carried over from the March 17, 2014 IEP. Student was making progress on these goals, but because a year had not passed since her last annual IEP, Student had not yet completed them. At hearing, Ms. Faulk questioned Goals 2 and 3, which were both communication goals. Ms. Faulk considered Goal 2 to be somewhat encompassed by Goal 9, which required Student to focus on longer and more complete utterances, but she felt it was appropriate to continue with Goal 2 since Student was making progress on it. Ms. Faulk was concerned that Goal 3, which was a labelling goal, focused on a strength of Student’s. She would have preferred a more elaborate activity that focused on Student’s weakness, but, since Student was making progress on the goal, she did not believe it was inappropriate. She also believed that, to the extent that the goal addressed vocabulary, it could remain an appropriate goal each year if it incorporated more advanced vocabulary. Goal 6, which was identical to Goal 7 of the March 17, 2014 IEP, presented the same issue as was discussed above with respect

to Goal 7, in that they both used the word “Satisfactory.” As was discussed above, this is not a fatal defect in the goal.

17. Goal 8 modified Goal 3 in the March 17, 2014 IEP, by adding the use of a visual schedule. Student had not had the full year to achieve Goal 3 from the previous IEP, and there was no evidence that carrying the goal over, and incorporating Student’s use of a visual schedule, was inappropriate.

18. The subject goals in the IEP’s were measurable and appropriate. Student did not demonstrate that she was deprived of a FAPE by reason of any defects in the goals.

*Student’s Issue 1B(1): Appropriate Behavior Services*

19. Student contends that the IEP’s of March 22, 2013, September 4, 2013, March 17, 2014, May 30, 2014, and December 18, 2014, failed to offer appropriate services in the area of behavior support.<sup>16</sup> District contends that Student’s behaviors did not require behavior support until October 2014, when the IEP team decided to retain Multilevel Services to provide a one-to-one behavior aide to Student, and to perform a functional behavior assessment. Further, the behavior services offered in the December 18, 2014 IEP, provided a FAPE.

20. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student’s educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483.) (*Target Range.*) Citing *Rowley, supra*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but determined that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Target Range, supra*, at 1484.) This principle was subsequently codified in the IDEA and Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE 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 child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) The failure to comply with procedures for assessments is a procedural violation. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2005) 464 F.3d 1025, 1031.)

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<sup>16</sup> The annual IEP’s were those of March 22, 2013, March 17, 2014, and December 18, 2014. The other IEP’s were interim IEP meetings to discuss specific concerns of Parents as they arose between annual IEP meetings, and the teams at those meetings did not offer any substantive modifications to the annual IEP’s. Therefore, both Student’s Issue 1B(1) and 1B(2) are addressed in terms of the annual IEP’s. Had the annual IEP’s included the matters that are the subject of these issues, the interim IEP’s would have also included those matters.

21. The IDEA and California law require that an IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address behavior when a student's behaviors impede his learning or that of others. (34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) Under the IDEA, the Department of Education recommends that school districts be proactive and perform a functional behavioral assessment when a child engages in behaviors which interfere with learning. Following the functional behavioral assessment, a school district develops a behavior support plan or a behavioral intervention plan. (Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46721 (August 14, 2006.)) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028.)

22. At all relevant times, California law has recognized behavioral supports such as a functional behavioral assessment and behavior support plans, but it had not prescribed the content of a behavior support plan, or defined a functional behavior assessment. However, until July 1, 2014, the California Code of Regulations specifically defined the content and application of additional, specific behavioral supports, known as a functional analysis assessment and a behavioral intervention plan. This case therefore straddles two versions of California law regarding behavior interventions. Student's IEP's of March 22, 2013, and March 14, 2014, and all interim IEP meetings between those annual IEP meeting until July 1, 2014, were subject to the prior law, as contained in the California Code of Regulations. As of July 1, 2014, an amended version of the California Code of Regulations became effective, and those amended version repealed the behavior intervention provisions of the prior version of the regulation. (*See*, Stats. 2013, ch. 48.) Therefore, all of Student's IEP's created subsequent to July 1, 2014, in particular the triennial meeting held on December 30, 2014, January 22, 2015, and February 3, 2015, were not subject to the regulations regarding the application, form, and content of a functional analysis assessment and a behavioral intervention plan.

23. Prior to July 1, 2014, California law defined a behavior intervention as "the systematic implementation of procedures that resulted in lasting positive changes in the individual's behavior." (Cal. Code Regs, tit. 5, § 3001(d), repealed effective July 1, 2014.) It included the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*)

24. When behaviors rose to the level of "serious behavior problems," California law prior to July 1, 2014, imposed formal requirements for addressing them, even when they had not resulted in formal discipline. "Serious behavior problems" meant behaviors which were self-injurious, assaultive, or caused serious property damage and other severe behavior problems that were pervasive and maladaptive for which instructional/ behavioral approaches specified in the student's IEP were found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (a),(b), repealed effective July 1, 2014.)

25. Prior to July 1, 2014, if the IEP team found that such “serious behavior problems” existed, a functional analysis assessment should be performed. (Cal. Code Regs., tit. 5, § 3052, subd. (b), repealed as of July 1, 2014.) The regulations specified who could conduct such an assessment, how such an assessment was to be performed, and the contents of the assessment report. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1), (b)(2), repealed as of July 1, 2014.) Upon completion of the functional analysis assessment, an IEP team meeting was to be held to review the results and to develop the behavioral intervention plan, if necessary. (Cal. Code Regs., tit. 5, § 3052, subd. (c).) The behavioral intervention plan was only necessary if Student exhibited a serious behavior problem that significantly interfered with the implementation of the goals and objectives of the Student’s IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f); Cal. Code Regs., tit. 5, § 3052, subd. (a)(3), repealed as of July 1, 2014.)

#### STUDENT’S MARCH 22, 2013 IEP

26. Student’s March 22, 2013 IEP, which went into effect when Student was in kindergarten in Ms. Stilson’s class, recognized that Student’s behaviors impeded her learning or that of others. Student’s problematic behaviors in Ms. Stilson’s class included eloping and screaming, inattention, and difficulty with transitions. The IDEA and the California Education Code required that the IEP team *consider* the use of positive interventions and supports, and other strategies, to address this behavior. The IEP team did so. The team included behavior goals to address issues regarding transitioning to non-preferred tasks and compliance with directions. Student’s IEP accommodations also addressed these matters. Her IEP accommodations addressed her attention issues, as well, by including such techniques as providing preferential seating, giving directions one at a time, using visual cues and on-task reminders, and allowing extra movement in the classroom. Student was provided with a one-to-one aide towards the end of kindergarten, whose job was to keep her on task, and assist her in transitioning between activities. The evidence demonstrated that these, and indeed all, of Student’s behaviors were well-managed in Ms. Stilson’s classroom. Student made progress on her goals. There was no evidence that Student required any additional behavior support than that provided by her March 22, 2013 IEP during Student’s kindergarten year. The March 23, 2013 IEP did not deprive Student of a FAPE on this ground during Student’s kindergarten year.

27. Student’s March 22, 2013 IEP also governed Student’s educational program during the 2013-2014 school year, when Student was in first grade, until the March 17, 2014, IEP was developed. District was aware that, from a behavioral standpoint, Student’s first grade year was noteworthy. First, in August 2013, Student was attacked by another child in the classroom who attempted to choke her. Second, from August until October 2013, Student’s class was taught by a succession of substitutes, which resulted in a lack of structure and consistency. Student’s aide noticed that Student’s behavior deteriorated after the August 2013 incident, such that she engaged in aggressive and anxious behaviors, she expressed fear and anxiety, and she resisted going to school. District was aware of these behaviors not only through Student’s one-to-one aide, but also directly due to the September 4, 2013 IEP team meeting that Mother requested and which was convened in response to the choking incident.

District was not obligated to address these behaviors immediately upon learning about them, as District could reasonably believe that the behaviors would ease on their own with the passage of time, especially since Student's first grade class had a permanent teacher who might impose more structure and consistency.

#### STUDENT'S MARCH 17, 2014 IEP

28. However, Student's maladaptive behaviors continued during first grade even after October 2013 when Ms. Stanley was assigned as the permanent teacher for Student's class. In particular, Student had been engaging in aggressive behaviors, such as hitting, kicking, pushing, and biting, up to the time of Student's March 17, 2014 IEP. This IEP governed the remainder of her first grade year, and part of her second grade year in Ms. Piercy's class during the 2014-2015 school year. The pre-July 1, 2014 version of the California Code of Regulations was in effect during Student's first grade year, and thus those regulations apply to Student's March 2014 IEP.

29. Student's March 2014 IEP contained goals regarding greetings and social responses, a goal regarding transitioning to and performing non-preferred activities, and compliance with directions. The accommodations in this IEP included strategies to support these goals, similar to the one in her March 22, 2013 IEP. The team offered Student a one-to-one aide, just as did the March 22, 2013 IEP. However, nothing in this IEP addressed that Student's maladaptive behaviors had increased considerably since the previous annual IEP. By the March 2014 IEP, Student's aggressive behaviors had not abated. They were not relieved by the behavior supports in the March 22, 2013 IEP which were in effect during Student's first grade year up through the time of the March 17, 2014 IEP. Further, the March 2014 IEP did not have any more robust behavior supports than did the March 22, 2013 IEP. Under the law in effect at the time of the March 17, 2014 IEP, Student's behaviors were "serious behavior problems." More specifically, Student's aggressive behaviors were assaultive, and her aggressive behaviors and eloping behaviors were pervasive and maladaptive. The approaches specified in Student's IEP were ineffective in controlling them. As such, California law prior to July 1, 2014, imposed upon District the obligation to perform a functional analysis assessment, and then to hold an IEP meeting to discuss the results of the assessment. The IEP team could also develop a behavioral intervention plan after the functional analysis assessment was completed. However, a behavioral intervention plan would only be required if Student's behaviors significantly interfered with the implementation of the goals and objectives of the Student's IEP. Student made progress on her goals during first grade. Therefore, no behavioral intervention plan developed in conformity with the California Code of Regulations would have been required. However, that does not mean that District would not have been required to offer additional behavior services, including, but not limited to, an ordinary behavior support plan that was not defined by the Code of Regulations.

30. The failure to perform a functional analysis assessment was a procedural violation. A procedural violation only constitutes a denial of FAPE if the violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in

the decision making process regarding the provision of a FAPE to the child; or caused a deprivation of educational benefits. In this case, the failure to perform a functional analysis assessment impeded Student's right to a FAPE and caused a deprivation of educational benefits from March 2014 through October 2014, when District provided Student additional behavior support by assigning a one-to-one behavior aide to Student from Multilevel Services, and commenced to perform a functional behavior analysis. One cannot predict with certainty what the results of a functional analysis assessment might have been, had District performed one in spring 2014. However, the functional behavior assessment that the District performed in fall 2014, which analyzed the behaviors of aggression and elopement that Student displayed in March 2014, was part of the basis for District's decision to offer to provide different and additional services to Student. These services included a categorical, structured, classroom, with a specially trained teacher, with applied behavior analysis and other behavioral techniques imbedded in the curriculum, and a behavior support plan. This supports that a functional analysis assessment performed pursuant to the California Code of Regulations in March 2014 would also have reflected that District should have offered Student more behavior support during the latter part of the 2013-2014 school year and thereafter. Consequently, District's failure to perform a functional analysis assessment impeded Student's right to a FAPE and deprived Student of an educational benefit. District's procedural violation in developing the March 17, 2014 IEP deprived Student of a FAPE, and this violation continued until approximately November 4, 2014, when District provided a one-to-one behavior aide to Student through Multilevel Services, and Multilevel Services proceeded to conduct a functional behavior analysis of Student on behalf of District.

#### STUDENT'S DECEMBER 18, 2014 IEP

31. Student's December 30, 2014 IEP team meeting and its continuation meetings were focused on Student's behaviors. Since these meetings occurred after July 1, 2014, the California Code of Regulations requirements as to behavior interventions did not apply. The team developed behavior goals, and a behavior support plan, and the Stockdale program was offered with Student's behaviors in mind. The Stockdale classroom was small, structured, homogeneous, and interventions based upon the principles of applied behavior analysis were incorporated in to the program. Student would have 120 minutes of one-to-one discrete trial training daily, and behavior intervention services of 30 minutes per month on a consultation basis. The teacher was trained in applied behavior analysis, other behavioral interventions, and in teaching students with autism. The evidence was overwhelming that the IEP team at these meetings considered the use of positive behavioral interventions and supports, and other strategies, to address Student's behavior in compliance with the California Education Code and the Code of Federal Regulations. At these IEP meetings, Parents and their attorney did not criticize the behavioral interventions agreed to by the IEP team. Rather, they criticized the offer of placement primarily because it was too far away. After the IEP meeting, Parents specifically advised District that they agreed with the implementation of the behavior support plan and the behavior goals.

32. Student did not meet her burden of demonstrating that the behavior services in the December 30, 2014 IEP and amendments did not offer Student a FAPE. Student offered

the testimony and report of Dr. Gilbertson and Dr. Hayden to support her contention that the Stockdale program was not appropriate for her, and that Student required a highly restrictive program of 25 hours per week of intensive behavioral services. Dr. Hayden also criticized the functional behavioral assessment performed by Multilevel Services, the behavior support plan attached to it, and the behavior support plan included in the IEP. For the reasons stated in the Factual Findings, neither of those witnesses' testimony or reports was persuasive. The evidence demonstrated that the behavior interventions and services included in Student's December 30, 2014 IEP and amendments were reasonably calculated to provide Student with some educational benefit.

*Student's Issue 1B(2): Appropriate Assistive Technology Services*

33. Student contends that she should have had an iPad or other assistive technology to assist her in communicating. District contends that Student did not require any assistive technology for communication.

34. An IEP team must consider whether a child needs assistive technology devices and services for the child's education. (20 U.S.C. § 1414(3)(B)(v), 34 C.F.R. § 300.324(a)(2)(5); Ed. Code, § 56341.1, subd. (b)(5); Cal. Code Regs, tit. 5, §3051.19, subd. (a).)

35. Student did not meet her burden of proof on this issue. Student's iPad was useful to her in her home environment for communication, and Mother conveyed this to Student's teacher, Ms. Stilson. When Student was in kindergarten, during the 2012-2013 school year, Ms. Stilson, agreed to use the iPad in class. However, Ms. Stilson discovered that the iPad was not helpful to Student in class; rather, it posed a distraction to her. Thereafter, Student did not have assistive technology in her first grade class (the 2013-2014 school year) or her second grade class (the 2014-2015 school year.).

36. There was no evidence that Student required assistive technology for communication, including the use of an iPad in class, to receive a FAPE, or that any of Student's IEP teams since March 22, 2013, had information that Student needed to use an iPad or any other device to replace her spoken communication. The evidence was undisputed that Student could make her needs and wants known in kindergarten, and her speech skills began to greatly improve in December 2013/January 2014. At the time of her triennial speech and language assessment, the evidence was uncontradicted that Student used speaking and listening as her primary means of communication. Ms. Faulk, the speech and language pathologist who assessed Student in fall 2014, was qualified to assert, and asserted without contradiction, that assistive technology in the form of a communication device like the iPad, was used as a replacement for spoken communication, and that Student did not need any communication device to replace her spoken communication. As is further discussed below, Ms. Faulk's assessment of Student was appropriate, which enhanced her credibility as a witness. In contrast, Dr. Gilbertson had no particular qualifications to support his recommendation that Student required an independent evaluation in assistive technology,

nor did he demonstrate any understanding of when assistive technology for communication should be used.

*Student's Issue 1C: Appropriate Documentation of Behavior Events/Injuries*

37. Student contends that she was deprived of a FAPE because the information Parents received regarding the choking incident, her sunburn, the fall during which she injured her lip, and her accessing another child's medication, were not consistent, and that they did not receive the incident reports in a timely fashion. Further, Parents never received any information regarding the physical restraint incident that Parents believed occurred in November 2014.<sup>17</sup> Therefore, Parents allege they were restricted from participating in the development of Student's educational program. District contends that the restraint incident never occurred. District also contends that Parents were advised in a timely manner when the other events occurred and were provided with documentation of those events, such that there was no deprivation of a FAPE.

38. Student did not provide any credible evidence that Ms. Piercy or any other District staff member physically restrained Student in November 2014, as Mother reported to the County Sheriff. With respect to the choking incident, the trip and fall incident during which Student injured her lip, and the Diastat incident, Parents were promptly notified that those incidents had occurred. District also responded promptly to Parents' inquiries after Parents discovered Student's sunburn. District provided Parents written reports of these incidents shortly after they occurred. The incidents were also the subject of correspondence between Parents and the District, and were, or could have been, discussed at Student's IEP meetings.

39. Student cited no specific legal authority that a school district deprives a student of a FAPE if it does not document and report to parents in a particular manner various random injuries or accidents that befall a student while on campus. Such events occur on school campuses regardless of a student's special education status. Indeed all of the events that befell Student could have befallen any student at Student's school. Any failures to document or report such matter may be a basis for other types of legal actions. However, Student has cited no authority that, under the circumstances of this case, the sufficiency of

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<sup>17</sup> In her closing brief, Student has attempted to expand the issues in this matter, which only involved a single allegation of physical restraint, by including issues pertaining to a variety of alleged incidents of "physical restraint." These matters were not raised in the Amended Complaint, and were not included in the issues for hearing, which were developed at the PHC and discussed at the outset of the hearing. Student's attempt to expand the issues violates the ALJ's order at the end of the hearing, in which the parties were directed not to use their closing briefs to expand the issues in the case. The additional incidents of alleged physical restraint will not be discussed in this Decision. (Ed. Code, § 56502, subd. (i).)

the documentation of these incidents provides a basis for a due process complaint based upon a deprivation of a FAPE to Student.<sup>18</sup>

40. Regardless, any failures of the District to provide appropriate documentation of the choking, sunburn, trip and fall, and Diastat incidents would, at best, constitute a procedural violation. A procedural violation only constitutes a denial of FAPE if the violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or caused a deprivation of educational benefits. In this case, Student did not meet her burden of demonstrating that District impeded her right to a FAPE or caused a deprivation of educational benefits with respect to this issue. In view of the evidence that Parents participated in discussing these incidents during IEP team meetings and/or through correspondence with District, Student has not met her burden of demonstrating that District's conduct significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to Student.

*Student's Issue ID(1): Predetermination of placement*

41. Student contends that District predetermined her placement at the December 18, 2014, IEP meetings and the continued meetings of January 22, 2015 and February 3, 2015. District contends that there was no predetermination, and that Parents had a complete opportunity to discuss placement and their concerns at the time of the IEP meeting.

42. In determining the educational placement of a special education student, the IEP team must consider placements along the continuum of alternative placements. (34 C.F.R. §§ 300.114-300.118; Ed. Code, § 56342.) Each special education local plan area shall ensure that a continuum of program options is available for special education students. The continuum of program options shall include all, or any combination, of the following, in descending order of restrictiveness: (a) regular education programs; (b) a resource specialist program; (c) related services; (d) special day classes; (e) nonpublic, nonsectarian school services; (f) state special schools; (g) instruction in nonclassroom settings; (h) itinerant instruction; (i) instruction using telecommunication, and instruction in the home, in hospitals, and in other institutions. (34 C.F.R. § 300.115; Ed. Code §§ 56360, 56361.)

43. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances in which placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F. 2d 840, 857-859.) (*Deal*). To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range*,

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<sup>18</sup> In this regard, the issue as framed at the PHC and discussed at hearing is not that the incident reports were educational records, and Student did not receive copies of them. Rather, Student's issue is that the reports and information that District provided about these incidents were insufficient or incomplete.

*supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns were considered by the IEP team has participated in the IEP process in a meaningful way].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.)

44. However, an IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp. 2d 127, 139 [IDEA did not provide for an "education . . . designed according to the parent's desires."].) Furthermore, the law does not require that a school district place a child at her neighborhood school if there is no program available there to meet her needs. (*See, e.g. McLaughlin v. Holt Public Sch. Bd. of Educ.* (6th Cir.2003) 320 F.3d 663, 672 [least restrictive requirement provisions and regulations do not mandate placement in neighborhood school]; *Hudson v. Bloomfield Hills Public Sch.* (6th Cir.1997) 108 F.3d 112 [IDEA does not require placement in neighborhood school]; *Urban v. Jefferson Cnty. Sch. Dist.* (10th Cir.1996) 89 F.3d 720, 727 [IDEA does not give student a right to placement at a neighborhood school]; *Wilson v. Marana Unified Sch. Dist. No. 6 of Pima Cnty.* (9th Cir.1984) 735 F.2d 1178 [school district may assign the child to a school 30 minutes away because the teacher certified in the child's disability was assigned there, rather than move the service to the neighborhood school].) Rather, the relevant question in considering whether there has been predetermination is whether the school district came to the IEP meeting with an open mind. (*Deal, supra*, 392 F.3rd at 858; *Doyle v. Arlington County School Bd.* (1982) 806 F.Supp. 1253, 1262.)

45. Student did not demonstrate that District predetermined placement. There was no evidence that any of the IEP team members had been instructed as to what their views should be on placement prior to the IEP meeting. Indeed, even Mr. Thompson, who recommended the Stockdale placement at the January 2015 IEP team meeting, had not decided upon which placement he would recommend for Student until he appeared at the December 2014 and January 2015 IEP team meetings, heard the results of the assessments, the comments of the team members regarding Student's needs and present levels, and ascertained the goals and the behavior support plan that the team developed. The January 2015 meeting included a discussion regarding the continuum of placements available in the District, including a general education placement with supports, and a special day class, and the continuum of placements available in a County program. The February 2015 IEP meeting was devoted almost entirely to a discussion about the proposed placement, and again, the continuum of placements in the District and in a County program was discussed. The evidence also demonstrated that all parties, including Parents and their attorney, had the opportunity to express their concerns and ask questions during each session of these three IEP team meetings. Indeed, at the February 2015 IEP meeting, each team member's opinion as to placement was solicited. District attempted to address Parents' concerns regarding

transportation by inviting the transportation supervisor to the February 2015 IEP meeting, and by modifying the transportation offer to include individualized transportation with a bus driver and an aide who were trained with respect to children with special needs.

46. Parents did not feel as though the District sufficiently discussed the supports and services that could be put in place so that Student could be placed in a general education classroom, and whether that would provide Student more structure and role models. Parents were free to provide their input on that issue at the IEP team meeting. The evidence demonstrated that District did not believe that it had sufficient resources to serve Student, based upon the information presented and discussions that occurred at the December, January, and February sessions of the triennial IEP team meeting. District's resources were described and discussed at the January 2015 and February 2015 sessions of the IEP team meeting, including a general education placement with additional supports and services. There was no evidence that, as of the time of the triennial IEP team meeting, District had any information that a general education classroom with supports would be appropriate for Student, even with the implementation of the new behavior support plan, or that District had any other resources to meet Student's needs. It does not constitute predetermination when District does not discuss developing a program for Student from the ground up in a general education classroom which the educators on the IEP team did not consider appropriate, with supports and services that District did not have, when County had a program that District reasonably believed provided a FAPE to Student. The fact that District ultimately, after three talk-filled IEP team meetings, offered a placement that Parents did not want, does not mean that District predetermined Student's placement.

47. Student contends that the fact that the documentation of this IEP states that the County Schools Superintendent would provide services indicates that this information was inserted into the IEP document before placement was offered, and thus constitutes proof of predetermination. Student presented no evidence as to how the IEP document was prepared, or when the subject information was inserted into the document.

48. Parents and their counsel meaningfully participated in all three sessions of the triennial IEP meeting. They asked questions, and expressed their concerns, and the IEP was modified in response to their questions and concerns. District did not present Parents with an independently developed IEP on a "take it or leave it" basis. The placement decision in the December 18, 2014 IEP was not predetermined. District did not deprive Student of a FAPE on this ground.

*Student's Issue 1D(2): Failing to Consider Placement in the Least Restrictive Environment*

49. Student contends that District's failure to offer a placement in the District constituted a failure to consider a placement in the least restrictive environment. District contends that the Stockdale placement constituted a FAPE in the least restrictive environment.

50. In determining the educational placement of a child with a disability, the child's placement should conform to the IEP and the child should be placed in the least restrictive environment. (34 C.F.R. §300.116(a),(b).) The child should be educated in the school the child would attend if the child were not disabled, unless the IEP otherwise requires. (34 C.F.R. §300.116(c).) In selecting the least restrictive environment, the IEP team should consider any potential harmful effect on the child or on the quality of services that the child needs. (34 C.F.R. §300.116(d).) A child should not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general educational curriculum. (34 C.F.R. §300.116(e).)

51. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56000, subd. (b).) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56040.1.) Nevertheless, as was stated in Legal Conclusion 44, the law does not require that a school district place a child at her neighborhood school if there is no program available there to meet her needs.

52. To measure whether a placement is in the least restrictive environment, four factors must be considered: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom. (*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403.) (*Rachel H.*)

53. The analysis of whether District failed to consider placement in the least restrictive environment so as to deprive Student of a FAPE involves the consideration of several sub-issues. The first sub-issue is whether the Stockdale placement, separate from the transportation issue, conforms to Student's IEP. Student failed to demonstrate that the proposed placement at Stockdale did not conform to Student's IEP. First, Student's experts, Dr. Gilbertson and Dr. Hayden, had incorrect and insufficient information regarding the Stockdale program, such that their negative opinions of the Stockdale program lacked foundation. Second, with the exception of Mother,<sup>19</sup> all witnesses who testified regarding

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<sup>19</sup> Mother's opposition to Student's placement in a categorical or homogeneous classroom, as expressed at the various sessions of the December 18, 2014 IEP team meeting and thereafter, is noteworthy in that both of the experts Parents called to testify at hearing

Student's placement, including Dr. Gilbertson and Dr. Hayden, agreed that Student required a small, homogenous, structured classroom. Some of these witnesses, including Ms. Faulk and Dr. Gilbertson, testified that Student also required a classroom with a language-rich environment, and others, including Dr. Gilbertson, Dr. Hayden, and Mr. Tickle, and Mr. Thompson, testified that Student required a classroom with many behavioral supports. Dr. Gilbertson and Dr. Hayden believed that Student should have the opportunity for mainstreaming, and Dr. Gilbertson also believed that Student's classroom should emphasize the development of academic, motor skills, and social interactions. The proposed Stockdale placement, which had an academic core curriculum, had all of these features, and more, including a variety of instructional modalities, technological support, a teacher who was specially trained to teach students with autism, and program oversight by a specialist who also had training in teaching students with autism. The Stockdale program comported with Student's needs, goals, and services, all as determined by the IEP team.

54. The second sub-issue in the analysis of whether District failed to consider placement in the least restrictive environment so as to deprive Student of a FAPE concerns the lengthy time that Student would have to travel to and from the Stockdale placement. To make the trip in the shortest time possible, the IEP provided that Student would be transported in a van with just herself, an aide, and a driver. Under these conditions, District estimated that the trip would take 80 minutes each way. Student was concerned that the length of the bus ride was unreasonable, that the trip was unsafe, and that the long bus ride would prevent her from having free time and from receiving her home-based applied behavior analysis provided by the Regional Center.

55. Student's position is unpersuasive. First, Student cites to no California statute that defines the maximum amount of permissible travel time on a school bus to and from school. The IDEA does not contain any provision addressing the appropriate length of bus rides for students with special needs. Furthermore, the IDEA does not preclude busing children to special education programs of a school district or special education local plan area beyond the local school district, since multi-district cooperation in the delivery of special education related services is encouraged, especially in rural and sparsely populated areas. (Bureau of Education for the Handicapped, *Letter to Waxler*, August 22 1978, 211 IDELR 60.) In this case, Parents live in a remote area, which is a 20 minute drive from downtown Tehachapi, a small town in the mountains which is itself in a remote area.

56. In the absence of specific provisions governing the length of a special education student's bus rides, the cases reflect that the determination as to whether a particular special needs child's travel time on a school bus is so lengthy as to deprive the child of a FAPE in the least restrictive environment is based upon the Student's individual needs. For example, in *Covington Community School Corp.* (SEA Ind. 1991) 18 IDELR 180, a bus trip of one hour was considered too long for the student because of her individualized needs, not because the ride was considered too long for every student. In

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advocated a homogeneous classroom. This is only one example of several internal inconsistencies in Student's presentation of this case.

*Covington*, some students lived 75 miles from their school, so even a 140 minute bus ride was deemed appropriate for them. In *District of Columbia Public Schools* (SEA D.C. 2004) 108 LRP 7451, the bus ride to the student's school was two hours each way. The hearing officer found the bus ride inappropriate because the student, who was visually impaired, was confined to a wheelchair and could not tolerate being in the chair on a bus for two hours.

57. Here, consideration of Student's individual needs does not lead to a conclusion that an 80 minute bus ride was unreasonable so as to deprive Student of a FAPE in the least restrictive environment. First, there was no evidence of any physical, mental, emotional, or behavioral reasons why Student could not tolerate a commute of approximately 80 minutes each way to and from school. Indeed, Dr. Gilbertson reported that Student enjoyed car rides. Student was required to travel between home and the University of California at Los Angeles to receive dental care, and there was no evidence that Student was adversely impacted by such travel. Dr. Gilbertson stated that Student had sensory issues that would negatively impact her classroom performance after such a long bus ride, but he did not persuasively describe the basis for his opinion, especially when Student would be entering a classroom with a focus on behavioral and sensory supports. Dr. Gilbertson had not observed Student in any classroom. He did not explain why, if the transportation described in Student's IEP would result in harm to Student, he did not include such information in his report. Furthermore, his opinion was unknown to District at the time of the December 18, 2014 IEP, and therefore, under the "snapshot" rule described in Legal Conclusion 7, Dr. Gilbertson's opinion is not relevant to whether the District members of the IEP team made an appropriate decision regarding transportation. Significantly, Ms. Wakeen's occupational therapy assessment did not identify any sensory issues that would adversely affect Student's classroom performance after a long bus ride.

58. Second, there was no persuasive evidence that Student's commute would be unreasonably unsafe. District currently transports 11 other children in the District to schools in Bakersfield. Further, no child has ever had to stay overnight in Bakersfield because of weather conditions. Third, the evidence reflected that District adequately considered whether Student would be harmed by the bus ride. Indeed, the IEP team at the February 3, 2015 IEP meeting included the District's transportation supervisor to explain the transportation options. In response to Parents' concerns, the District offered individualized transportation so as to minimize the length of the trip.

59. Finally, there was no specific evidence that Student would be prevented from accessing her home behavioral services from the Regional Center. Those services were provided during the week from 4:00 to 6:00 p.m. and on Saturdays. District anticipated that the van would deliver Student home by 3:30 p.m., which meant that Student's travel should not interfere with those services. Moreover, Student does not receive these services as part of her IEP. Student cited no legal authority that District is obligated to ensure that Student be able to access these services. Similarly, free time is not part of Student's IEP, and District is not obligated to ensure that Student have free time. Under these circumstances, District's offer of transportation was reasonable and did not deprive Student of a FAPE in the least restrictive environment.

60. The final sub-issue in the analysis of whether District failed to consider placement in the least restrictive environment so as to deprive Student of a FAPE is whether a general education setting, with related services and supports, would be appropriate, as Parents contend.

61. In this case, after discussing the continuum of placement options in the District and in the County, District offered the Stockdale special day class. Applying the *Rachel H.* factors to this case, a general education setting would not be appropriate at this time. First, based upon Student's present levels of performance, as reflected not only by Kern County's assessments but also by Dr. Gilbertson, Student's own expert, Student could not obtain academic benefits in a general education classroom with typical peers. Student was functioning academically at approximately the mid to late first-grade level. She could not read or spell any but the shortest, most simple words. She had not mastered addition math facts to the number 10. Her cognition may be in the normal range, or approaching the normal range, but, as Dr. Gilbertson's report emphasized, Student had large deficits in processing information, in working memory, and in attention. Ms. Faulk's assessment reflected that Student's receptive vocabulary skills were at the pre-kindergarten level. There was no evidence that Student could process or understand academic information in a general education classroom with typical peers, even with the assistance of a one-to-one behavior aide.

62. Then, there are Student's significant behavioral difficulties. She was unable to attend to tasks, she eloped, and engaged in aggressive behaviors. The evidence demonstrated that in her second grade classroom, even with the assistance of a District aide and a trained behavior aide from a nonpublic agency, Student was rather isolated. She did not interact with her teacher, but rather only with her aide, and she only participated marginally in class activities. Indeed, Student was only able to participate in the triennial assessments because one or both of her aides were present to manage her behaviors. The new behavior support plan in the December 18, 2014 IEP should be of help, but there was no evidence that it would be immediately sufficiently effective such that Student would be able to manage her behaviors and be able to address her school work to obtain academic benefit in a general education classroom.

63. Student may someday obtain non-academic benefits from being with typical peers in a general education environment. They can provide social interaction and role models. However, although Student may show some interest in typical peers, her behaviors now are such that she cannot easily tolerate or cooperate with others. She behaves aggressively toward both adults and children when Student cannot have an object or activity that she desires, or when she is relegated to an object or activity that she does not prefer, or when she wants to escape. Until her behaviors are better controlled, her ability to obtain non-academic benefits from typical peers is questionable.

64. Turning to the third *Rachel H.* factor, both Student's academic weaknesses and behaviors would adversely affect the teacher and other students in a general education classroom. Student's teacher would have to spend time severely modifying her curriculum,

and would have to give Student a large amount of extra attention, to the detriment of the other children in the class. Further, Student's behaviors, as described above and which also include screaming and whining, would be disruptive to classroom order.

65. There was no evidence pertaining to the fourth *Rachel H.* element, which is the relative cost of the general education classroom with supports and services versus the Stockdale placement. However, the evidence on the other factors demonstrated that Student could only be in a general education environment if she were off by herself, with a one-to-one behavioral aide helping her to manage her behaviors with the assistance of the behavior support plan, and providing discrete trial training. This would turn the general education environment into a more restrictive environment for Student.

66. The evidence demonstrated that District considered the least restrictive environment in offering placement at Stockdale, with the related services of transportation, speech and language and a one-to-one aide. District did not deprive Student of a FAPE on this ground.

*District's Issues 2A, 2B, and 2C: Occupational Therapy, Speech and Language, and Adapted Physical Education Assessments*

#### ASSESSMENTS

67. An assessment of a student who is receiving special education and related services must occur at least once every three years unless the parent and the school district agree that such a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2); Ed. Code, § 56381, subd. (a)(2).) The same basic requirements as for an initial assessment apply to re-assessments such as the three-year (triennial) assessment. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303; Ed. Code, § 56381, subd. (e).) Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) The pupil must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the pupil has a disability or whether the pupil's educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code, § 56320, subs. (e) & (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related service needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306.)

68. The school district must provide notice to the parents of a child with a disability, in accordance with 34 Code of Federal Regulations part 300.503, which describes any evaluation procedure the agency proposes to conduct. (34 C.F.R. § 300.304.) The district must obtain informed parental consent prior to conducting an assessment or reassessment of a child with a disability. (34 C.F.R. § 300.300.) Parental consent pursuant to the IDEA requires that the parent has been fully informed of all information relevant to the evaluation, the parent understands and agrees in writing to the carrying out of the activity for

which parental consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom. (34 C.F.R. § 300.9.)

69. The general law pertaining to assessments provides that as part of a reevaluation, the IEP team and other qualified professionals must review existing evaluation data on the child, including teacher and related service providers' observations. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. §300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the school district must identify any additional information that is needed by the IEP team to determine the present level of academic achievement and related developmental needs of the student, and to decide whether modifications or additions to the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The school district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

70. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).) 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 school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), and 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; 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)(2), (3); Ed. Code, § 56320, subds. (a), (b).)

71. In conducting the assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, which may assist in determining whether the student is a child with a disability, and the content of the IEP. (20 U.S.C. § 1414(b)(2)(A)(i).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).)

72. Assessments must be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d); 34 C.F.R. § 300.304(c)(3).)

73. The assessor must prepare a written report that includes: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social

functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) the need for specialized services, materials, and equipment for pupils with low incidence disabilities. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting required after the assessment. (20 U.S.C. § 1414(b)(4)(B); Ed. Code, § 56329, subd. (a)(3).)

74. The IEP team shall meet to review an initial formal assessment, and may meet to review any subsequent formal assessment. The team shall also meet upon the request of a parent to review, develop, or revise the IEP. (Ed. Code, § 56343, subd. (a), (c).)

#### INDEPENDENT ASSESSMENTS

75. The procedural safeguards of the IDEA provide that under certain conditions a parent is entitled to obtain an independent evaluation of a child at public expense. (20 U.S.C. §1415(b)(1).) An independent evaluation is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) A parent may request an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, §56329, subd. (b).) When a parent requests an independent evaluation at public expense, the school district must, “without unnecessary delay,” either initiate a due process hearing to show that its evaluation is appropriate, or provide the independent evaluation at public expense, unless the school district demonstrates at a due process hearing that the evaluation obtained by the parent does not meet its criteria. (34 C.F.R. §300.502(b)(2); Ed. Code, § 56329, subd. (c).) The school district may inquire as to the reason why the parent disagrees with the independent evaluation, but the school district may not require the parent to provide an explanation, and may not unreasonably delay in either providing the independent evaluation at public expense or in filing its due process complaint to demonstrate the appropriateness of its assessment. (34 C.F.R. § 300.502(b)(4).)

76. Whether the length of time that has passed before a district initiates a due process hearing or provides the independent evaluation at public expense constitutes “unnecessary delay” is a question of fact, based upon the circumstances of the particular case. (*J.P. v. Ripon Unified School District* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 2009 WL 1034993) (*Ripon*). For example, in *Ripon* the court determined that the school district’s due process request filed more than two months after the request for an independent evaluation was timely, as the parties were communicating regarding the request for the independent evaluation in the interim, and did not come to an impasse on the issue until less than three weeks before the school district’s filing. In contrast, in the case of *Pajaro Valley Unified School District v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289) (*Pajaro Valley*), the school district did not file its due process complaint to defend its assessment until approximately 11 weeks after Student’s request for an independent assessment. Then, at hearing, the school district offered no explanation as to why it delayed for 11 weeks in filing its complaint, or why that delay was “necessary.” The court found that the school district’s “unexplained and unnecessary delay in filing for a due process hearing

waived its right to contest Student's request for an independent evaluation at public expense, and by itself warranted entry of judgment in favor of Student and [parent]." [Emphasis added.] As described below, District timely filed its due process request to defend its assessments.

### *Occupational Therapy Assessment*

77. District contends that its occupational therapy assessment was appropriate and that it need not provide an independent educational evaluation at District expense. Student contends that the assessment was not appropriate, because Ms. Wakeen believed Student's cognitive level was low, and because she was unable to complete parts of one assessment tool.

78. Ms. Wakeen's occupational therapy assessment conducted on behalf of District met all legal requirements for assessments. Student did not offer any testimony of any qualified witness or any other credible evidence to criticize the assessment or to support Student's contention that the assessment was inappropriate. Ms. Wakeen was qualified to conduct the assessment. She used a variety of assessment measures, including standardized tests, clinical observation of Student for an entire school day, interviews with Mother, Student's teacher, and Student's aides from Multilevel Services as well as her District aide. She assessed Student in all areas of suspected disability regarding her fine motor skills. Ms. Wakeen reviewed existing evaluation data. She prepared a thorough and appropriate report of the assessment, which explained the assessment results, described Student's observed behaviors and their relationship to her academic functioning, described Student's strengths and weaknesses, and discussed whether Student required related services in the area of occupational therapy. Parents were provided a copy of Ms. Wakeen's report prior to its presentation at the December 18, 2014 IEP team meeting. Dr. Gilbertson recommended that Student have an independent occupational therapy evaluation, because he assumed that Ms. Wakeen mistakenly believed that Student's low scores on the assessment correlated to her cognitive level, but, as Ms. Wakeen credibly explained, Student's cognitive level was but a small part of her analysis of Student's need for occupational therapy services.

### *Speech and Language Assessment*

79. District contends that its speech and language assessment was appropriate, such that Student is not entitled to an independent speech and language assessment at District expense. Student contends that the assessment was not appropriate, because Student became fatigued and could not completed one of the test instruments. Student also contended that Ms. Faulk mistakenly considered Student to be of low cognition.

80. Ms. Faulk's speech and language assessment conducted on behalf of District met all legal requirements for assessments. Student did not offer any testimony of any qualified witness or any other credible evidence to criticize the assessment or to support Student's contention that the assessment was inappropriate. Ms. Faulk was qualified to conduct the assessment. Student spoke English, and Ms. Faulk administered the assessments

in English. Her assessment instruments were appropriate to administer to Student, they were selected so as not to be discriminatory, and she administered them in accordance with the test instructions. She used assessment instruments that were valid and reliable, as is demonstrated, in part, by the fact that nobody at the IEP meeting expressed any criticisms of her report. Ms. Faulk used a variety of assessment measures, including standardized tests, language sampling, observations of Student in class and at recess, observations of communication interactions, interviews with Student's speech and language pathologist, Mother, teacher, and classroom aides. She reviewed existing evaluation data. Ms. Faulk assessed Student in all areas of suspected disability within the speech and language realm. She prepared a thorough and appropriate report of the assessment, which explained the assessment results, described Student's observed behaviors and their relationship to her academic and social functioning, described Student's strengths and weaknesses, and discussed whether Student needed special education and related services. Parents were provided with a copy of Ms. Faulk's report prior to its presentation at the December 18, 2014 IEP meeting.

#### *Adapted Physical Education Assessment*

81. District contends that its adapted physical education assessment was appropriate, such that Student is not entitled to an independent assessment at District expense. Student contends that District's adapted physical education assessment was not appropriate, because the assessment was incomplete.

82. Ms. Steele's adapted physical education assessment conducted on behalf of District met all legal requirements for assessments. Student did not offer any testimony of any qualified witness or any other credible evidence to criticize the assessment or to support Student's contention that the assessment was inappropriate. Ms. Steele was qualified to conduct the assessment. Student spoke English, and Ms. Steele administered the assessments in English. Her assessment instruments were appropriate to administer to Student, they were selected so as not to be discriminatory, and she administered them in accordance with the test instructions. She used assessment instruments that were valid and reliable, as is demonstrated, in part, by the fact that nobody at the IEP meeting expressed any criticisms of her report. She used a variety of assessment measures, both standardized and non-standardized, including observation of Student. She reviewed existing evaluation data. Ms. Steele assessed Student in all areas of suspected disability. She prepared a thorough and appropriate report of the assessment, which explained the assessment results, described Student's observed behaviors and their relationship to her academic and social functioning, described Student's strengths and weaknesses, and discussed whether Student needed related services. Parents were provided with a copy of Ms. Steele's report prior to its presentation at the December 18, 2014 IEP meeting. Dr. Gilbertson recommended that Student receive an independent adapted physical education assessment, because he did not understand why, if Student's skills were as low as reflected in the assessment, Ms. Steele did not recommend adapted physical education. As Ms. Steele credibly testified, Dr. Gilbertson had no understanding of adapted physical education.

83. Not only has District demonstrated that the subject assessments were appropriate, but District also acted in a timely fashion in pursuing its due process complaint to establish the appropriateness of these assessments. Student did not contend that there was any undue delay before District filed its Complaint. There was no evidence as to when Student specifically requested the independent evaluations in these areas. The only evidence that Student desired independent assessments in these areas was contained in Dr. Gilbertson's independent psychoeducational assessment report dated April 27, 2015. District filed its Complaint on May 22, 2015, less than a month after Dr. Gilbertson's report was completed. There was no evidence that that this brief period of time constituted undue delay. Under these circumstances, Student is not entitled to independent educational assessments at public expense.

## REMEDIES

1. Student prevailed on part of Student's Issue 1B(1). Student did not request any particular remedy with respect to this issue, and provided no specific evidence as to compensatory education with respect to any of her specific issues. However, an award of compensatory education would be appropriate as Student failed to make meaningful progress in the reduction of inappropriate behaviors due to District's failure to offer to conduct a functional analysis assessment at the time of the March 17, 2014 IEP team meeting. Such an assessment likely would have resulted in recommendations for the District to provide additional behavioral supports for Student.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (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.* pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized determination, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* ) D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1497.) The award must be fact-specific and must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

3. In this case, District should have provided more behavior support to Student during the 2013-2014 school year. The evidence demonstrated that Student's behaviors deteriorated after the choking incident in August 2013, and that District was aware of the deterioration in Student's behaviors. As was explained above, District acted reasonably in not immediately providing further behavior supports to Student, as Student's behaviors may have diminished with time, especially with the assignment of a permanent teacher in Student's classroom in October 2013. However, Student's behavior did not improve by the

time of the March 17, 2014, IEP. At that time, District should have performed a functional analysis assessment pursuant to the California Code of Regulations which were in effect at that time. Such an assessment likely would have determined that Student required additional behavior supports. Instead, District did not provide additional behavior supports until early November 2014. Student still requires behavior support to function in the classroom setting, as is demonstrated by the functional behavioral assessment conducted in fall 2014 and the behavior support plan in Student's December 30, 2014 IEP. The Stockdale placement District offered was geared toward addressing Student's behaviors. However, as a remedy for District's failure to provide Student with sufficient behavior support as described above, it is appropriate for Student to have additional behavioral assistance as she transitions into the new placement, especially because transitioning into different environments has been a recognized behavioral need for Student, and because Student has not been in school since February 2015. Consequently, District should provide Student with a transition plan. Additionally, District should provide Student with a full time one-to-one behaviorally-trained aide to assist Student throughout her school day, beginning on the first day that Student attends the Stockdale placement, and continuing for a period of 60 calendar days thereafter. At that time, an IEP meeting should be held to determine whether Student continues to require such additional one to one-assistance. This additional one-to-one assistance is not a stay put service, as it is intended to assist Student with the transition to the Stockdale classroom.

4. The December 18, 2014 IEP provides for a one-to-one aide to accompany Student on the bus ride to and from Stockdale. In place of such an aide, and as further compensatory education, District should provide a one-to-one behaviorally trained aide on the van, to assist with any behavioral issues Student might experience on the van. The aide may work with Student on her behavior goals in the IEP, but shall not be required to do so. This service shall continue throughout the 2015-2016 regular school year, and is stay put. Additionally, Student's attention deficits and transition difficulties will require that Student engage in transition activities, such as activities incorporating movement, after her bus ride. Therefore, a one-to-one behavior aide shall assist Student in transitioning to the classroom from the bus, and this service shall continue throughout the 2015-2016 school year, and shall be stay put.

## ORDER

1. Within 30 days of the date of this Decision, District shall (a) develop a transition plan to assist Student in transitioning into the classroom environment in Stockdale, and (b) convene an IEP team meeting to discuss the plan. The plan shall include, but shall not be limited to, transition activities for Student to engage in each day with a one-to-one behaviorally trained aide after the van transports her to school, to prepare Student to be ready for class after her long ride. The plan shall be developed with the assistance of a board-certified behavior analyst employed or contracted by District, Kern County Office of the Superintendent of Schools, or Kern County Special Education Local Plan Area.

2. District shall provide Student a one-to-one behaviorally trained aide to accompany her on the round-trip journey to and from Stockdale, until Student's next annual IEP. This aide shall replace the aide service on the van that is provided for in Student's December 18, 2014, IEP. The aide shall assist Student with any behavioral issues Student might experience on the van. The aide may work with Student on her behavior goals in the December 18, 2014 IEP, but shall not be required to do so.

3. The services of the behavioral aide on the van and the behavioral aide to assist Student in transitioning from the van to the classroom shall continue until Student's next annual IEP. These services shall be stay put.

4. District shall provide Student with a full-time one-to-one behaviorally trained aide to assist Student throughout her school day, beginning of the first day that Student attends the Stockdale placement, and continuing for a period of 60 calendar days, not counting days in which school is not session for in excess of seven consecutive calendar days. This service shall not be stay put.

5. Before they provide services to Student, all one-to-one behaviorally trained aides ordered herein shall receive training as to Student's behavioral needs by a board-certified behavior analyst as referred to in section 1 of this Order.

6. Within five school days after the expiration of the 60 day period described in section 4 of this Order, District shall convene an IEP to determine whether Student continues to require such additional one-to-one assistance.

7. Unless otherwise stated in this Order, all services ordered herein are in addition to the services included in Student's December 18, 2014 IEP.

8. All other relief sought by Student is denied.

9. District's assessments in the areas of speech and language, occupational therapy, and adapted physical education are appropriate so that District is not obligated to fund any independent evaluations in these areas.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on that portion of Student's Issue 1B(1) that pertained to the March 17, 2014 IEP and its May 30, 2014 addendum. District prevailed on Student's Issues 1A(1); 1A(2); 1A(3); 1B(1), except for that portion that pertained to the March 17, 2014 IEP and its May 30, 2014 addendum; 1B(2), 1C in its entirety; 1D(1); 1D (2); and District's Issues 2A, 2B, and 2C.

## RIGHT TO APPEAL

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

DATED: October 2, 2015

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ELSA H. JONES  
Administrative Law Judge  
Office of Administrative Hearings