

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015080091

DECISION

Student, by and through her Parents, filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on July 30, 2015, naming the Los Angeles Unified School District. On September 3, 2015, the parties jointly requested a continuance. On September 4, 2015, a continuance was granted.

Administrative Law Judge Ted Mann heard this matter in Van Nuys, California, on December 8, 9, 10, and 14, 2015.

Attorneys Devon Pollard and Seshah Wolde-Tsadik appeared on behalf of Student. Mother attended portions of the hearing. Student did not attend the hearing. Attorney Mary Kellogg represented District. Specialist Timothy Taylor attended on behalf of District.

On the last day of hearing, a continuance was granted for the parties to file written closing arguments and the record remained open until January 11, 2016. Upon timely receipt of written closing arguments, the record was closed and the matter submitted for decision on January 11, 2016.

ISSUES¹

1. Did District deny Student a free appropriate public education, within the statutory period, by failing to assess Student in the areas of:
 - (a) speech and language;
 - (b) educationally related mental health;
 - (c) psycho-educational functioning; and
 - (d) functional analysis and functional behavior?

2. Did District deny Student a FAPE, within the statutory period, by failing to provide an adequately supervised, qualified paraprofessional, to meet Student's needs:
 - (a) in the area of toileting; and
 - (b) in the area of instructional support?

3. Did District deny Student a FAPE, within the statutory period, by failing to provide behavior intervention services and supervision in conformance with Student's individualized education program?

4. Did District deny Student a FAPE, within the statutory period, by failing to provide appropriate assistive technology for Student?

Student's proposed resolutions include: District funded independent educational evaluations; placement in a non-public school; District funding for highly qualified female paraprofessional(s) from a non-public agency for one to one support in the areas of toileting, behavior and instruction; speech and language; behavior and occupational therapy services; compensatory education consisting of one to one intensive educational therapy; speech and language services; occupational therapy; behavior therapy; and assistive technology, including augmentative and alternative communication devices.

SUMMARY OF DECISION

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Student waived other issues raised in the complaint on the record at the beginning of the due process hearing.

Student did not meet her burden of proof in her claims that District had denied her a free appropriate public education by failing to timely assess Student in speech and language, educationally related mental health and psycho-educational functioning, or functional analysis and functional behavior. District did not commit a procedural FAPE violation in its reassessment of Student following her Mother's request. District did not need to assess Student in these areas of functioning to allow the individualized educational program team to develop an adequate program for Student. Rather, the nature and extent of Student's disability was well understood by the individualized education program team.

Student also failed to meet her burden of proof that District denied her a FAPE by failing to provide an adequately supervised, qualified paraprofessional, to meet Student's needs in both toileting and instructional support. The paraprofessionals provided by District were both adequately qualified and supervised.

Student further failed to meet her burden of proof that District denied her a FAPE by failing to provide behavior intervention services and supervision in conformance with Student's individualized education program.

Lastly, Student failed to meet her burden of proof that District denied her a FAPE by failing to provide appropriate assistive technology to her during the statutory period. Student made meaningful progress with the services provided by District, and Student's displeasure with the amount of such services or District's methodology is not a basis to find a FAPE denial.

FACTUAL FINDINGS

Jurisdiction

1. At the time of the hearing, Student was a fourteen-year-old girl who resided within District's boundaries at all relevant times, and was eligible for special education under the primary category of Intellectual Disability.

Background

2. Student was first diagnosed with Rubenstein-Taybi Syndrome at the age of two- weeks-old and she has consistently shown developmental delays. She has significant challenges in attention, and in both short and long term memory, affecting her ability to learn, and resulting in slow and uneven progress educationally.

3. Student originally entered District's special education program in December 2004 at the time of her third birthday with eligibility under Multiple Disabilities - Orthopedic. In 2008, Student's eligibility was changed to Mental Retardation.

4. Student received speech and language services through the 2009-2010 school year. Student was exited from speech and language services in 2010 following a June 10, 2010 psycho-educational report, and a speech and language reassessment report dated June 4, 2010.

5. An IEP meeting was conducted on May 18, 2012 with a resulting IEP for Student. Student was then 10 years old and in the fourth grade. The only assessment done in preparation for the May 18, 2012 annual IEP was an adapted physical education assessment. Parent consented to the May 18, 2012 IEP, and agreed that no reassessment was needed of Student at that time.

6. Pursuant to the May 18, 2012 IEP, Student's placement was in a special education class at Mar Vista Elementary School, with adapted physical education and occupational therapy services. Student had eight goals, including Behavioral Support, Functional Academics-Reading, Functional Academics-Reading Comprehension, Functional Academics-Math, Written Language, Bathroom Skills, Pre-Vocational Skill, and Object Control. Student had a Behavior Support Plan focusing on her behavior of leaving her seat without permission.

7. A Functional Behavior Assessment was completed of Student by special education teacher, Eva Silvera-Sheftel, dated February 15, 2013, in preparation for Student's triennial IEP. It reported that Student had behavioral issues, inattention, elopement and toileting issues.

8. District conducted an Adapted Physical Education assessment of Student and had a report prepared dated March 29, 2013. District specialist Java DeLaura conducted an Occupational Therapy assessment of Student and prepared a report dated April 15, 2013.

May 2, 2013 Triennial IEP

9. The triennial IEP meeting was conducted on May 2, 2013 with a resulting IEP for Student. At this time her eligibility was revised to Intellectual Disability.

10. Pursuant to the May 2, 2013 IEP, Student's placement continued in the special education class for the balance of the 2012-2013 fifth grade school year at Mar Vista Elementary, with adapted physical education and occupational therapy services. District offered placement at Palms Middle School for the upcoming 2013-14 school year. Student had nine goals, including Behavioral Support, Functional Academics-Reading, Functional Academics-Reading Comprehension, Functional Academics-Math, Written Language, Self-Help Skills, Pre-Vocational Education, Object Control, and Fine Motor. Student had a Behavior Support Plan focusing on her off-task inattentive behavior and her lack of toileting training. The BSP offered adult support and supervision in the bathroom on average 120 minutes per day and a behavior goal that stated that she would follow teacher-directed seated activities, to address her off-task and impulsive behavior. There was no one-to-one aide

offered. The BSP toileting and attention goals were to be implemented by the classroom teacher and classroom staff.

11. Parent consented to the assessments that had been done, eligibility, and services. She registered her concerns about Student's toileting needs and safety. Parent once again consented to waiving assessments of Student for the IEP.

2013-2014 School Year at Palms Middle School

12. Pursuant to the triennial, Student entered Palms Middle School for the sixth grade 2013-14 school year. When Student arrived at Palms, District quickly realized that Student had behaviors that required additional support over and above the BSP in the triennial. Parent requested a behavioral aide for Student when Student started at Palms Middle School.

13. Trina March has been a special education classroom teacher since 2001. She has a mild-moderate special education credential. She also has a master's degree in special education from National University that she earned in 2005. Ms. March was Student's classroom teacher since sixth grade. As one of Student's classroom teachers, she saw Student daily since fall 2013. She was Student's case carrier for the 2013-2014 and 2014-2015 school years. She was very familiar with Student, her needs and capabilities.

14. When the 2013-2014 school year began in fall 2013, Ms. March believed that Student's observed behaviors and lack of safety awareness required one-to-one supervision of her, although no Behavioral aide was part of Student's then current IEP dated May 2, 2013. She arranged for Student to have one-to-one supervision in the classroom.

15. District convened an IEP meeting on October 1, 2013 to address these issues.

16. At the October 1, 2013, IEP meeting, District offered "behavior intervention implementation" services and "behavior intervention consultation", meaning a full-time one-to-one behavioral aide along with three hours per month supervision by "District-assigned qualified providers." The IEP also offered bus transportation with adult support and supervision. Parent consented. The BSP was revised to address Student's attentional and elopement issues, in that she was constantly out of her seat and eloping out of the classroom. The BSP offered: (1) a behavior chart; (2) positive reinforcements; and (3) preventative strategies. The BSP was to be implemented by the aide, teacher and staff.

17. Ms. March was very familiar with Student's toileting needs and history since the beginning of the sixth grade. She was the primary person responsible for Student's toileting assistance in fall 2013. Initially, Student had regular toileting accidents in the classroom.

18. Curley Jones-Morgan has worked for District for approximately 17 years as a special education classroom assistant. She attended high school at Dorsey High School until

approximately 1971, and eventually earned her GED while working with District. She also earned an associate's degree from Compton College.

19. Ms. Jones-Morgan was assigned as Student's one-to-one aide pursuant to the October 1, 2013 IEP. Thereafter, she worked with Student in the classroom during the first semester of the 2013-2014 school year. She also assisted Student on the school bus from the beginning of the 2013-2014 school year. She was supervised in the classroom by special education teacher Ms. March.

20. Ms. Jones-Morgan provided both classroom support and toileting support during her time in Student's classroom as a special education classroom assistant.

21. Ms. Jones-Morgan assisted Student with her toileting on a regular, five times daily schedule. Although she had occasional accidents, Student generally recognized when she needed to use the restroom. Student could use the toilet on her own. Student was also able to take off and change her pull-ups on her own.

22. Ms. March supervised Ms. Jones-Morgan in these duties and reviewed Student's then current IEP, dated October 1, 2013 with Ms. Jones-Morgan, including a careful review of Student's toileting needs. Ms. Jones-Morgan provided the assistance called for in the October 1, 2013 IEP, including the behavioral aide service and both academic and toileting support.

23. Although Student was assigned a one-to-one aide, that did not mean that the aide was by Student's side every moment of the school day. When working in small groups, or when Student was on-task, the aide could fade somewhat or give Student some autonomy. According to Ms. March, a one-to-one aide can work individually with Student, or in a group setting, or shadowing only, depending on the needs of Student and classroom dynamics. All are appropriate versions of one-to-one assistance. The one-to-one aide was always focused on Student and ready to assist her as necessary without creating complete dependence in the Student. During small group, the one-to-one aide might sit with Student, or if Student was independent enough, then might help another student. If another provider was working with Student, the aide might lead the group or assist in other ways. During whole group instruction, the one-to-one aide would typically be sitting with Student or monitoring Student from the back of the room. If the Student was having difficulties focusing, staying on task, or with other behaviors, the aide would refocus or prompt Student either verbally or gesturally.

24. Ms. Jones-Morgan transitioned out of Student's classroom in December 2013. After Ms. Jones-Morgan left, Mr. Jabari Washington became Student's behavioral aide. There was a gap in having a specific behavioral aide assigned to Student from January 29, 2014 to February 20, 2014 when Mr. Washington took over one-to-one behavioral aide duties for Student. The classroom teachers and other classroom adults provided behavioral support for Student during this period, as well as toileting and academic support.

25. Ms. March believed that Student did not suffer any denial of FAPE as a result of the three-week period without an assigned behavioral aide.

26. Jabari Washington has been employed by District for 16 years as a teacher's assistant. He has also served as the Palms Middle School basketball coach for the last seven years. He graduated from Los Angeles High School in 1996. He attended college at West Los Angeles College, Los Angeles Trade Tech College, and California State University at Dominguez Hills, but did not graduate. Mr. Washington was a special education classroom assistant for the first 12 years of his employment by District. Beginning in 2011, he began providing one-to-one services to special education students. Mr. Washington received training through the District as a behavioral aide and a classroom aide. He received a one-day training on behavior and restraint, including the use of positive behavioral support. He has been providing one-to-one services to Student since the spring semester in 2014, i.e. during the second half of the 2013-14 school year.

27. Mr. Washington attended classroom team meetings with other staff in order to discuss strategies for addressing Student's behavioral and academic goals approximately six times per year. The lead classroom teacher supervised his work with Student, and provided him with instruction and feedback. He discussed Student regularly with Student's special education classroom teachers. He talked with teachers when Student was having behavioral issues, and he discussed both distractibility and elopement with Student's teachers.

28. As a behavioral aide to Student, he was concerned with her safety, academics, and transportation. He did not assist with Student's toileting needs. He received supervision from both Ms. Michaels and the classroom teachers' team for Student's classroom.

29. Mr. Washington's primary safety concern with Student was elopement. She made consistent progress while he worked with her. He estimated that Student eloped two to three times per week during the spring 2014 semester.

30. Mr. Washington provided academic support to Student in the classroom. He read with Student, he helped her modify words and trace words, and he helped her with math, all in furtherance of her IEP goals. She preferred reading to math and her preference mirrored her motivation and success with each subject. Student had significant difficulty learning new skills and needed a lot of repetition to acquire a new skill. Student also had difficulty with retention of information, so that a lot of reinforcement was needed to help her learn new skills.

31. Mr. Washington provided Student with assistance with her bus transportation. He accompanied her either two or three days each week. Student frequently cursed on the bus and sometimes spit as well. The behavior was much more prevalent on the bus than in other parts of the school day. He was able to calm and redirect her away from the behavior. He typically sat beside her on the bus, but not always.

32. Mr. Washington had a good understanding of Student's unique needs. He worked well with Student, in part, because of her familiarity and level of comfort with him. He was both qualified to provide the behavioral aide and classroom aide services and able to assist Student in making progress on her IEP goals and behavior support plan. Student has received an educational benefit from his provision of services to Student.

33. Student's annual IEP occurred on May 2, 2014, and continued the same placement and services except that it discontinued the behavior supervision. At this time, Student could self-initiate bathroom breaks to some degree; was able to orally communicate the sequence of steps in her bathroom sequence; and follow those steps with increasing accuracy; and no longer needed to wear pull-up diapers at school. She was adjusting well to a regular toileting schedule.

34. At that time her behavior was still problematic, but improving. She was staying on task longer and more consistently, and was able to attend longer, even to non-preferred tasks. Student's elopement behaviors had improved. The behavior support plan was revised to focus on Student's attentional issues, keeping her sitting in her seat for longer periods of time and attending to work tasks, rather than to her elopement issues which had significantly improved.

September 2014 Assistive Technology Assessment

35. Vincent Licossi has been an assistive technology assessor for District since 2001. He was also a special education teacher for five years with District. He obtained his special education clear credential in 2000. He conducted an assistive technology assessment of Student as documented in his report, dated September 5, 2014.

36. In conducting his assessment, Mr. Licossi did the following: teacher interview; attempted a parent interview; interview of Student's occupational therapist, adapted physical education provider, and classroom assistant, respectively; review of school records; review of Student work samples; and classroom observations of Student. The assessment was conducted over three days which is not uncommon for assistive technology assessments. As part of his assessment, Mr. Licossi observed Student interacting with several forms of assistive technology including Maxi-Aids, onscreen keyboard, and Write: Outloud. He also considered whether Pix Writer could be used with Student.

37. Maxi-Aids are adhesive labels for computer keys that provide larger letters (than a regular keyboard) against a high contrast background. An EasySee keyboard is similar with the large, high-contrast letters integrated into a standard keyboard. Mr. Licossi observed Student trying to use the Maxi-Aids, and thought that they might be of assistance to her. She had some difficulty finding the letters, but the technology didn't seem to be outside her potential. His opinion was that using an ABC only keyboard would not be good for Student as it was too restrictive, and would not allow Student to learn the QWERTY keyboard.

38. The onscreen keyboard was a keyboard on a computer screen accessed by a trackpad so as to eliminate the need to type letters to use the computer. An onscreen keyboard places the keyboard on the same plane as the word processing document Student is using. Student had difficulty using the system and it did not seem to help her in Mr. Licossi's opinion.

39. The Write: Outloud system was a text-to-speech system that provided auditory support for Student's writing by saying the letters, words, and sentences as Student entered them. The classroom had a PC computer with the system installed at the time of his observations for the assessment report. The auditory component seemed to be helpful to Student, and the computer screen allowed Student to make legible and consistently spaced letters. However, her ability to locate keys was a restraint on her ability to use the system.

40. The PixWriter was a system that paired a picture and a word with audio feedback. Mr. Licossi did not attempt to use this system with Student as her writing expectations were not that extensive. He also felt that the pop-up pictures could be a distraction to her, and that the system was not age appropriate and could be counter-productive in building dependence on the system.

41. Mr. Licossi consulted with the occupational therapist on whether Student could use technology such as a keyboard or trackpad, and the occupational therapist felt that she had the fine motor skills to support using the technology. Mr. Licossi's observations of Student supported this conclusion generally. He felt that the special education teacher should have discretion to utilize the assistive technology as she felt was needed to advance Student's skills.

September 10, 2014 IEP Meeting

42. On September 10, 2014, District convened an amendment IEP meeting. At the meeting, Mr. Licossi's assistive technology analysis and report were addressed in the context of potential assistive technology needs of Student. Student's present level of performance was also summarized regarding Student's writing skills and potential use of assistive technology supports to assist her with her writing goals.

43. Mr. Licossi presented his report to the IEP team at the IEP meeting of September 10, 2014. The IEP team largely adopted his assistive technology recommendations, and he believed that the assistive technology supports written into the IEP were appropriate for Student. In the resulting IEP offer, the IEP team added assistive technology equipment to Student's supports in the IEP FAPE, Part 1 section. The assistive technology equipment included text-to-speech word processing software on the classroom computer, and high contrast, bold font letter stickers to adapt the existing classroom keyboard.

44. The assistive technology recommendations were incorporated into an IEP goal, annual goal six, to allow Student the option to use assistive technology to develop her

writing skills. Mr. Licossi left the practice time amount on the assistive technology to the classroom teacher's discretion. He believed that the assistive technology was there to help support Student, but not detract from the teacher's program and curriculum.

December 2014 Photograph

45. In or around December 2014, Mr. Washington took Student's picture with his cell phone in order to document a medical condition that day at school for her mother. The picture was taken in the special education classroom around third period and was sent by text message to Student's mother. The picture showed Student with mucus on her face and was meant to convey how ill Student was at school in order to get mother's attention. Prior to sending the picture Mr. Washington, the school nurse, and the assistant principal had all attempted to contact Student's mother by phone, but had been unable to do so. Mother received the photo by text. She was upset by Mr. Washington taking a photo of her daughter in that condition, and did not understand that her daughter was ill at school. She was also concerned about Mr. Washington because he was a male, not a female. She was also concerned that her daughter was not getting enough help overall, and had not made enough progress.

March 2015 Incident

46. In approximately March 2015, Mother and Mr. Washington had a dispute over Student's jacket that had been misplaced or lost at school. Student's mother drove Student to school the following morning and, according to Mr. Washington, proceeded to yell at him about the jacket. Mother does not recall yelling during the incident. Mr. Washington felt disrespected, and that Student's mother's conduct threatened to undermine his authority with his other students. He reported the incident to both the principal and assistant principal. The incident was documented by District in a letter to Parent dated April 1, 2015.

May 5, 2015 IEP

47. On May 5, 2015, District convened Student's annual IEP. Student's present levels and goals were revised but her placement and services remained unchanged. Student's toileting present level indicated that she was better able to follow the sequence of her toileting with accuracy, was self-initiating bathroom breaks three-to-five times per week, an increase from the one-to-two times per week in the September 10, 2014 IEP. She continued to need a moderate level of adult support, but had made significant progress towards meeting her toileting goal. The BSP was revised to focus even more on Student's attention and off-task behavior, and less on elopement. Student's elopement had improved such that the focus was on having her attend to tasks in her chair. The IEP contained a note of a discussion that "BII will remain on the bus."

Student's Progress 2013-2014

48. Initially, Student had regular toileting accidents, but they declined over the year. A toileting log was used in fall 2013, but was later abandoned.

49. Ms. March believed that the present levels of performance of Student in the May 2, 2013 IEP were generally accurate, and adequately described Student when she entered Palms Middle School. She believed that she fully understood Student's unique needs during the 2013-2014 school year. She believed that further assessment of Student was unnecessary with accurate present levels of performance, combined with her understanding of Student's unique needs. She had no concerns about Student's mental health during the 2013-2014 school year, and did not think that Student needed an educationally related mental health assessment during that time. She understood Student's behavioral needs well during that school year, and did not believe that Student needed additional behavioral assessment during that time.

50. Student had significant cognitive delays that affected every area of her school performance. Student also had memory difficulties and attentional difficulties, both of which affected her ability to perform in school. Student made progress with her attentional difficulties during the school year. From Student's entry into Palms through the end of the 2013-2014 school year, Ms. March saw a steady, if slow improvement in Student's capabilities and performance. Her expectations were steady, if slow, improvement by Student, punctuated by ups and downs. She believed that the pace of progress during that school year was consistent with Student's disability.

51. Mr. Washington was familiar with Student's behavioral goals (Goals #1 and #2), pre-vocational goal (Goal #7), and the Behavioral Support Plan from Student's October 1, 2013 IEP. For the October 1, 2013 IEP, he worked on each of the goals with Student, and utilized the behavior support plan's accommodations, modifications, and supports with Student. He was also familiar with Student's behavioral goals (Goals #2 and #3), pre-vocational goal (Goal #8), and the Behavioral Support Plan from Student's May 2, 2014 IEP. For the May 2, 2014 IEP, he worked on each of the goals with Student, and utilized the behavior support plan's accommodations, modifications, and supports with Student.

52. During the 2013-2014 school year, Student did not demonstrate behaviors that were directly injurious to her or to anyone in the school community. Student's primary behaviors of concern were elopement, toileting, off-task behavior and distractibility. She did yell, curse, and spit on the bus, but there was no indication that such behaviors arose from a mental health condition. The behaviors were addressed through Student's existing goals and behavior support plan. Student demonstrated generally improving behaviors over the school year as she demonstrated significantly decreased elopement, and reduced distractibility and off-task behavior. In toileting, she evidenced significant improvements in her ability to understand her toileting and to perform her toileting tasks with increasing independence, while greatly decreasing classroom toileting accidents.

53. During the 2013-2014 school year, Student did not demonstrate a need for speech and language service to any of the educational professionals who worked with her. She had very good oral communication skills and was able to interact well with teachers, staff, and peers. Her teachers did not have any reason to believe that she had speech and language issues that prevented her from accessing her education.

54. During the 2013-2014 school year, Student's classroom teachers, the school psychologist, and the IEP team, collectively, had a thorough understanding of Student's unique needs and abilities so as to be able to create an appropriate IEP for Student. Student made slow, if uneven, progress towards acquiring new skills and working towards meeting her IEP goals. Her progress was hindered by the nature of her disability and its negative effects on her attention, learning, and memory. Her slow progress reflected that she had significant difficulty learning and retaining new skills because of her disability.

Student's Progress 2014-2015

55. During the 2014-2015 school year, Student's elopement issues improved significantly. Student did not demonstrate behaviors that were directly injurious to her or to anyone in the school community. Student's primary behaviors of concern were toileting, off-task or out-of-seat behavior and distractibility. She did yell, curse, and spit on the bus, but there was no indication that such behaviors arose from a mental health condition. The behaviors were addressed through Student's existing goals and behavior support plan. Student demonstrated generally improving behaviors over the school year as she demonstrated significantly decreased off-task or out-of-seat behaviors, and distractibility.

56. Student's toileting and self-help skill improved over that same time frame, such that toileting accidents by Student became rare, and Student became largely toilet-trained. An adult classroom aide provided toileting assistance and training to Student. As a female, Student has only had a female aide provide her with toileting assistance. In toileting, she evidenced significant improvements in her ability to understand her toileting and to perform her toileting tasks with increasing independence, while largely eliminating classroom toileting accidents. By the end of the 2014-2015 school year, Student was able at times to ask for or initiate bathroom breaks, although she continued to receive a female escort to the bathroom.

57. During the 2014-2015 school year, Student did not demonstrate a need for speech and language service to any of the educational professionals who worked with her. She had very good oral communication skills and could interact well with teachers, staff, and peers. Oral communication was one of her strengths. Her teachers did not have any reason to believe that she had speech and language issues that prevented her from accessing her education.

58. During the 2014-2015 school year, Student's classroom teachers, the school psychologist, and the IEP team, collectively, had a thorough understanding of Student's unique needs and abilities so as to be able to create an appropriate IEP for Student. Student

made slow, if uneven, progress towards acquiring new skills and working towards meeting her IEP goals. Her progress was hindered by the nature of her disability and its negative effects on her attention, learning, and memory. Her slow progress reflected that she had significant difficulty learning and retaining new skills because of her disability.

Parent's Request for Assessments

59. On June 4, 2015, the last day of the 2014-15 school year, Mother requested functional behavior, occupational therapy, assistive technology, and speech and language reassessments in writing. District sent an assessment plan to Mother on August 21, 2015, a few days after the beginning of the 2015-16 school year.

Fall 2015 Assessments

60. District performed speech and language, psycho-educational, academic, functional behavior, adaptive physical education, and occupational therapy assessments in the fall of 2015. An IEP meeting to review the assessments occurred October 29, 2015.

SPEECH AND LANGUAGE ASSESSMENT

61. Lauren Schuchman was a speech/language pathologist who has worked for District since her graduation from a master's degree program in speech pathology from CSUN in 2012. She had a speech language pathology services credential, and a Certificate of Clinical Competence from the American Speech Language Hearing Association. She authored an assessment report in speech and language of Student dated October 12, 2015. Student had not received speech and language services for the approximately five years from 2010 through the time of Ms. Schuchman's assessment in the fall of 2015. Her report was based upon a review of Student's educational records, including prior assessments, interviews with Student's teachers, classroom observations, clinical observations, standardized assessments, and speech and language samples from Student. She specifically reviewed the prior speech and language assessment report for Student dated June 4, 2010. She conducted formal standardized assessment of Student using the Oral and Written Language Scales, Second Edition, the Expressive One-Word Picture Vocabulary Test-4, and the Linguistics Articulation Test. She collected speech samples from Student on September 30, 2015 and October 12, 2015. Student scored very low on the Language Scales and One-Word Picture testing, but she obtained an average score on the Articulation test.

62. Ms. Schuchman concluded that Student's speech and language were consistent with Student's cognitive ability, such that no speech and language services were necessary for Student. Schuchman relied on the school psychologist's report of September 24, 2015 that found that Student's cognitive function was primarily at the Preoperational – Stage 1: Preconceptional Thought (two to four years) with some emerging skills in the Preoperational – Stage 2: Intuitive Thought (four to seven years). Such a level of performance was consistent with the testing and observations of Student's speech and language skills by

Ms. Schuchman that indicated Student used grammatical structures typical of a normally developing four-year-old.

PSYCHO-EDUCATIONAL ASSESSMENT

63. Rosemary Gelinas worked for District since 1987. She had been a school psychologist since 1995. She was familiar with Student from Student's time at Palms Middle School. She had a master's degree in counseling with a school psychologist option.

64. She was the author of District's Psycho-educational Evaluation dated September 15, 2015. She was requested to undertake a comprehensive psychoeducational evaluation of Student and on that basis she completed an evaluation and subsequent report of her findings.

65. In conducting the evaluation and preparing her report, Ms. Gelinas reviewed Student's prior educational records, including a prior psychoeducational report dated June 10, 2010. She reviewed Student's IEPs and a functional behavior assessment dated May 15, 2013. She conducted observations of Student at school in the classroom, in unstructured settings, and during the assessments. She conducted standardized testing as well as obtaining reports from Student's teachers and parent. She also reviewed results of an assessment by Student's special education teacher, Kathy Tynan, who assessed Student using the Brigance Comprehensive Inventory of Basic Skills – II.²

66. Ms. Gelinas used the following assessment tools to assess Student: Southern California Scales of Ordinal Development; Cognitive Assessment System – Second Edition; Motor-Free Visual Perception Test – Third Edition; Bender Visual-Motor Gestalt Test – Second Edition; Woodcock-Munoz Language Survey – Revised; Behavior Assessment System for Children – Second Edition, including the teacher rating scale for adolescent³; Vineland Adaptive Behavior Scales – Second Edition, Survey Interview Form and Teacher Rating Form; and Sentence Completion. The cognitive Assessment System and Motor-Free Visual assessments were tried and aborted due to Student's inability or unwillingness to respond to the assessment.

67. Ms. Gelinas was able to develop an adequate assessment of Student's cognitive functioning despite not being able to use several assessment tools. She was confident in her assessment. She found that overall Student's cognitive functioning was well below average based on the assessments she was able to complete, along with her observations of Student, and completed scale questionnaires from both Student's parent and her teachers. She placed Student in Piaget's Pre-conceptual Thought – Stage 1 (two to four

² Ms. Gelinas did not have the Brigance results at the time she wrote her report, but the later acquired results did not change her opinion of student's capabilities or performance.

³ Ms. Gelinas sent the Behavior Assessment to Student's mother, but did not receive a completed questionnaire back from her.

years) with some emerging Pre-Operative Intuitive – Stage 2 (four to seven years) cognitive skills. Student has severe cognitive delays, and learns slowly compared to her peers.

68. Ms. Gelinas found that Student had delays typical of an individual with Rubenstein-Taybi Syndrome, including significant memory problems that make it hard for Student to retain information in short or long term memory. In order to accommodate Student, significant curriculum modifications were needed, and repetition, reminders, prompting, and re-teaching were all strategies to teach Student. She expected that Student would make very slow progress in all areas due to her challenges. She also found that Student's academic performance was consistent with Student's cognitive ability.

69. Ms. Gelinas believed that the assessments she performed were sufficient to establish Student's psychoeducational strengths and weaknesses. Her report comprehensively identified all of Student's areas of need. On that basis no further psychoeducational assessment of Student was necessary. She did not see a change in Student's unique needs from 2010-2013. She also believed that there was no need for a psychoeducational assessment of Student at the triennial mark in 2013 as Student's eligibility was established and consistent and Student's strengths, weaknesses, and unique needs had not changed and were well known to the IEP team. She did not believe that Student's behaviors were such that an educationally related mental health assessment was warranted.

ACADEMIC ASSESSMENT

70. Kathy Tynan has worked for District for approximately 18 years, much of that time as a long-term substitute in both general education and special education. She returned to college in 2011 to obtain her teaching credential. She had been working since approximately January or February of 2015 on an intern credential as a California State University at Los Angeles credential program student. She had worked at Palms Middle School as a special education teacher since that time, and had worked with Student since then.

71. Ms. Tynan prepared a report on Student's academic performance, dated October 5, 2015. The report was subsequently updated on October 29, 2015, and titled "Academic Report". Ms. March helped her draft the original report and the updated report. Ms. Tynan used the Brigance Comprehensive Inventory of Basic Skills – II to assess Student. As Student's classroom teacher, Ms. Tynan also assessed Student regarding English language development, pre-vocational education, self-help, and behavioral support.

72. Ms. Tynan had not administered the Brigance assessment before, but found her experience administering the Woodcock test and other higher level standardized assessments to be instructive and helpful. She administered the Brigance over four sessions. The assessment was selected and administered so as not to be racially, culturally, or sexually discriminatory, and was considered valid and reliable for the assessment. Student had some distractibility issues, but put forth a reasonable, focused effort and the results are considered to be a valid reflection of her skills and abilities.

73. Overall, Student performed very poorly on the Brigance. Her performance was not surprising to Ms. Tynan given Student's intellectual disability. Student essentially performed as expected. On five of eight test sections of the Brigance, Student's scaled score was given a grade level equivalent of first grade and an age equivalent of 6.5 years.

LEGAL CONCLUSIONS

Introduction - Legal Framework under the IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.⁵; 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 California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) 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) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, 56505, subd. (l).) 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 matter, because Student filed the complaint and requested the hearing, Student has the burden of proof.

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

Issue 1 - Failure to Assess as FAPE Denial

6. Student contends that District committed a procedural FAPE violation in not assessing Student timely after Parent's request for reassessment, and did not convene a statutorily timely IEP to review the reassessment. District denies that it failed to comport with the statutory requirements in conducting the requested reassessments or holding the subsequent IEP meeting. Student contends that District's failure to assess Student in the areas of speech and language, educationally related mental health, psycho-educational functioning, and functional behavior assessments resulted in a denial of FAPE to Student. District contends that not assessing Student in the areas of speech and language, educationally related mental health, psycho-educational functioning, and functional behavior did not constitute a denial of FAPE because District had the information that it needed to provide Student a FAPE without the assessments, and neither Student nor Parent was in any way disadvantaged.

7. A child eligible for special education may be reassessed if warranted by the child's educational needs or need for related services, or if reassessment is requested by a child's parent or teacher. (Ed. Code, § 56381, subd. (a)(1); 34 C.F.R. 300.303(a).) Unless the parents and the child's district of residence agree to the contrary, reassessments must not occur more than once a year, or more than three years apart. (Ed. Code, § 56381, subd. (a)(2); 34 C.F.R. 300.303(b).)

8. When a district agrees to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five school days, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) The plan must explain, in language easily understood, the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).) The district then has 60 calendar days from the date it receives the parent's written consent for assessment to complete the assessments and develop an IEP required as a result of the assessment, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a); 56344, subd. (a).) The 60-day time period excludes "days between the pupil's regular school sessions, terms, or days of school vacation in excess of five school days." (*Ibid.*) The 60-day time period also does not apply if the parent of a child repeatedly fails or refuses to produce the child for the assessment. (Ed. Code, § 56302.1, subd. (b)(2).)

9. A district's violation of its obligation to assess a student is a procedural violation of the IDEA and the Education Code (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) A procedural error, including a failure to assess, does not automatically require a finding FAPE was denied. A procedural violation denies a child a FAPE only if it impedes the right of the child to a free appropriate public education, significantly impedes the opportunity of the parents to participate in the decision

making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); 20 U.S.C. § 1415(f)(iii)(E)(ii).)

10. Here, Parent waived assessments in 2012 and 2013. District did not commit a procedural FAPE violation in its reassessment of Student following Mother's 2015 request. District acted within 15 days of Parent's request to provide an assessment plan. District then convened an IEP meeting on October 29, 2015, about 60 days from the time it received Parent's agreement to the assessment plan.

11. Even assuming for the sake of argument, and in the absence of evidence of the exact date that Parent sent her agreement to the assessment plan to District, that the IEP meeting fell slightly outside the 60 day limit prescribed by the Education Code, above, there is no evidence that either Parent or Student suffered any harm as the result of a possible slight delay in convening the IEP meeting.

(a)Speech and Language Assessment – Failure to Assess

12. Student contends that District's failure to assess Student in the area of speech and language resulted in a denial of FAPE to Student. District contends that no denial of FAPE occurred in the absence of assessment for speech and language during the statutory period.

13. Here, Student failed to meet her burden of proof that Student's educational program or related service needs, necessitated reassessment of Student since Student had been exited from speech and language services in 2010 based upon a speech and language assessment completed on June 4, 2010.

14. Subsequently, Student had not shown the need for speech and language services. District chose not to repeat the speech and language assessment as part of the triennial assessment of Student completed in advance of the individualized educational assessment of May 2, 2013.

15. District personnel testified convincingly that they had sufficient information about Student's unique needs at all times during the statutory period to prepare Student's individual education plans. Student argued that her limited progress in meeting her goals required reassessment. However, District's witnesses, Ms. Gelinas and Ms. March in particular, explained that Student was making steady, if uneven progress, and that the perceived slow rate of progress on the part of Student arose from her disability, not from a programmatic failure of any kind. Ms. Schuchman testified credibly and convincingly that Student's speech and language skills were commensurate with her cognitive ability, and thus Student did not require speech and language services. Student did not present significant evidence that Student was lacking in speech and language skills relative to her abilities, nor did Student present evidence that Student's speech and language skills were an impediment to her ability to access her education.

16. Student's right to a FAPE was not impeded as the individualized educational program team had the information they needed regarding unique needs relative to Student's speech and language skills and abilities so as to design an appropriate program and services for her. Likewise, the lack of a speech and language assessment did not significantly impede her Parent's opportunity to participate in the decision making process regarding the provision of FAPE. Finally, there is no evidence that the lack of a speech and language assessment during the statutory period caused Student a deprivation of educational benefits as she evidenced progress during that time.

(b) Educationally Related Mental Health Assessment – Failure to Assess

17. Student contends that District's failure to assess Student in the area of educationally related mental health resulted in a denial of FAPE to Student. District contends that no denial of FAPE occurred in the absence of assessment for educationally related mental health during the statutory period.

18. Here, Student failed to meet her burden of proof that Student's educational program or related service needs, including behavior support, necessitated reassessment of Student at any point during the statutory time period. District personnel testified convincingly that they had sufficient information about Student's unique needs at all times during the statutory period to prepare Student's individual education plans.

19. Student argued that her behaviors were such that an educationally related mental health assessment was needed to essentially rule out mental illness. However, both Ms. Gelinas and Ms. March testified credibly and believably that Student did not evidence behaviors that would suggest the need for an educationally related mental health assessment. They both testified that Student's behaviors had not changed significantly or deteriorated during the statutory period. Instead she had shown continual, if slow, improvement in her problem behaviors related to elopement, inattention, and toileting.

20. Student argued that her limited progress in meeting her goals required reassessment. However, District's witnesses explained that Student was making steady, if uneven progress, and that the perceived slow rate of progress on the part of Student arose from her disability, not from a programmatic failure of any kind.

21. Student's right to a FAPE was not impeded as the individualized education program team had the information they needed regarding Student's mental health needs so as to design a program and services for her. Likewise, the lack of an educationally related mental health assessment did not significantly impede Parent's opportunity to participate in the decision making process regarding the provision of FAPE. Finally, there is no evidence that the lack of an educationally related mental health assessment during the statutory period caused Student a deprivation of educational benefits as she evidenced both academic and behavioral progress during that time.

(c) Psycho-educational Assessment – Failure to Assess

22. Student contends that District's failure to conduct a psycho-educational assessment of Student during the statutory period resulted in a denial of FAPE to Student. District contends that no denial of FAPE occurred in the absence of a psycho-educational assessment of Student during the statutory period.

23. Here, as before, Student failed to meet her burden of proof that Student's educational program or related service needs, including behavior support, necessitated reassessment of Student at any point during the statutory time period. District personnel testified convincingly that they had sufficient information about Student's unique needs at all times during the statutory period to prepare Student's individual education plans. Student argued that her limited progress in meeting her goals required reassessment. However, District's witnesses, Ms. Gelinis and Ms. March, in particular, explained that Student was making steady, if uneven progress, and that the perceived slow rate of progress on the part of Student arose from her disability, not from a programmatic failure of any kind.

24. Student's right to a FAPE was not impeded as the individualized educational program team had the information they needed regarding Student's psycho-educational needs so as to design a program and services for her. Likewise, the lack of a psycho-educational assessment did not significantly impede her Parent's opportunity to participate in the decision making process regarding the provision of FAPE. Finally, there is no evidence that the lack of a psycho-educational assessment during the statutory period caused Student a deprivation of educational benefits as she evidenced progress during that time.

(d) Functional Behavior Assessment – Failure to Assess

25. Student contends that District's failure to assess Student in the area of functional behavior resulted in a denial of FAPE to Student. District contends that no denial of FAPE occurred in the absence of a functional behavioral assessment of Student during the statutory period.

26. Here, Student failed to meet her burden of proof that Student's educational program or related service needs, including behavior support, necessitated reassessment of Student at any point during the statutory time period.

27. District personnel testified convincingly that they had sufficient information about Student's unique needs at all times during the statutory period to prepare Student's individual education plans. To that end, District relied, in part, on a functional behavior assessment done by special education teacher Ms. Silvera-Sheftel, dated February 15, 2013, as well as Student's consistent, yet progressively resolving, behavioral needs during the statutory period.

28. Student argued that her limited progress in meeting her behavioral goals required reassessment. However, District's witnesses, Ms. Gelinis and Ms. March, in

particular, explained that Student was making steady, if uneven progress, and that the perceived slow rate of progress on the part of Student arose from her disability, not from a programmatic failure of any kind.

29. Student's right to a FAPE was not impeded as the individualized education program team had the information regarding Student's behavioral needs so as to design a program and services for her. Likewise, the lack of a behavioral assessment did not significantly impede her Parent's opportunity to participate in the decision making process regarding the provision of FAPE. Finally, there is no evidence that the lack of a behavioral assessment during the statutory period caused Student a deprivation of educational benefits as she evidenced progress during that time.

30. In sum, Student did not establish by a preponderance of the evidence that District denied her a FAPE during the two academic years at issue by failing to assess Student in any of the areas at issue in this case.

Issue 2 - Failure to Provide an Adequately Supervised, Qualified Paraprofessional as FAPE Denial

31. Student contends that she was denied a FAPE by District's failure to provide adequately supervised, qualified paraprofessionals to meet her needs in the areas of toileting and instructional support. District contends that the paraprofessionals providing services to Student in the areas of toileting and instructional support were both qualified and adequately supervised and that their provision of services to Student did not result in a denial of FAPE.

32. The IDEA requires that qualified personnel provide special education and related services. (20 U.S.C. § 1412(a)(14)(A).) The IDEA defines the term "qualified personnel" as personnel who are appropriately and adequately prepared and trained, and who possess the content knowledge and skills to serve children with disabilities. (*Id.*; 34 C.F.R. § 300.156(a).) Paraprofessionals may assist in the provision of special education and related services if they are "appropriately trained and supervised, in accordance with State law, regulation, or written policy" (20 U.S.C. § 1412(a)(14)(B)(iii).) A paraprofessional means an "educational aide, special education aide, special education assistant, teacher associate, teacher assistant, teacher aide, pupil service aide, library aide, child development aide, child development assistant, and physical education aide." (Ed. Code, § 44392, subd. (e).)

33. The methodology used to implement an IEP is left up to the school district's discretion so long as it meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child. (*Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well-motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled

student. (*Rowley, supra* 458 U.S. 176, 208; *Student v. Corona-Norco Unified School District* (2005) Cal.Ofc.Admin.Hrngs. Case No. 2005070169.)

34. Here, Student failed to offer significant evidence that any of the paraprofessionals providing either toileting or instructional support to Student were either unqualified or inadequately supervised. Rather, the great majority of the evidence presented at hearing supported the conclusion that the paraprofessionals were both qualified and adequately supervised. In particular, District employees Ms. Michaels, Ms. Tynan, and Ms. March all testified that the paraprofessionals were qualified to provide the subject services and that they were adequately supervised.

35. Student's special education classroom teachers Ms. Tynan and Ms. March provided credible testimony that classroom paraprofessionals met required standards. Ms. Tynan and Ms. March also testified credibly and convincingly that they provided ongoing supervision to the paraprofessionals in their classroom. Notably, both teachers dispelled any question that Student's male one-to-one aide ever had any hand in Student's toileting support, other than to perhaps notify other classroom adults that Student needed to use the bathroom.

36. Parent expressed concerns about the paraprofessionals training and supervision. However, other than describing several issues not related to either qualifications or supervision, Student did not present material evidence supporting her claims that the paraprofessionals were not qualified or not adequately supervised.

37. It is found by a preponderance of the evidence that the paraprofessionals providing services to Student in the areas of toileting and instructional support were both qualified and adequately supervised, and their provision of the indicated services did not result in a denial of FAPE to Student.

Issue 3 - Failure to Provide Behavioral Services and Supervision in Conformance to the October 1, 2013, May 2, 2014, September 10, 2014, and May 5, 2015 IEP's as FAPE Denial

38. Student contends that she was denied a FAPE by District's failure to provide behavior intervention services and supervision in conformance with Student's individualized education programs of October 1, 2013, May 2, 2014, September 10, 2014, and May 5, 2015. District contends that the behavior intervention services and supervision were provided to Student in conformance with her individualized education programs, or if there were some variance from the individualized education program, it was minor and immaterial, and did not result in a denial of FAPE to Student.

39. A failure to implement an IEP may deny a child a FAPE and thereby give rise to a claim under the IDEA. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2008) 502 F.3d 811, 820-822.) Minor implementation failures are not actionable given that special education and related services need only "conform" to the IEP. A school district is not statutorily required to maintain perfect adherence to the IEP. When a school district does not

perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs "when there is more than a minor discrepancy between the service a school provides to a disabled child and the service required by the child's IEP." (*Id.* at pp. 815, 821-822.) *Van Duyn* specifically rejected a "per se" standard whereby any failure to implement the IEP as written gave rise to an automatic IDEA violation. Instead, when implementation failures occur, it requires analysis of the nature, extent and impact of the failure. (*Id.* at pp. 824-825.) As discussed above the methodology used to implement an IEP is left up to the school district's discretion so long as it meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child. (*Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.)

40. Here, the evidence showed that that the behavior intervention services and supervision were provided to Student in substantial conformance with her individualized education program. The testimony of classroom teachers Ms. Tynan and Ms. March, along with the testimony of the behavioral services providers themselves, Ms. Jones-Morgan and Mr. Washington, was convincing and credible that Ms. Jones-Morgan and Mr. Washington provided services as behavioral aides in close adherence to Student's individualized education programs, dated October 1, 2013, May 2, 2014, September 10, 2014, and May 5, 2015 which provided for the following services: "Behavior Intervention Implementation" by a "District Assigned Qualified Provider". The same witnesses' testimony was equally convincing and credible that both providers were supervised in conformance with Student's October 1, 2013 individualized education program, which provided for "Behavior Intervention Consultation" by a "District Assigned Qualified Provider."

41. The one area highlighted by Student, the period from approximately January 29, 2014 to February 20, 2014, may represent a three-week period during which Student did not have an assigned behavioral aide. However, there is no evidence that the absence of an assigned behavioral aide during that three-week period, if it did in fact occur, was more than a minor discrepancy and certainly did not constitute a material failure of implementation so as to result in a denial of FAPE to Student. The evidence showed that Student made continued, if uneven progress, on her behavioral issues over the course of the statutory period. Student's attendance to task improved, her elopements decreased, her out of seat incidents decreased, and her toileting improved markedly. Student simply presented no evidence that the three-week period, if it occurred, had any negative effect on Student sufficient to find a denial of FAPE.

42. Student also raises the issue that her toileting assistance required a behavioral aide. However, Student's agreed upon individualized education plans of May 2, 2013, October 1, 2013, May 2, 2014, September 10, 2014, and May 5, 2015 all simply call for adult support and supervision. As discussed, above, there was minimal if any evidence presented by Student at hearing to support the contention that Student did not receive such supervision for toileting during the statutory period, or that Student did not make significant progress in toileting over that time.

43. Student additionally raises the issue that her transportation assistance required a behavioral aide. However, Student's agreed upon individualized education plans of October 1, 2013, May 2, 2014, September 10, 2014, and May 5, 2015 that provide transportation services all simply call for adult support and supervision⁶. As discussed, above, there was minimal if any evidence presented by Student at hearing to support the contention that Student did not receive such assistance for transportation during the statutory period, or that Student was not adequately assisted with her transportation needs over that time.

44. It is found by a preponderance of the evidence that the behavior intervention services and supervision were provided to Student in conformance with her individualized education program, or to the extent that there was a variance from the individualized education program, it was minor and immaterial, and did not result in a denial of FAPE to Student. Thus, Student failed to meet her burden of proving that District did not materially implement Student's individualized education programs and attendant behavioral support plans.

Issue 4 – Failure to Provide Appropriate Assistive Technology as FAPE Denial

45. Student contends that she was denied a FAPE by District's failure to provide appropriate assistive technology to her during the statutory period. District contends that the extent of assistive technology services it provided to Student during that time period was sufficient and did not result in a denial of FAPE to Student.

46. When developing a pupil's IEP, the IEP team shall "[c]onsider the communication needs of the pupil," (20 U.S.C. § 1414(d)(3)(B)(iv); Ed. Code, § 56341.1, subd. (b)(4)) and shall consider whether the pupil requires assistive technology services and devices. (20 U.S.C. § 1414(d)(3)(B)(v).) An "assistive technology device" is defined as "any item, piece of equipment or product system [other than a surgically implanted device] . . . that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs." (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.) Assistive technology devices or services may be required as part of the child's special education services, related services, or supplementary aids and services. (34 C. F. R. § 300.105.)

47. As discussed above in Legal Conclusion 33, the methodology used to implement an IEP is left up to the school district's discretion so long as it meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child.

⁶ Student argues that a comment under the May 5, 2015 IEP, Part 4 – Additional Discussion suggests that the "BII will remain on the bus". However, there is no evidence that the comment is other than a passing or shorthand reference to the two providers who accompanied Student on the bus. Ms. Jones-Morgan and Mr. Washington, both of whom were BIIs or that such a characterization is meant to supersede all other mention of adult assistance on the bus in Student's IEPs of October 1, 2013, May 2, 2014, September 10, 2014, and May 5, 2015.

(*Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.)

48. Here, there was little or no evidence presented by Student that District failed to provide appropriate assistive technology to her during the statutory period. To the contrary, District presented credible evidence, in particular through the credible testimony of Mr. Licossi, that as of September 2014 Student was carefully assessed for assistive technology, and that Student was also provided with assistive technology in the classroom that was meant to supplement and augment her writing skill.

49. Significantly, assistive technology assessor Mr. Licossi had significant discretion in the methodology utilized by him in assessing Student and in introducing assistive technology to Student in the classroom in support of her unique needs. As noted, above, so long as the school's methodology meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child, the school is within its discretion in choosing how to deliver the services at issue.

50. Student's argument was essentially that more and better technology could have been introduced to Student at a greater frequency. However, as indicated, above, that is not a compelling argument, and there was minimal evidence, if any, presented by Student of a denial of FAPE resulting from District's assistive technology choices for Student.

51. Prior to the September 2014 assessment and IEP, there is simply no evidence offered by Student to suggest that Student needed an assistive technology assessment or plan to access her education. When the assistive technology was introduced it was on a very limited basis and restricted to two devices owing to Student's disability. Even assuming that there was a failure to assess Student for assistive technology for the 2013-2014 school year, there is no indication that either Parent or Student suffered any colorable harm. There is no evidence that Student's right FAPE was impeded, that Parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child was significantly impeded, or that Student suffered a deprivation of educational benefits.

52. In summary, Student did not meet her burden of proof that District denied her a FAPE by District's failure to provide appropriate assistive technology to her during the statutory period.

ORDER

Student's requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on all issues presented.

RIGHT TO APPEAL THIS DECISION

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: February 12, 2016

/s/
TED MANN
Administrative Law Judge
Office of Administrative Hearing