

STATE OF VERMONT
DEPARTMENT OF EDUCATION

IN RE: A.G.

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Special Education Due Process
Docket No. D.P. 07-14 A.G.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Summary

In the following order, the Hearing Officer finds for the District based on findings of relevant fact and conclusions of applicable law. This decision incorporates most of the requested findings and legal arguments briefed by the District because the Hearing Officer finds they are supported by the weight of the evidence and relevant to the specific legal issues to be determined. This does not mean that all of Parents' arguments and allegations of fact are unsupported by the evidence submitted by them. It means that in the Hearing Officer's view, Parents' evidence does not tip the balance on the questions raised by Parents as to the District's obligations under IDEA and relevant regulations.

While this decision does not provide relief to Parents, the Hearing Officer recognizes that Parents are loving, supportive and protective of their daughter and have worked diligently in her best interests as they perceive them. The Hearing Officer also recognizes that District personnel have worked diligently to provide the education and services to which A.G. is entitled. Differences have arisen out of the stresses of dealing with challenging issues, different communication styles and preferences, and differing views on strategies and tactics. The result has been a loss of mutual trust.

Without blaming any party, in the Hearing Officer's view, A.G.'s educational interests require all parties to work toward more productive parent/school communication patterns. The Hearing Officer recommends that at least for the next few IEP team or other parent/school meetings, the services of a mediator or facilitator be retained and used to develop formal or informal protocols or other agreements designed to make communication between the parties more positive, efficient and productive. A.G. can only benefit from a mutual commitment to improved working relationships between Parents and school.

FINDINGS OF FACT

This matter was heard by Hearing Officer Donald R. Powers on January 22 and 23, 2008, at Vermont Technical College in Randolph, Vermont. Parents were present.

Orange Southwest Supervisory Union was represented by Special Education Coordinator Stephen Kinney and attorney of record Heather P. Thomas. Based on the testimony of the witnesses and the exhibits admitted into evidence, the Hearing Officer makes the following findings of fact:

Birth to Fall 2006

1. A.G.'s date of birth is 1-1-02. STIPULATED AGREED UPON FACTS, ¶1.
2. A.G. began receiving speech and occupational therapy services through the Family Infant Toddler Program in 2004. STIPULATED AGREED UPON FACTS, ¶2.
3. A.G. transitioned to EEE services commencing on her third birthday January 1, 2005. STIPULATED AGREED UPON FACTS, ¶3.
4. A.G. began attending Ayer's Brook Center Preschool in February 2005 for two afternoons a week. STIPULATED AGREED UPON FACTS, ¶4.
5. A.G. returned to Ayer's Brook Center Preschool in the fall of 2005 for the afternoon program four days a week, Monday through Thursday, 12 p.m. to 2:30 p.m. She continued there through June 2007. STIPULATED AGREED UPON FACTS, ¶5.

2006-2007 SCHOOL YEAR

6. Theresa Bowmer served as Director of the Ayer's Brook Preschool during the 2006-2007 school year. During that year she would talk almost daily with Parent about A.G.'s behaviors in class and progress. TESTIMONY OF THERESA BOWMER 155:12-156:2.
7. At no time during the 2006-2007 school year did A.G.'s team discuss addressing A.G.'s behaviors within her IEP, as problematic behaviors were infrequent. TESTIMONY OF THERESA BOWMER 157:23-158:2.
8. There was a team meeting on December 5, 2006, to discuss A.G.'s

progress. STIPULATED AGREED UPON FACTS, ¶16. At that meeting it was decided that A.G.'s OT direct services would be eliminated and that she would only receive OT support via consultation with the Ayer's Brook Staff. Id.

9. A.G.'s three-year re-evaluation was due in January, 2007. In that month, Ms. Bowmer discussed informally with Parent re-evaluating A.G.'s eligibility for special education and decided to wait to do that upon her entry at Brookfield.

TESTIMONY OF THERESA BOWMER 166:24-12.

10. On March 13, 2007, Theresa Bowmer informed Alisa Scipio (OT) that A.G.'s Parents had recently told her that they were planning to move to Massachusetts at the end of the year. DISTRICT AFFIDAVIT EXHIBIT 3, THERESA BOWMER, ¶10, DISTRICT AFFIDAVIT 7, ALISA SCIPIO, ¶19.

11. By the spring of 2007, A.G. was receiving support at school during "circle time" for behavior issues— support that many other children in the class also received. DISTRICT AFFIDAVIT EXHIBIT 5, WENDY CASHMAN, ¶5. A.G. also could experience behavioral difficulty in the form of "melt downs." Id. at ¶7. This also occurred for other children within this age group. Id. The Ayer's Brook staff would respond to serious behavioral problems by removing A.G. from her peers, processing verbally what had occurred, and then reintegrating her back into class. Id. at ¶10.

12. At the time Ms. Bowmer was planning for A.G.'s transition to kindergarten, the only OT issues that she was aware of, having reviewed A.G.'s entire school file, was the work that the staff was doing with the assistance of OT Scipio regarding transitions to/from school. TESTIMONY OF THERESA BOWMER 160:24-161:16. Despite her daily conversations with Parent, Ms. Bowmer had never discussed sensory issues with Parent and she did not consider this to be a concern at the time. Id. Ms.

Bowmer was not aware of CDC testing in 2004 and was not told of it by Parent.

TESTIMONY OF THERESA BOWMER 197:24-198:4. Ms. Bowmer communicated with Parent on a daily basis and discussed what would work for A.G. in the future. TESTIMONY OF

THERESA BOWMER 195:12-14. Ms. Bowmer was not aware that occupational therapist Diane Solomon was working with A.G. at her home, and did not receive any suggestions or recommendations from Ms. Solomon on how to accommodate A.G.

TESTIMONY OF THERESA BOWMER 196:16-25.

13. Ms. Bowmer testified that she felt that by the second half of the school year, A.G. had mastered the routine of Ayer's Brook and was doing "well" at school.

TESTIMONY OF THERESA BOWMER, JANUARY 22, 2008.

14. Theresa Bowmer invited A.G.'s future case manager, special educator Priscilla Edwards, to come in and observe A.G. and touch base with Parent in order to assist with A.G.'s transition to kindergarten. TESTIMONY OF THERESA BOWMER 158:11-14.

Ms. Bowmer did not believe there would be any problems with the transition, or in Brookfield's ability to deliver to A.G. her IEP services, because she was making "such good progress." TESTIMONY OF THERESA BOWMER 158:15-23. "I knew that they could service her with the two times for the speech and language and I knew they had OT services (consultation) for her that could be just automatically put into place for when she started kindergarten. So I felt like they have everything all ready for [A.G.]."

TESTIMONY OF THERESA BOWMER 174:9-14.

15. On May 3, 2007, Priscilla Edwards visited Ayer's Brook to observe A.G. in class in order to assist with her transition to kindergarten. DISTRICT AFFIDAVIT EXHIBIT 3, THERESA BOWMER, ¶11-12, DISTRICT AFFIDAVIT EXHIBIT 4, PRISCILLA EDWARDS, ¶1, DISTRICT AFFIDAVIT EXHIBIT 5, WENDY CASHMAN, ¶11. Ms. Edwards visited Ayer's Brook for

approximately an hour and during that time spoke to the staff and with Alisa Scipio (who at that time was providing consultation with the staff, the only OT services A.G. was receiving under her IEP). TESTIMONY OF THERESA BOWMER: 159: 11-15.

16. During her meeting with Ms. Edwards, Ms. Bowmer shared with Ms. Edwards the strategies that they had been working on with A.G. TESTIMONY OF THERESA BOWMER 159:19-22. Ms. Bowmer also discussed with Ms. Edwards the services A.G. was receiving under her IEP, which was two thirty minute sessions per week in speech and language and a fifteen minute consultation for occupational therapy and understood that this was “ready to go” and “put in place.” TESTIMONY OF THERESA BOWMER 196:10-15. Ms. Bowmer shared that there were no current concerns about A.G., and that A.G.’s parents had asked that she be taken off her IEP entirely. DISTRICT AFFIDAVIT EXHIBIT 4, PRISCILLA EDWARDS, ¶11. Ms. Edwards advised that this not occur until she arrived at Brookfield and could be evaluated in that setting. DISTRICT AFFIDAVIT EXHIBIT 4, PRISCILLA EDWARDS, ¶11. Ms. Edwards concluded that based on the information she had obtained from Ms. Bowmer, and on A.G.’s progress in the preschool program, and the limited level of support she was receiving via her IEP, that the appropriate level of coordination in her transition to Brookfield was being accomplished. TESTIMONY OF PRISCILLA EDWARDS 210:8-10. While occupational therapy had focused in part on assisting A.G. with transitions, by the time Ms. Edwards met with Ms. Bowmer, long before A.G. began kindergarten, it was communicated that A.G. had been “very successful and had made tremendous progress in all areas to the degree that most of her supports other than 15 minutes of consult for OT were being removed and that most of it had been.” TESTIMONY OF PRISCILLA EDWARDS 238:1-4.

17. It was not possible for A.G.'s future kindergarten teacher to be involved in any such meeting as she was not hired until May 2007. TESTIMONY OF SARAH LANGLOIS.

18. While at Ayer's Brook, Ms. Edwards was introduced to A.G.'s Parent. PARENTS AFFIDAVIT EXHIBIT 1, [PARENT]. Ms. Bowmer had previously informed Parent that Ms. Edwards had been invited to come in and do an observation of the children that would be attending Brookfield. TESTIMONY OF THERESA BOWMER 159:2-5.

19. Ms. Bowmer felt that despite the absence of a formal meeting between herself, Parent, and Ms. Edwards, she was comfortable that in light of the daily contact she had with Parent, her conversations with Ms. Edwards and A.G.'s progress, the arrangements made for A.G.'s transition to Brookfield were sufficient. TESTIMONY OF THERESA BOWMER 160:2-13, 201:16. Ms. Bowmer testified that knowing A.G. as she did and of the challenges she would face in kindergarten she believed that Brookfield Elementary School would be an appropriate placement for her and that she had done all that was necessary to provide for the provision of the services outlined in A.G.'s IEP. TESTIMONY OF THERESA BOWMER 200:11-16, 204:16-21, 205:5-8.

20. During her visit to Ayer's Brook Preschool on May 3, 2007, Ms. Edwards met informally with Parent. Ms. Edwards did not meet formally with Parent as she understood from the Ayer's Brook staff that there were no concerns, that everyone, including the Parents, were happy with how A.G. was doing and the progress that she had made, and that the Parents had expressed the desire to have her removed from her IEP "so I would then believe at that point that there would be no need to have that kind of formal type of interaction with you unless you had wanted that and to me that was not the case." TESTIMONY OF PRISCILLA EDWARDS 211:1-8.

21. Sarah Langlois – A.G.'s kindergarten teacher - met and spoke with

Priscilla Edwards before A.G. started at Brookfield and Ms. Edwards shared with Ms. Langlois her impressions of A.G. from her observation at Ayer's Brook Preschool.

TESTIMONY OF SARAH LANGLOIS 404:8-15. Ms. Langlois also had an opportunity to review A.G.'s IEP prior to her arrival in kindergarten. Id. Based on the content of the IEP and her discussions with Ms. Edwards, Ms. Langlois had no concerns about implementing A.G.'s IEP prior to her starting at Brookfield. TESTIMONY OF SARAH LANGLOIS 404:16-20. She considered there to be little if any coordination necessary to implement A.G.'s IEP as written. Id. Even with the benefit of hindsight, Ms. Langlois stated that with her training and experience, and knowledge of working with A.G. in the fall of 2007, had she known before A.G. started kindergarten what she knows now in 2008 about A.G., she would not have done anything different to transition A.G. into kindergarten. TESTIMONY OF SARAH LANGLOIS 421:20-422:2.

22. Parents expressed the conclusion that their input was not adequately considered in transitioning A.G. and therefore the process was flawed. TESTIMONY OF [PARENT] 473:23-24. This conclusion does not appear to be supported by the facts that Parent spoke with her daughter's teachers on almost a daily basis throughout this period. In addition to having met Ms. Edwards, albeit informally, PARENTS AFFIDAVIT EXHIBIT 1, [PARENT], Parent was introduced to Sarah Langlois, the kindergarten teacher at Brookfield, on May 31, 2007, an event for entering kindergarten students and their parents. TESTIMONY OF SARAH LANGLOIS 404:21-405:3, PARENTS AFFIDAVIT EXHIBIT 1, [PARENT]. Ms. Langlois also met with Parent at the open house before school started. TESTIMONY OF SARAH LANGLOIS 405:9-12. One of the purposes of that event is for parents to share concerns with the teacher. TESTIMONY OF SARAH LANGLOIS 405:13-17. Parent did not share any concerns about A.G.'s

transition to kindergarten with Ms. Langlois. TESTIMONY OF SARAH LANGLOIS 405:18-21. Parent did not mention any concerns about A.G.'s behavioral challenges to Ms. Langlois. TESTIMONY OF SARAH LANGLOIS 405:22-25. Ms. Langlois testified that while it would have been helpful to know of such concerns she would have wanted to see A.G. in her classroom and to give her a chance to adjust to the routine of kindergarten before putting any behavioral supports in place for A.G. TESTIMONY OF SARAH LANGLOIS 406:1-8. Given the consensus of A.G.'s team members in the spring of 2007, including Parent, that A.G. was performing well, it is difficult to conclude that a "formal" meeting would have resulted in any different preparation for A.G.'s attendance at Brookfield in the fall.

23. Ms. Cashman, with 35 years of experience with children in this age group, testified that the transition to kindergarten is one of the most significant transitions a child can make educationally and that it usually takes children up to six weeks to transition to the routine of kindergarten. TESTIMONY OF WENDY CASHMAN. She also testified that she would not generally have put in place a paraprofessional assigned specifically to a particular student before that transition period had concluded. Id. She also stated that knowing A.G. as she did from her work with her during the spring of 2007, she would not have felt it appropriate to have support personnel in place solely for A.G. at the beginning of the school year. DISTRICT AFFIDAVIT EXHIBIT 5, WENDY CASHMAN, ¶14. Ms. Cashman testified that in her affidavit she was trying to express that she did not think an individual aide needed to be in place to transition A.G. to kindergarten. TESTIMONY OF WENDY CASHMAN 342:8-13. Ms. Cashman testified that until a child is able to experience the schedule there are "too many unknowns," that you "can't know about the transition" to the routine of kindergarten "until you have

the child in the kindergarten.” TESTIMONY OF WENDY CASHMAN 342:15-24. Ms.

Cashman testified that the transition period could take six weeks to “really feel the child in the schedule.” TESTIMONY OF WENDY CASHMAN 343:1-3.

24. Ms. Cashman’s concerns regarding A.G.’s transition, with thirty years of experience with children in education at this age, and having worked with A.G. during the spring of 2007, were that A.G. needed additional social skills, to develop her ability to maintain focus during fine motor activities, and to have quick and positive drop offs at school by her mother. DISTRICT AFFIDAVIT EXHIBIT 5, WENDY CASHMAN, ¶13. The occupational therapist who was working on A.G.’s case during the 2006-2007 school year noted that A.G.’s performance with respect to fine motor skills appeared typical when compared to her peers during the January – June 2007 period. DISTRICT AFFIDAVIT 7, ALISA SCIPIO, ¶23. In addition, at the end of the 2006-2007 school year the staff of Ayer’s Brook considered A.G. to be doing well and was demonstrating progress in the areas which her OT services had focused that year (transition between home and school). DISTRICT AFFIDAVIT EXHIBIT 3, THERESA BOWMER, ¶13, DISTRICT AFFIDAVIT 7, ALISA SCIPIO, ¶22. Other than transitioning between home and school, in which the staff had seen marked improvement, the staff shared no other concerns with the OT during consultations at years end. DISTRICT AFFIDAVIT 7, ALISA SCIPIO, ¶22. Wendy Cashman, whose experience includes having begun the preschool program in Northfield and Randolph, Vermont, and who worked with A.G. between March and June of 2007, had no concerns that A.G. would require any particular supports in order to transition, or that she would not be able to transition to kindergarten. DISTRICT AFFIDAVIT EXHIBIT 5, WENDY CASHMAN, ¶14. Finally, A.G.’s occupational therapist recommended in June 2007 that in order to transition A.G. to kindergarten the

consultative services (which were all the OT services that A.G. was receiving at that point) merely needed to be continued until the need for any such services were re-evaluated in the fall. DISTRICT AFFIDAVIT 7, ALISA SCIPIO, ¶24, EXHIBIT A, JUNE 2007 REPORT.

25. There is no evidence or testimony by any of A.G.'s current or past educators or by any expert that would suggest that testing conducted in the winter or spring of 2007 would have provided the IEP team with information that would have permitted A.G. to transition more successfully to the Brookfield Elementary School for kindergarten. See Infra. Mary Wright, M.A., School Psychologist, testified "it is my opinion to a reasonable degree of certainty that assessing a child within an environment where the child of this age has become very comfortable and experiencing success – such as at Ayer's Brook in 2007 – would not have provided an assessor with information that would have allowed the assessor to provide specific recommendations on how to assist A.G. in an environment that was as different as Brookfield Elementary School." DISTRICT AFFIDAVIT 6, WRIGHT AFFIDAVIT, ¶19. Wendy Cashman, who worked directly with A.G. in the spring preceding her transition to Brookfield, testified "It is my opinion that there is nothing that should have been done or could have been done in advance of A.G.'s arrival in kindergarten to address her behaviors. I do not think assigning a 1:1 aide in advance would have been appropriate. Rather it would be important to get A.G. into the classroom and then see how her behaviors evolved and address them as they arose." DISTRICT AFFIDAVIT 5, CASHMAN AFFIDAVIT, ¶14. Finally, A.G.'s kindergarten classroom teacher testified: "I think it would have been important to just get her into the environment and see how she responded to the – the structure. I mean its completely two different environments." TESTIMONY OF SARAH LANGLOIS 414:4-19.

26. Parent claims that A.G.'s behavior at home changed after she entered Brookfield. "She was doing really fabulous before she entered the Brookfield school, and now ... she's much more aggressive at home all the time every day, and it was not every day. It was not all the time before...A.G. has changed. She's changed a lot. It's incredibly challenging." TESTIMONY OF [PARENT] 498:2-10. In fact, however, since A.G. was almost two years old, Parent has reported to service providers and educators behaviors that most persons would consider to be "challenging," that she has had difficulty with A.G.'s "tantrums" DISTEVID/CORE/3 (Family Infant and Toddler Project of Vermont Parent Form "Family could use help with...tantrums"); with A.G. being rough with animals Id. at 6 ("she likes...playing rough with dogs"); seeking assistance in helping A.G. to be more "flexible" DISTEVID/CORE/14 (IFSP Date 8/17/04); seeking assistance in having A.G. request what she wants with words "rather than screaming" Id. at 16; with concerns around A.G.'s violence DISTEVID/CORE/26 (Speech and Language Evaluation 1/28/04 "[A.G.'s] mother...reported that her primary concern is with A.G.'s behavior in that she becomes violent when she is frustrated. Her primary method of communicating is by reaching for what she wants and/or screaming and yelling." In fact, in September 2004, Parent reported to the team that A.G. "still screams and can scream for hours according to [Parent]...[Parent] wants respite and Missy made several suggestions and will follow through with some ideas." DISTEVID/CORE/34 (Team Minutes 9/1/04). A.G. was also reported to have been aggressive towards her parents as early as 2004. "She can be aggressive toward her parents" and to "throw toys and food she does not want." DISTEVID/CORE/37 (Parmalee OT Discharge Summary December 2, 2004). In March 2005, Parent reported to Anne Marie Bohn, the OT provider that

A.G. needs music and that without it she will kick the dog and cat and misbehave. DISTEVID/PROVIDERS/27 (Bohn Treatment Note of 3/23/05 consult with Parent). Parent also told Ms. Bohn in that same session that A.G. can get “violent during dinner and transitions” and that she “screams – high pitched for hours for fun and has lost her voice more than fifteen times in the last one and one half years because of it.” Id. at 28. By the fall of 2005, Parent was still reporting to the Ayer’s Brook Director that A.G. could scream for “up to six hours.” DISTEVID/CORE/65 (contact log September 8, 2005). In addition, service providers as early as 2004, when A.G. was age 2, reported that A.G. would “tantrum 1-2 times per day lasting five minutes on average, but can be significantly longer. During a tantrum she will throw herself face down and press her face against the floor, couch, etc. She does not respond to verbal directives, though mom feels she understands when she is spoken to. At other times she will pace back and forth from one end of the living area to another or walk circles around small picnic table. This looks like a self calming activity for [A.G.]” DISTEVID/CORE/23 (OT Evaluation, Tricia Parmalee, 1/18/04).

27. At the time A.G. entered Brookfield her IEP called for two sessions of SLP services for 30 minutes a week, and for two sessions (fifteen minutes) of OT consultation a month with A.G.’s teachers. DISTEVID/CORE/108 (IEP Service Page).

2007-2008 School Year A.G. Enters Kindergarten

28. A.G. entered Ms. Sarah Langlois’ kindergarten classroom at Brookfield Elementary School on August 27, 2007. STIPULATED AGREED UPON FACTS, ¶17.

29. On August 29, 2007, Priscilla Edwards contacted Parent by phone and Parent discussed with Ms. Edwards an “effective means of my communicating with the classroom teacher. The preschool gave parents a detailed report every day,

verbally. I liked knowing what A.G. does at school since she has trouble verbalizing 'what happened today at school.' She always says 'I don't know.' I requested a way the teacher could communicate these things and the journal idea sounded good to me." PARENT'S AFFIDAVIT 1, [PARENT], 25. The journal was not a request by the Parent for behavioral information regarding A.G., but her school work. TESTIMONY OF PARENT, 475:9-18. The journal was also implemented as soon as the Parent requested it. PARENT'S AFFIDAVIT 1, [PARENT], 25 (noting the journal came to her from school the very next day after she made her request).

30. The behaviors that A.G. manifested at the Brookfield Elementary School were beyond that expected by Principal Rosane and Case Manager Edwards based on A.G.'s success at Ayer's Brook. TESTIMONY BOB ROSANE, 69:17; DISTRICT AFFIDAVIT 4, EDWARDS AFFIDAVIT, ¶6. These were not, however, behaviors that the school considered to be at crisis levels. TESTIMONY BOB ROSANE, 69:22, 70:8-14. They also did not constitute behaviors that were beyond the capacity of the Brookfield Elementary School. DISTRICT AFFIDAVIT 6, WRIGHT AFFIDAVIT, ¶22. The behaviors that were being observed were considered to be typical of transitional issues for new kindergarteners, albeit in greater amounts. TESTIMONY BOB ROSANE, 70:20-71:2, TESTIMONY OF PRISCILLA EDWARDS 211:12-212:2, 238:7-18. Brookfield Elementary School administrators and A.G.'s case manager did not feel that the issues confronting A.G. with her transition to kindergarten merited an "emergency IEP team meeting." TESTIMONY OF PRISCILLA EDWARDS 212:4-5. "I'll reflect on the fact that her IEP at that time only had OT consult and had speech and language. We were quite capable of meeting those needs and did that right up front." TESTIMONY OF PRISCILLA EDWARDS 212:6-8. "We have supports in place for all the kindergarten students to

help them make that kind of transition. She was not an outstanding student in regard to what was going on.” TESTIMONY OF PRISCILLA EDWARDS 212:21-24. “We frequently, again, have challenges with all kindergarten students transitioning into our building. We would expect that at least for a two to three week period.” TESTIMONY OF PRISCILLA EDWARDS 238:15-18.

31. The journal was not the only method of communication between Parent and Ms. Langlois, A.G.’s classroom teacher. Ms. Langlois would also speak with Parent daily during pick up (she would usually arrive 15 minutes early) about what had happened in school that day. TESTIMONY OF SARAH LANGLOIS, 406:12-17. Accordingly, in addition to the journal on occasions when A.G. had had a particularly difficult day, Ms. Langlois would speak with her Parents directly during pick up about the day. TESTIMONY OF SARAH LANGLOIS 407:23-408:5. The journal continued to be used until the Parents refused to return it to the school. DISTRICT AFFIDAVIT 4, EDWARDS ¶13. Prior to October 11, 2007, the Parents did not ask Ms. Langlois to communicate in any different way about their daughter’s behaviors in school. TESTIMONY OF SARAH LANGLOIS 421:4-19.

32. On August 29, 2007, Priscilla Edwards forwarded to Parents a notice of meeting to develop a special education evaluation plan for Tuesday, September 4, 2007. STIPULATED AGREED UPON FACTS, ¶8.

33. During September 2007, Priscilla Edwards spoke regularly with Parent by phone, often at Parent’s initiation for long periods of time, often in excess of one hour. DISTRICT AFFIDAVIT 4, EDWARDS, ¶17. Parent spoke with Ms. Edwards by phone on August 29, 2007, September 6, 18, 19, 20, 21, 27, 28, October 1, 8, 9, 10 and 13. PARENT AFFIDAVIT 1, [PARENT] AFFIDAVIT. Parent did not complain during these

conversations that the classroom teacher, Ms. Langlois, was not providing her with information about her daughter at school. Id.; DISTRICT AFFIDAVIT 4, EDWARDS, ¶17. Ms. Edwards felt that her conversations with Parent provided Parent with information regarding A.G.'s behaviors at school: "I communicated very closely with – [Parent]. There were definitely exchanges of what we were seeing at school." TESTIMONY OF PRISCILLA EDWARDS 257:25-258:2. In her testimony, Parent admitted that A.G.'s behaviors at school with respect to transitioning to the routines of kindergarten were a subject of those conversations. TESTIMONY OF [PARENT] 475:19-476:5, 476:20-25. Parent complained in her testimony that the conversations were vague as they focused only on "transition anxiety." TESTIMONY OF [PARENT] 478:23-25. During these conversations, Parent shared her concerns around A.G.'s behaviors at home, including occasions when A.G. would hit her, or hit their family dog (apparently at least once causing a concussion). TESTIMONY OF PRISCILLA EDWARDS 259:4-9. Parent testified about problematic behaviors she was experiencing at home with A.G., that she was seeking assistance from the school, and did not feel that the school was helpful. TESTIMONY OF [PARENT] 479:10-12.

34. During September 2007, Ms. Edwards spoke with Theresa Bowmer about A.G.'s behaviors in kindergarten and how they compared to Ayer's Brook. Ms. Bowmer reported that A.G. had oppositional behavior problems but did not diagnose her, and that she could be aggressive towards adults and herself. TESTIMONY OF THERESA BOWMER 170:1-13.

35. During the first week of school, Ms. Edwards began to investigate the prospect of hiring a paraprofessional to assist in the kindergarten in order to make it possible for the classroom teacher, Sarah Langlois, to work more closely with A.G.

DISTRICT AFFIDAVIT 4, EDWARDS, ¶6. At that time A.G.'s IEP only provided for SLP services and OT consultation services; she had no direct classroom support provided by her IEP. Id. [DISTEVID/CORE/106-117]

36. On September 4, 2007, an evaluation planning team meeting occurred, at which Parent gave her consent for the evaluation to occur. STIPULATED AGREED UPON FACTS, ¶9. During the meeting Parent did not mention that A.G. had been previously evaluated by the CDC in 2004 or that the resulting CDC report mentioned concerns around sensory integration dysfunction (the actual report does not contain a diagnosis, only mentions concerns). DISTRICT AFFIDAVIT 4, EDWARDS, ¶8. The 2004 CDC report was also not contained within A.G.'s file and her file did not contain any references to the sensory issues alluded to within that report. TESTIMONY OF PRISCILLA EDWARDS 222:13-25. While sensory issues had been a concern in the past, the current IEP only provided for OT consultation. Sensory issues were not considered current pressing concerns by her case manager. TESTIMONY OF PRISCILLA EDWARDS 228:10-18. Parent had shared with Ms. Edwards that she had used joint compression in the past with A.G., but she had indicated that this was no longer needed. TESTIMONY OF PRISCILLA EDWARDS 232:1-4. No one suggested during this initial meeting that the scope of the evaluation should encompass behavioral issues. TESTIMONY OF PRISCILLA EDWARDS 283:7-10.

37. Ms. Edwards testified that if the evaluation had been conducted while A.G. was at Ayer's Brook there is no way for her to speculate as to how that would have affected programming, behavior planning, assessment of sensory issues or placement issues, as it was an entirely different environment. TESTIMONY OF PRISCILLA EDWARDS 233:19-24, 222:2-16.

38. On September 4, 2007, Lisa Hard, paraeducator, began working full time in the kindergarten classroom. DISTRICT AFFIDAVIT, EDWARDS ¶19. Ms. Hard was a paraeducator the school would use to support transitions in kindergarten generally, to support Ms. Langlois, and to allow Ms. Langlois, who had greater experience, to spend more time individually with specific students, particularly A.G. TESTIMONY OF BOB ROSANE, 90:22-91:2, 94:4-10, TESTIMONY OF SARAH LANGLOIS 412:22-413:1.

39. By the second week of school (which began on September 4, 2007), Sarah Langlois had instituted changes to her classroom to assist and accommodate A.G. in her transition to kindergarten. For example, during circle time A.G. had a spot next to the teacher so that if there were times when she experienced difficulty focusing Ms. Langlois could put her hand gently on her back and whisper “follow along with us.” TESTIMONY OF SARAH LANGLOIS, 411:17-23. After Ms. Langlois first observed A.G. having difficulty sharing toys, she used a timer and “that really seemed to help her seeing the timer.” TESTIMONY OF SARAH LANGLOIS 412:5-13.

40. On September 5, 2007, Mary Wright, School Psychologist, began to conduct her comprehensive educational evaluation of A.G. at the Brookfield School. DISTRICT AFFIDAVIT 6, MARY WRIGHT, ¶12. The purpose of the evaluation was to determine whether A.G. met the special education guidelines as a student with a speech-language impairment or a specific learning disability in any of the basic skill areas. DISTRICT AFFIDAVIT 6, MARY WRIGHT, ¶13. Ms. Wright began her evaluation on September 5, 2007 with a classroom observation. At no time did Ms. Wright experience difficulty in gaining A.G.’s compliance in leaving the class to conduct her testing. TESTIMONY OF MARY WRIGHT 396:5-18. In addition, the two times Ms. Wright worked with A.G. she did not appear anxious. TESTIMONY OF MARY WRIGHT 397:24-398:1.

41. Another area in which the school began to work with A.G. was that its principal, Bob Rosane, took opportunities when they presented themselves to get to know A.G. so that he could establish a relationship/rapport that he could draw upon when she needed further assistance and direction. TESTIMONY OF BOB ROSANE, 73:4-75:13.

42. On September 5, 2007, A.G. threw her bag at the teacher and tossed some books over her shoulder when she was done reading them – hitting another student. PARENT’S AFFIDAVIT EXHIBIT 1, [PARENT], 25. She was taken by Bob Rosane to his office to regroup and in order for him to establish some rapport with her and get to know her. TESTIMONY OF BOB ROSANE, JANUARY 22, 2008. PARENT’S AFFIDAVIT EXHIBIT 1, [PARENT], 25. Parent arrived at the end of the school day when A.G. was in the principal’s office with Principal Rosane. PARENT’S AFFIDAVIT EXHIBIT 1, [PARENT], 25. Mr. Rosane tried to reassure Parent that A.G. was not in any trouble and that they were simply spending some time together to get to know each other better and to allow her to focus before returning to the classroom. DISTRICT AFFIDAVIT 2, BOB ROSANE, ¶18. Parent claimed that A.G. had “never, ever been sent to the principal during her academic career” and abruptly left the office with A.G. Id.

43. Mr. Rosane is trained in non-violent crisis intervention techniques and at the times in question he was a physical intervention specialist, currently certified. DISTRICT AFFIDAVIT 2, ROSANE AFFIDAVIT, ¶17. On no occasion did he engage in a physical action with A.G. that he would, based on his training and experience, characterize as a “physical restraint.” When he took A.G. to his office, he did so in order to talk with her to get to know her better, to establish rapport, to help her to regroup and refocus. Id.

44. In the wake of A.G.'s difficulties at school on September 5, 2007, Parent removed two favorite toys (two stuffed animals) and told A.G. she could have them back "if she had a good day at school" on September 6, 2007. PARENT'S EXHIBIT 24, JOURNAL, (9/5/07 entry). School staff were also informed by Parent that they could remind A.G. that she "needs to have a good day" if she wanted to get her toys back. Id.

45. On September 6, 2007, Priscilla Edwards contacted Parent by phone during the school day to inform her that A.G. was having a hard time focusing and that she continued to mention missing her toy. PARENT'S AFFIDAVIT EXHIBIT 1, [PARENT], 26, TESTIMONY OF PRISCILLA EDWARDS 262:1-14.

46. A.G. did not attend school on Friday September 7, 2007, due to a family trip. PARENT'S AFFIDAVIT EXHIBIT 1, [PARENT], 26.

47. Parent claims that on Monday, September 10, 2007, A.G. did not want to get up for school and "begged not to go" and that this was very concerning, PARENT'S AFFIDAVIT EXHIBIT 1, [PARENT], 26. Parent testified that this then became the pattern for A.G., that she would pull the blankets over her head every day from then on and say she didn't want to go to school. TESTIMONY OF [PARENT] 478:1-5. A.G.'s classroom teacher testified that this is a "very normal response for kids that are entering kindergarten." TESTIMONY OF SARAH LANGLOIS 420:9-17. After school that same day, A.G. was visited at home by OT provider Diane Solomon for her monthly visit. PARENT'S AFFIDAVIT EXHIBIT 1, [PARENT], 26. Parent apparently wasn't too concerned with A.G.'s reaction that morning for Ms. Solomon reported in her notes and testified that she was told by Parent that day that kindergarten was going well. TESTIMONY OF DIANE SOLOMON, 306:17-307:5. However, Ms. Solomon clearly testified that if she were to

make recommendations on what the school should do to accommodate A.G., she would need to observe A.G. at the school first, which she had not done. TESTIMONY OF DIANE SOLOMON 319:12-21, 317:11-15.

48. Ms. Solomon testified that generally, for children with sensory needs, training of the school staff would be important, and that the details of that training would depend upon the child. TESTIMONY OF MELISSA CARPENTER 310:13-19. A.G. continued to receive 15 minutes of OT consultation for her educational providers during the fall of 2007 as required under her IEP. Ms. Solomon also testified that sometimes it would be beneficial to have observations around behaviors to address sensory issues. TESTIMONY OF MELISSA CARPENTER 311:2-5. An OT evaluation was conducted on September 14, 2007, and September 21, 2007, which included observation of A.G. in the class. DISTEVID/PROVIDERS/106.

49. On September 10, 2007, Parent filled out the Conners' Parent Rating Scale for A.G.'s evaluation and reported that the following were "very much true" (on a scale of "not at all true" "just a little true" "pretty much true" and "very much true"): that A.G. is "angry", "everything must be just so" "loses temper" "actively defies or refuses to comply with adults' requests" "temper outbursts" "interrupts or intrudes on others." DISTEVID/PROVIDERS/24-25. She also reported that it is "pretty much true" that A.G. "argues with adults," "does not seem to listen to what is being said to her," is "excitable, impulsive," "things must be done the same way every time," "talks excessively," "has difficulty waiting in lines" "has rituals that she must go through," is "distractable," "is afraid of the dark and hornets," "demands must be met immediately – easily frustrated," "mood changes quickly and drastically." Id.

50. On September 14, 2007, Anne Marie Bohn worked with A.G. at school as

part of her OT evaluation and noted that as they walked by Mr. Rosane's office A.G. recalled having visited his office "to look at his dragon and his puppets."

DISTEVID/PROVIDERS/93.

51. On Monday, September 17, 2007, Mary Wright interviewed Parent as part of her comprehensive evaluation of A.G. DISTRICT AFFIDAVIT EXHIBIT 6, MARY WRIGHT, 4. Wright asked Parent if A.G. had been previously tested and Parent replied that there had been prior testing by CDC in 2004. DISTRICT AFFIDAVIT EXHIBIT 6, MARY WRIGHT, 5. Wright asked what the results had been and was told that Dr. Scollins had found A.G. to be delayed verbally. Id. Parent did not mention any results which indicated difficulties or concerns around SDI. Id. As the report was not in A.G.'s educational file, Mary Wright asked Ms. Edwards about it. Ms. Edwards knew nothing of the report. Id. They both reviewed the SLP's file and did not find the report. Id. Ms. Wright then asked Parent for the report and never received it. Id.

52. During her conversation with Parent, Mary Wright recorded that Parent's "greatest" concern with respect to A.G. was her impulse control, specifically swearing and aggression and throwing things. DISTRICT AFFIDAVIT EXHIBIT 6, MARY WRIGHT, 7.

53. During her conversation with Parent, Mary Wright was told that A.G. had not displayed difficulties at Ayer's Brook, that she had had trouble at home, but not at school. DISTRICT AFFIDAVIT EXHIBIT 6, MARY WRIGHT, 7.

54. During her conversations with school personnel, Ms. Wright found no evidence of inappropriate restraint having been employed with A.G. at the Ayer's Brook school. DISTRICT AFFIDAVIT 6, WRIGHT AFFIDAVIT, ¶¶19, 11. Sarah Langlois, the classroom teacher, indicated to Ms. Wright a few instances where A.G. had kicked and screamed but she did not recall Ms. Langlois using the word "violent" and it did

not sound to Ms. Wright as though A.G.'s behaviors were violent, and Ms. Wright did not observe A.G. behaving violently. TESTIMONY OF MARY WRIGHT, 389:18-391:2. Ms. Wright also explained in her testimony that the instances where her notes of conversations with school personnel appear to refer to a "restraint" of A.G., did not involve behaviors which Ms. Wright considered to qualify under the technical term of "physical restraint." TESTIMONY OF MARY WRIGHT 391:11-393:6.

55. Based on the information obtained from A.G.'s Parents and teachers, combined with her classroom observation, Mary Wright, M.A., concluded that A.G. displayed sensory, emotional and behavioral issues which impacted her functioning within the academic environment. DISTRICT AFFIDAVIT 6, WRIGHT AFFIDAVIT, ¶12. She therefore recommended that the educational team and Parents meet to consider a more formal psychological assessment and behavioral intervention for A.G. Id. Ms. Wright discussed these recommendations with Parent on September 17, 2007. DISTRICT AFFIDAVIT 6, WRIGHT AFFIDAVIT, ¶14. Ms. Wright also made it clear in her report that the goal of such an assessment would not be to pathologize A.G.'s behaviors but to more thoroughly determine the etiology of her issues in an effort to develop strategies for A.G. to be successful within the educational setting, as well as enhance some more positive behaviors within the home setting. DISTRICT AFFIDAVIT 6, WRIGHT AFFIDAVIT, ¶13. Ms. Wright's report also contained a draft success plan for use in the classroom as a temporary measure for addressing A.G.'s behaviors pending the further evaluation recommended. DISTRICT AFFIDAVIT 6, WRIGHT AFFIDAVIT, ¶15. That plan included provisions for removal of A.G. from the classroom when appropriate, and the goal of such removals would not be to punish but to help A.G. gain control so she could return to the classroom and be successful. TESTIMONY OF MARY WRIGHT 394:

1-20.

56. After Wright issued her report, Parent contacted her to tell her that she disagreed with the characterization of A.G.'s behaviors within the classroom in her report. DISTRICT AFFIDAVIT 6, WRIGHT AFFIDAVIT, ¶16. Wright responded that she had reported faithfully what she had observed. Id.

57. Prior to September 20, 2007, A.G. was not removed from her classroom for more than five minutes. TESTIMONY OF BOB ROSANE: 125:24-126:16.

58. On September 20, 2007, A.G. began her day by perseverating on toys and stating that she had to be good. DISTRICT AFFIDAVIT 2, ROSANE AFFIDAVIT, ¶10. Mr. Rosane was called to the classroom to find A.G. kicking and screaming and under a table in the class. Id. After several minutes of Mr. Rosane's coaxing, A.G. consented to leave the classroom. Id. Mr. Rosane and A.G. walked hand in hand down the hall to his office. Id. Once there, Mr. Rosane explained that he would have to contact her mother, at which point A.G. exploded and remained inconsolable until her mother arrived twenty minutes later. Id. She then tantrumed that she did not want to go home and that she wanted to stay. Id. At this point, Ms. Edwards had also entered the office and observed A.G. trying to swing at Parent's face as A.G. was insistent that she did not want to go home. TESTIMONY OF PRISCILLA EDWARDS 264:20-265:10.

59. On September 24, 2007, a meeting was held, attended by Parents and school personnel. STIPULATED AGREED UPON FACTS, ¶12. The meeting, which was not an IEP meeting, was called as a result of discussions between Ms. Edwards and Parent to discuss "what had been happening." TESTIMONY OF PRISCILLA EDWARDS 266:2-6. In setting up the meeting, Ms. Edwards did not understand Parent wanted it to be an IEP meeting or to discuss changes to the IEP. TESTIMONY OF PRISCILLA EDWARDS 266:7-

9. Neither Ms. Edwards – nor in her view did any team member - feel that there were behaviors or occurrences at this point (or any point) that necessitated calling an “emergency IEP meeting.” TESTIMONY OF PRISCILLA EDWARDS 266:14-21.

60. During the September 24, 2007 meeting, school psychologist Mary Wright and Priscilla Edwards suggested further evaluation and the consideration of an emotional disability. DISTRICT AFFIDAVIT 2, ROSANE AFFIDAVIT, ¶11. Parent, however, was adamant that this not be pursued at this time. Id. Her correspondence to the school, dated October 2, 2007, confirmed this. DISTEVID/CORE/136-37 (Parent’s 10/2/07 Letter). The school was told that the questions it considered relevant for further testing would not be considered by the Parents within the context of the school’s evaluative process. Id. There were no mentions at this meeting of sensory integration concerns or a 2004 CDC report. Id.

61. During the September 24, 2007 meeting, Ms. Edwards discussed her view that the use of removal of a favorite toy at home by the Parents to respond to A.G.’s behaviors at school would not be effective. TESTIMONY OF PRISCILLA EDWARDS 262:15-263: 14. Ms. Langlois, the classroom teacher, also felt strongly that consequences should not be instituted at home regarding conduct at school for this age group and mentioned this to the Parents at the September 24, 2007 meeting because after toys were taken from A.G. on September 5, 2007, she appeared to have more difficulty at school and they had more difficulty having her leave the classroom to regroup. TESTIMONY OF SARAH LANGLOIS 408:11-410:8. Ms. Langlois explained that she believed this to be true because prior to the “toy” incident on September 5, 2007, A.G. was willing to leave the classroom to regroup (as she did on September 5, 2007), but thereafter she would yell and say “no, they’re going to take

my toys away." TESTIMONY OF SARAH LANGLOIS 457:18-23.

62. During the September 24, 2007 meeting, Mr. Rosane mentioned that the school was considering hiring Marie Dunwoody to work as a paraeducator specifically assigned to A.G. DISTRICT AFFIDAVIT 4, EDWARDS AFFIDAVIT, ¶13. The Parents stated they were happy with this suggestion as Ms. Dunwoody had worked with A.G. at Ayer's Brook. Id.

63. During the September 24, 2007 meeting, Parent did not request that any changes be made to A.G.'s IEP. TESTIMONY OF PRISCILLA EDWARDS 266:22-25.

64. Parent testified that by September 24, 2007 she did not trust the school. TESTIMONY OF [PARENT] 486:15-17. On September 25, 2007, the Parents wrote a letter, [DistEvid/Core/126-128] delivered on September 26, 2007 by hand to Steve Kinney's office. STIPULATED AGREED UPON FACTS, ¶13. Mr. Kinney responded with a letter dated September 26, 2007. [DistEvid/Core/129.]

65. The Parents' letter of September 25, 2007, requested that Ms. Edwards be the sole contact person from the school. [DistEvid/Core/133.]

66. The Parents' letter of September 25, 2007, complained about the information that the Parents had received regarding their daughter's behaviors in school. [DistEvid/Core/133.] At about this time the Parents stopped returning the home school journal to school. PARENT'S EXHIBIT 29 (home/school journal last entry is dated September 24, 2007); DISTRICT AFFIDAVIT 4 PRISCILLA EDWARDS, ¶13.

67. On September 27, 2007, Mr. Kinney spoke with Parent by phone about her September 25, 2007 letter. STIPULATED AGREED UPON FACTS, ¶14. Mr. Kinney spoke with Parent at length about her concerns and completed the call believing that he had had a good conversation in which she felt comfortable sharing her concerns.

DISTRICT AFFIDAVIT 1, AFFIDAVIT OF STEVE KINNEY, ¶4.

68. On September 27, 2007, a Notice of IEP team meeting was issued and sent to the Parents for a meeting to be held on October 1, 2007. STIPULATED AGREED UPON FACTS, ¶15. [DISTEVID/CORE/130]

69. On September 27, 2007, Ms. Edwards sent the Parents a letter enclosing a copy of the Ayer's Brook IEP, the Original Notice of Special Education Evaluation; Evaluation Plan and Report; and Parental Rights. STIPULATED AGREED UPON FACTS, ¶16. [DistEvid/Core/134]

70. On September 28, 2007, Ms. Edwards spoke with Dr. Nancy Cotton about having her come into A.G.'s classroom to observe and assist with the development of a support plan. DISTRICT AFFIDAVIT 4, EDWARDS AFFIDAVIT, ¶18. Mary Wright had previously discussed with Ms. Edwards the prospect of bringing in Dr. Nancy Cotton to further observe A.G. in the classroom and to form recommendations for behavioral supports for A.G. DISTRICT AFFIDAVIT 6, WRIGHT AFFIDAVIT, ¶22. Ms. Edwards also discussed this with Parent during phone calls in September, Id. at ¶17; TESTIMONY OF PRISCILLA EDWARDS 267:6-268:4. Ms. Edwards proceeded to follow up once Parent communicated to her on September 28, 2007, that she had researched Dr. Cotton's background and found her acceptable. Id. at ¶17, PARENT AFFIDAVIT 1, [PARENT] AFFIDAVIT, 32, TESTIMONY OF PRISCILLA EDWARDS 268:4-8. Ms. Edwards testified that she would not have contacted Dr. Cotton sooner than that because it would have been important for A.G. to have time to first settle and transition into the routine of kindergarten before conducting an observation to create a behavioral plan for her. TESTIMONY OF PRISCILLA EDWARDS 268:23-269:7. Dr. Cotton was scheduled to observe A.G.'s class on November 6, 2007, however this was cancelled due to A.G.'s removal

from school by her Parents. Id. at ¶18, TESTIMONY OF PRISCILLA EDWARDS 269:10-15.

71. On September 28, 2007, Parent requested to Ms. Edwards in a phone conversation that she forward documentation of A.G.'s behaviors in class. PARENT AFFIDAVIT 1, [PARENT] AFFIDAVIT, 32. The summary of the information regarding A.G.'s classroom behaviors that had been provided by Ms. Langlois to Mary Wright in connection with her evaluation was forwarded by mail to Parent on October 7, 2007. [DistEvid/Core/138.] The Parents later complained after filing for due process that the content of the summary was not specific enough. Bob Rosane testified that "the reason it wasn't documented is because I felt that we were moving forward in a really logical and supportive way in terms of the entire process. There's – again, we've had lots of dialogue around this. There – there's a process that we follow as an organization that's mandated both by law and by best practice, and I felt we were moving forward and following those steps." TESTIMONY OF BOB ROSANE, 99:20-100:2.

72. Principal Rosane testified that no pink slips were issued with respect to A.G.'s behaviors under the school's discipline procedures because "the pink slip policy, sort of a three-strikes-you're out procedure, is meant primarily as a punitive measure. It's to say to kids, you know what? You're caught, here's the consequence...One of the things that we feel – that I feel...is absolutely critical in a situation like this when we're looking at kids for the first time and when we're starting to see emerging behaviors is not to make an assumption about what kids can and can't do and I never want to reprimand or punish behavior that represents behavior – something a kid just can't do." TESTIMONY OF BOB ROSANE, 109:7-21. Mr. Rosane then continued: "If I had known and felt comfortable that [A.G.] were doing any of this intentionally, that she was doing it maliciously, then we would have followed that –

those procedures, but I didn't have that feeling. I couldn't in any way say whether this was behavior she could or could not control, and I felt that to come down in that way strictly in a sort of a behavioral punishment type thing was absolutely unwarranted."

TESTIMONY OF BOB ROSANE 110:4-12. Principal Rosane also testified that he did not think use of the pink slips was the proper way to communicate to the Parents about A.G.'s behaviors. TESTIMONY OF BOB ROSANE 111:9-12. Rosane preferred direct communication with the Parents, which he engaged in with Parent. TESTIMONY OF BOB ROSANE 111:15-112:5.

73. When A.G. experienced behavioral challenges, Ms. Langlois would attempt to redirect A.G. within the classroom, which was usually successful. TESTIMONY OF SARAH LANGLOIS 410:15-22. On a few occasions when this was not successful and A.G. was disruptive to herself or other children she would be removed from the class. TESTIMONY OF SARAH LANGLOIS 410:21-411:2. Ms. Langlois would not be the one to remove A.G., and never considered the manner of removal by others to be inappropriate. TESTIMONY OF SARAH LANGLOIS 413:3-14. In her entire time at Brookfield, prior to the initiation of due process, A.G. was only removed from class on two or three occasions. TESTIMONY OF SARAH LANGLOIS 450:24-25. She was removed prior to October 11, 2007 by Principal Rosane or Martha Blaisdell. TESTIMONY OF SARAH LANGLOIS 451:5-8 (Marie Dunwoody did not begin working with A.G. until October 2007). Usually, A.G. left willingly by taking the person's hand. TESTIMONY OF SARAH LANGLOIS 451:11-15. Ms. Langlois testified that she never saw A.G. removed from class in a way that was violent or harmful to her, that she never saw A.G. respond to a removal in a way that made her believe A.G. was emotionally hurt by being removed, and never saw A.G. respond in a way to removals that suggested she was

physically hurt by those removals. TESTIMONY OF SARAH LANGLOIS 463:9-464:1. When she was removed, she was out of the classroom typically for no more than five or ten minutes, and when she returned she was able to return to class smoothly. TESTIMONY OF SARAH LANGLOIS 464:12-21.

74. Between September 24, 2007, and October 1, 2007, school representatives discussed with the Parents their opinion that the removal of toys at home for behaviors at school was causing A.G. undue anxiety and requested that this practice not be used as it could result in a set-up for failure at school. TESTIMONY OF BOB ROSANE 145:3-16.

75. On October 1, 2007, an IEP meeting was held for A.G. and to discuss the issues raised in the Parents' letter of 9/26/07, including A.G.'s recent behaviors. This meeting was attended by Mr. Kinney, Mr. Rosane, Ms. Edwards, Ms. Langlois, Ms. Blaisdale, Ms. Solomon, Ms. Carpenter, Parents and Ms. Kilpatrick of VPIC by phone. STIPULATED AGREED UPON FACTS, ¶17. Mr. Rosane testified that he left the meeting feeling that everyone was very comfortable; "there were kind of thank-yous all around at the end." TESTIMONY OF BOB ROSANE: 143:6-7. At the conclusion of the October 1, 2007 meeting, Mr. Kinney believed that the Parents were no longer upset, that the team was working well, and that there was an understanding about the steps necessary to return A.G. to school. DISTRICT AFFIDAVIT 1, AFFIDAVIT OF STEVE KINNEY, ¶16.

76. At the October 1, 2007 IEP meeting the team, with the Parents' agreement, removed A.G.'s SLP services entirely. DISTEIVD/CORE/136-37 (Parent Letter 10/2/07). During the meeting, there was discussion of the Parents' impression that A.G. was experiencing "panic" attacks around attending school, which conflicted with the school representative's impression of A.G.'s experience at

school, and lead to the Parents' announcing that they did not want any testing of these issues conducted by the school, that they would privately pursue this testing "outside of the school." PARENT EXHIBIT 16 (TAPE OF MEETING OF OCTOBER 1, 2007).

77. On October 1, 2007, a Notice of Meeting for October 12, 2007, [DistEvid/Core/135] was issued for the IEP team to review and discuss the results of the re-evaluation. STIPULATED AGREED UPON FACTS, ¶18.

78. In October 2007, Ms. Marie Dunwoody, a paraeducator, began working as a kindergarten support person for 1.5 days a week. STIPULATED AGREED UPON FACTS, ¶19. She worked directly with A.G. TESTIMONY OF PRISCILLA EDWARDS, SARAH LANGLOIS.

79. On October 2, 2007, A.G. returned to school. STIPULATED AGREED UPON FACTS, ¶20. Upon her arrival, she greeted Kindergarten Teacher Sarah Langlois individually with a hug. TESTIMONY OF SARAH LANGLOIS 420:22-421:3. Later during that same day when Mr. Rosane visited A.G.'s classroom, "she ran over and gave (him) a big hug, which made (him) feel like the school was really on the right track." TESTIMONY OF BOB ROSANE 143:16-18.

80. On October 2, 2007, the Parents wrote to Ms. Edwards about the results of A.G.'s return to school, praised the efforts of Ms. Langlois in accommodating A.G.'s needs in the classroom, and reported that A.G. had had a good day.

[DistEvid/Core/136-137.] In that letter they asked Ms. Edwards to hire Wendy Cashman to work in the classroom as a support for A.G., and informed her that Ms. Cashman would be able to start work on October 15, 2007. Id. The Parents also asked that documentation of the first month of school be provided. Id. The only additional documentation that was in existence at that time was a summary which classroom teacher Langlois had prepared, and that was forwarded by mail five days

later on October 7, 2007. [DISTEVID/CORE/138.]

81. The Parents' letter of October 2, 2007, also states in the sentence immediately following references to A.G.'s "anxiety" that "if any testing is to be done I believe that we will consult with the CDC for that and I am conducting research into a private counselor who will be able to interface with the school if needed. A diagnosis of any specific emotional disturbance or learning disability in the school records will not be in A.G.s' best interest in the long run." [DISTEVID/CORE/136.] Ms. Edwards did not understand that the Parents were requesting an independent evaluation of their daughter in October 2007 through the special education rules. TESTIMONY OF PRISCILLA EDWARDS 270:3-7. Had it been requested at that time, the request would have been premature as the current evaluation process had not yet been completed, and was not completed until December 2007, when the EPT report was forwarded to the Parents. TESTIMONY OF PRISCILLA EDWARDS 270: 19-21, SEE ALSO DISTEVID/CORE/242-245.

82. Jill Pomerantz conducted the comprehensive speech and language evaluation of A.G. as part of the re-evaluation plan agreed to by the team on September 4, 2007. DISTEVID/CORE/143. Ms. Pomerantz met with A.G. on five occasions, the last being on October 3, 2007. TESTIMONY OF JILL POMERANTZ, 360:1-5. Ms. Pomerantz observed A.G. as being "very happy in the classroom." TESTIMONY OF JILL POMERANTZ, 360:22-24. Ms. Pomerantz did not observe A.G. to be uncomfortable at the Brookfield School. TESTIMONY OF JILL POMERANTZ, 362:19-21. Ms. Pomerantz also observed A.G. "meld" back into class after the testing was done for each session. TESTIMONY OF JILL POMERANTZ, 361:4-9. A.G.'s classroom teacher confirmed A.G. was able to return after testing and perform and participate. "There were times when she didn't want to go for the testing, but she was always able to come back and

was perfectly fine when she came back. It didn't impact – I didn't see extreme, you know, behaviors or anything after she came back." TESTIMONY OF SARAH LANGLOIS 415:6-17.

83. Parents first requested a copy of A.G.'s student file on October 9, 2007. PARENT AFFIDAVIT 1, [PARENT] AFFIDAVIT, 35. After some discussion between the parties "to know what exactly they were looking for," a copy was made available for the Parents to pick up. TESTIMONY OF BOB ROSANE, 143:5-9. The Parents picked up the copy on Wednesday, October 17, 2007. PARENT AFFIDAVIT 1, [PARENT] AFFIDAVIT, 37.

84. On Wednesday, October 10, 2007, Parents contacted Mr. Kinney to request that the October 12, 2007 EPT meeting be cancelled. STIPULATED AGREED UPON FACTS, ¶23. They explained that this was due to their inability to obtain advocacy representation from two different organizations. [DistEvid/Core/141.] Parent said in a later affidavit that she decided not to proceed with the meeting because she was suspicious of Mr. Kinney's "insistent" desire to proceed with the meeting. [PARENT] AFFIDAVIT, 36.

85. During the evening of Wednesday, October 10, 2007, Ms. Edwards returned a call from Parent in which she had received during the school day. DISTRICT AFFIDAVIT 4, EDWARDS AFFIDAVIT, ¶24. During that call Parent told Ms. Edwards she was concerned that her daughter may not continue to be eligible for special education based on the results of the speech and language evaluation. Id. Ms. Edwards explained to Parent that the team would need to meet to consider all the information and that Brookfield would continue to support A.G. whether or not she were on an IEP. Id. Parent, however, told Ms. Edwards she did not think Brookfield would meet A.G.'s needs. Id. At no time during that phone call, however, did Ms. Edwards

understand that Parent had decided to no longer go forward with the planned EPT meeting on October 12, 2007. TESTIMONY OF PRISCILLA EDWARDS 270:1-14.

86. On Thursday, October 11, 2007, Ms. Edwards forwarded a copy of the Speech and Language Evaluation Report to Parents. STIPULATED AGREED UPON FACTS, ¶25. In her letter of that date, Ms. Edwards noted that the only outstanding report was the OT evaluation report which would be forwarded upon receipt. [DistEvid/ Core/142.] Parent had previously received a copy of the Comprehensive Education Evaluation. STIPULATED AGREED UPON FACTS, ¶25.

87. On Friday October 12, 2007, Parents filed for Due Process. Per their request, the EPT meeting to discuss the evaluation results did not take place.

88. Had the October 12, 2007, EPT meeting gone forward, Ms. Wright fully expected the school to have been willing to implement her proposed behavior plan pending further evaluation. DISTRICT AFFIDAVIT 6, WRIGHT AFFIDAVIT, ¶20. Ms. Wright also testified that she did not consider in her professional opinion the behavioral difficulties that she witnessed and which had been reported to her, as beyond the capacity of the Brookfield Elementary School staff. Id. at 22. Wright also testified that based on her training and experience and to a reasonable degree of psychological certainty that the evaluation she performed and the recommendations she made were adequate and appropriate to provide A.G. with an opportunity to access education within the classroom, and that if A.G. had been allowed to remain and if her recommendations had been allowed to have been implemented, she would have been able to have an opportunity to succeed in the classroom and experience academic progress. Id. at 23.

89. A.G.'s case manager, Priscilla Edwards, testified that throughout the fall,

up until the Parents filed for due process, it was her opinion that A.G. was experiencing difficulty with transition as many kindergarteners often do but that at no point was it interfering with her education, that she was clearly making progress.

TESTIMONY OF PRISCILLA EDWARDS 221:12-22. She also testified that the progress reports from the first 20 days of school showed that A.G. was making progress.

TESTIMONY OF PRISCILLA EDWARDS 244:22-245:15. At the time the Parents filed for due process, Principal Rosane believed that A.G. was receiving a free and appropriate public education based on his training and experience and knowledge of A.G. at the time. TESTIMONY OF BOB ROSANE 143: 16-21. Priscilla Edwards, her case manager, also was confident that even before the assessment by Dr. Cotton could be implemented, A.G. had the necessary supports in place to allow A.G. to access her education and make reasonable progress. TESTIMONY OF PRISCILLA EDWARDS 269:16-24. Her classroom teacher, Ms. Langlois, also testified that A.G. was making progress while at Brookfield and that if she had been allowed to remain at Brookfield she would have continued to make progress. TESTIMONY OF SARAH LANGLOIS 413:19-414:3. Ms. Langlois specifically testified that "I was seeing growth in the classroom specific to what she was doing in the classroom." TESTIMONY OF SARAH LANGLOIS 434:13-434:5.

90. On Monday October 15, 2007, Wendy Cashman began working with A.G. at the Brookfield Elementary School. STIPULATED AGREED UPON FACTS, ¶127. Upon her arrival at Brookfield, and after working with A.G., Ms. Cashman was impressed by all of the academic progress that A.G. had achieved in the previous six weeks, and by her ability to navigate the challenges that Ms. Cashman had considered would confront A.G. upon entering kindergarten. TESTIMONY OF WENDY CASHMAN 347:19-348:5. Ms. Cashman testified that she believed that A.G. was making "significant"

academic progress while she worked with her at Ayer's Brook and was accessing her education, and that the social piece was "coming." TESTIMONY OF WENDY CASHMAN 348:15-20, 348:22-349:1. At no point during her time working with A.G. at Brookfield did she either observe A.G. being removed from the class, have concerns with how personnel were treating A.G., and she did not herself remove A.G. from class. TESTIMONY OF WENDY CASHMAN 350:4-16.

91. To the extent that Ms. Carpenter observed changes in A.G.'s emotional state during the fall, during her once a month visits, she conceded in her testimony that she did not observe A.G. at school and does not have psychiatric training and therefore cannot speak to what, if any, other factors may have contributed to A.G.'s emotional state. TESTIMONY OF MELISSA CARPENTER 321:18-323:1. Ms. Carpenter also conceded that emotional reactivity was an area she had worked on with A.G. between the winter and summer of 2007 prior to her entry into kindergarten in 2007, and that she had not "not met" the goals set with respect to improving emotional regulation. TESTIMONY OF MELISSA CARPENTER 323:2-325:23. Ms. Cashman, who worked with A.G. both at Ayer's Brook Preschool and in the Brookfield Kindergarten starting on October 15, 2007, testified that it is common for kindergarteners to experience regressive behaviors and changes in esteem as they go through the "huge" transition of adapting to kindergarten. TESTIMONY OF WENDY CASHMAN 351:1-13. Ms. Cashman testified that A.G.'s behaviors had not fundamentally changed from Ayer's Brook. TESTIMONY OF WENDY CASHMAN 335:19-25. 337:21-338:2. Ms. Cashman testified, however, that unlike at Ayer's Brook, A.G. struck her while at Brookfield. TESTIMONY OF WENDY CASHMAN 399:8-12. Ms. Cashman testified that when kids are frustrated they will often strike out with those they feel comfortable with, and since she had known

A.G. for some time she would qualify as someone A.G. is comfortable with. TESTIMONY OF WENDY CASHMAN 340:6-14. Ms. Cashman also testified that she saw A.G. strike other children at Ayer's Brook as a preschooler. TESTIMONY OF WENDY CASHMAN 340:15-20.

92. On October 23, 2007, Steve Kinney wrote to the Parents reminding them that they still needed to contact the school to re-schedule the October 12, 2007 EPT meeting which had been cancelled at their request. [DISTEVID/CORE/162.] That letter points out that the District has the responsibility of reviewing the evaluations that had been conducted to date at that meeting, and that a request for further, independent, evaluation can be done in writing by the parent. Id.

93. On October 30, 2007, Steve Kinney wrote to the Parents again referring to the need to reschedule the October 12, 2007 EPT meeting. [DISTEVID/CORE/163-64.] The previous day the school received a copy of the 2004 CDC report for the first time. DISTRICT AFFIDAVIT 1, KINNEY AFFIDAVIT ¶19.

94. On November 1, 2007, Parent contacted Steve Kinney via letter, indicating that she would contact Ms. Edwards to reschedule the October 12, 2007 EPT meeting. [DISTEVID/CORE/168-170.] In that letter, Parent states that they were going to suggest dates for the meeting at an upcoming November 5-6, 2007 mediation. Id. The letter fails to suggest any meeting dates, and after recounting recent troubling episodes with A.G. simply asks that Mr. Rosane return A.G.'s school work and belongings when he attends the upcoming mediation session. Id. There was no discussion or reference to a request for an independent evaluation.

95. On November 5-6, 2007, the parties mediated without resolution of outstanding issues between the parties.

96. On November 19, 2007, the parties met at a re-convened EPT meeting, STIPULATED AGREED UPON FACTS, ¶128, which was rescheduled 2 times at the Parent's request. [DistEvid/Core/173-174.] During the meeting it was agreed that until further reports, which the Parents were obtaining from other providers, were available, the District would prepare and distribute a draft IEP to move the process along. TESTIMONY OF PRISCILLA EDWARDS 277:20-278:3.

97. On November 19, 2007, the EPT team met to review the results of the evaluation to date and found A.G. to qualify for special education for developmental delay for the under age 6 guidelines. PARENT EXHIBIT 16 (Tape of 11/19/07 Meeting).

98. On November 20, 2007, the Parents wrote to the school rejecting their offer of OT services in Taftsville, and tutoring at home by Marie Dunwoody (one of the two para educators who had worked with A.G. at Brookfield) on the basis, in part, of concerns from A.G.'s counselors at the Clara Martin Center. Parents rejected the offer of "specials" at Brookfield, and requested a written write-up of the results of the November 19, 2007 meeting. [DistEvid/Core/179.] There was no discussion or reference to any request for an independent evaluation in this correspondence. Id.

99. On November 26, 2007, Mr. Kinney responded to Parent's November 20, 2007 letter. [DistEvid/Core/182-83.] While explaining the OT services that were being offered in greater detail, Mr. Kinney also responded to Parent's concern about the use of Ms. Dunwoody as the tutor. Id. Mr. Kinney asked for written information from A.G.'s counselors at the Clara Martin Center, explaining that in the absence of such information, due to the lack of alternative personnel available for the position, the assignment of Ms. Dunwoody would remain. Id. Mr. Kinney also explained that he would continue to look into alternatives for A.G.'s access to specials other than at

Brookfield Elementary School. Id.

100. On November 29, 2007, Mr. Kinney again wrote to Parents seeking information from A.G.'s counselor regarding her ability "to work with the tutor we have assigned, and any recommendations she has for A.G.'s ability to return to the Brookfield School, either immediately or for participation in specials, or a method for determining when she could return full time." [DistEvid/Core/184.]

101. On December 13, 2007, Mr. Kinney again wrote to the Parents seeking information regarding A.G.'s emotional health and the problems posed by assigning Ms. Dunwoody as her tutor while she remained at home. [DistEvid/Core/ 187.]

102. On December 18, 2007, Ms. Edwards forwarded to the Parents the Evaluation Plan and Report. STIPULATED AGREED UPON FACTS, ¶29.

103. On December 20, 2007, Ms. Edwards forwarded a copy of the current IEP as drafted in the wake of the November 19, 2007 meeting. DISTEVID/CORE/213-235.

104. On December 26, 2007, Parents forwarded a response to the Evaluation Plan and Report to Ms. Edwards with questions. STIPULATED AGREED UPON FACTS, ¶30. In their response, Parents' object to the evaluations conducted to date and appear to request an independent evaluation.

105. On January 8, 2008, Ms. Edwards forwarded a written response to the Parents' December 26, 2007 communication. [DistEvid/Core/242.] In her letter, Ms. Edwards again notes that the District had yet to receive any documentation or information regarding A.G.'s emotional issues or the objection to the use of Ms. Dunwoody as her tutor. Id. Ms. Edwards also encloses procedures and instructions for the Parents to request an independent evaluation. Id. Ms. Edwards closed by

requesting that the Parents contact her to set up a meeting to discuss the reports the Parents had received from other providers. Id.

CONCLUSIONS OF LAW

Introduction

The Parents seek a finding by the Hearing Officer that the District failed to meet its legal obligations with respect to (1) a three year evaluation of A.G. due in January 2007; (2) planning and implementing A.G.'s transition from preschool to kindergarten in September 2007; (3) Parent's requests prior to October 11, 2007, for documents and records; (4) convening an IEP team meeting to discuss A.G.'s behavior at Brookfield School and Respondent's responses to behavioral issues; (5) development and implementation of an IEP for A.G. at Brookfield School; (6) Parents' request for an independent psychological evaluation; (7) communicating with Parents regarding behavioral issues and behavioral measures prior to October 11, 2007.

PRE-HEARING ORDER DATED JANUARY 14, 2008. Based on the foregoing Findings of Fact, the Hearing Officer concludes that the District met its legal obligations with respect to each of these issues and is entitled to judgment in its favor.

I. The District Substantively Met Legal Requirements for Three Year Evaluation

A discussion of the appropriateness of the re-evaluation conducted by the IEP Team requires an examination of two issues: (1) the timing of the evaluation and (2) whether or not the delay, if any, affected the Parents' rights to participate in the evaluation and/or the content of the evaluation and therefore the provision of FAPE to A.G.

A. Facts and Circumstances Surrounding the Timing of Evaluation

With respect to the first issue, the Parents claim both that the re-evaluation

should have occurred in January 2007 and that they never agreed to put it off until A.G. entered kindergarten, and that therefore the entire evaluation process is flawed. Although disputed, Ms. Bowmer testified and the Hearing Officer found that Ms. Bowmer spoke with Parent about the fact that A.G.'s re-evaluation was due in January 2007 and Parent concurred the evaluation should be put off. Ms. Bowmer testified that this conversation occurred and that for that reason the evaluation did not occur until A.G. entered kindergarten. Parent disputes that this conversation ever occurred. Accordingly, one must consider the surrounding facts and circumstances. With respect to ongoing plans for A.G.'s special services, the facts as found are that:

1) Ms. Bowmer spoke with Parent on almost a daily basis throughout the 2007-2008 school year;

2) That in December 2006, A.G.'s IEP team met and agreed to reduce A.G.'s occupational therapy services from direct services to consultation only, and discussed her continuing progress with speech and language services;

3) That in March 2007, Ms. Bowmer shared with other service providers the fact that Parents were intending to move out of state at the end of the school year;

4) That when meeting with Priscilla Edwards on May 3, 2007 to discuss transitioning A.G. to kindergarten, Ms. Bowmer shared that A.G.'s Parents had asked that due to A.G.'s progress that she be taken off her IEP entirely.

The facts further found show that when the District moved forward to begin the evaluation of A.G. in the fall of 2007, by convening an EPT meeting on September 4, 2007, Parent's response to these efforts was to ask if it were "necessary to do this right now." In the opinion of Ms. Edwards, it was Parent's preference at that time to

not go forward with the evaluation. In addition, it is undisputed that when Mary Wright, who had conducted the comprehensive educational evaluation of A.G. in September 2007, recommended further evaluation and the consideration of an emotional disability at a meeting held on September 24, 2007 with the Parents, Parent was adamant that this would not be pursued. Parent was similarly adamant in her correspondence with the school in September/October 2007. When the EPT was set to meet and formally discuss the results of the evaluative process to date on October 12, 2007, Parent, suspicious of the school's intentions, cancelled the meeting. Parent did not respond to the school's two written requests that she contact the school to reschedule the meeting in order to go forward and complete the process. Accordingly, while it remains disputed whether or not Parent agreed in January 2007 to postpone A.G.'s re-evaluation, it is undisputed that Ms. Bowman told Ms. Edwards in May 2007, that A.G.'s Parents believed she no longer needed special services, that in September Parent wanted the District to consider putting off the evaluation, that in late September when it was suggested that the scope of the evaluation be broadened, Parent was adamant in person and in writing that further testing not occur, and that it was ultimately Parent who brought a halt to the entire evaluative process. These undisputed facts are more consistent with Ms. Bowman's version of events - that Parent wanted the re-evaluation postponed – than with Parent's version.

B. Legal Impact of Any Such Delay

Even if it were the District's "fault" that the evaluation was delayed, the law does not hold that every procedural error in the development of an IEP renders the IEP legally inadequate under the IDEA. Grim v. Rhinebeck Central Sch. Dist., 346

F.3d 377, 381 (2d Cir. 2003). Rather, a reviewing officer must determine whether or not the error either seriously interfered with the right of parental participation, Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186 (2d Cir. 2005), or resulted in substantive harm for the provision of FAPE. Nack v. Orange City Sch. Dist., 454 F.3d 604 (6th Cir. 2006), W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1484 (9th Cir. 1992). Whether or not a procedural violation results in harmless error depends on an analysis not only of records, but of the total factual circumstances. ML v. Federal Way Sch. Dist., 394 F.3d 634, 653 (9th Cir. 2005).

C. Delay In Evaluation Did Not Deprive Parent of Participation in Process

The evaluation promptly began upon A.G.'s entry into kindergarten with an EPT meeting on September 4, 2007, and with evaluations commencing the very next day. It was clear at the September 24, 2007 meeting that any consideration of emotional issues within the context of the evaluation would not be permitted by the Parents, and that they would perform any such testing privately. This was confirmed by later correspondence from the Parents to the school. EXHIBIT E. While an EPT meeting was scheduled to occur on October 12, 2007, to discuss the results of the re-evaluation - this was cancelled at the Parents' request. Had that meeting proceeded, the team would likely have implemented some form of Ms. Wright's draft behavioral plan, gone forward with arrangements to have Dr. Cotton observe A.G. in the classroom, and consider further areas of testing. When the Parents cancelled the October 12, 2007 meeting, the Parents also filed for Due Process. Steve Kinney nevertheless immediately wrote to them requesting that they reschedule the EPT so the process could go forward and asked that they do so, in writing a second time, without success. Eventually the school rescheduled the meeting, after two days of

unsuccessful mediation, and then again rescheduled that meeting at the Parents' request. The Parents claim that the delay affected their ability to participate and suggest areas of inquiry in the process, and furthermore that as a result issues of sensory integration dysfunction (something that was never diagnosed) were not adequately considered. Yet at no time prior to their request for due process – once the evaluation was underway - did the Parents raise the prospect of having the re-evaluation address concerns of sensory integration dysfunction. During her consultation with Mary Wright, who conducted the comprehensive educational evaluation, Parent's "primary concern" was A.G.'s "impulse control." When asked by Ms. Wright whether A.G. had previously been tested, Parent responded that the CDC had tested A.G. in 2004 and found her to be delayed verbally – she made no mention of any concerns of sensory integration dysfunction as being suggested in that report. Ms. Wright asked for this report from Ms. Edwards, who was unaware of the report, and thereafter the school requested the report from Parents and did not receive it until October 29, 2007, after the Parents cancelled the EPT meeting of October 12, 2007, and filed for due process. Finally, upon completion of the evaluation, the IEP team concluded that SLP services which had been in place could be removed, and that OT services would be continued at a reduced level. Accordingly, the evidence clearly shows that where A.G. was receiving special services any delay in her evaluation had no impact in her ability to receive those special services, as these were only further reduced following the evaluation.

D. Delay In Evaluation Did Not Negatively Affect its Content and Provision of FAPE

The Parents suggest that if the evaluation had occurred sooner, behavioral

issues would have been addressed within the evaluation. All the educational experts who testified stated that performing an evaluation while A.G. was at Ayer's Brook would have been unhelpful in this regard as it would be important to get the child into the environment of kindergarten and then observe her reactions within that environment (Cashman testifying you need to get the child into the environment first and give her time to adjust; Mary Wright, M.A., testifying that assessing a child in the environment that she was leaving where she had already experienced success would not provide the assessor with "specific recommendations on how to assist A.G." in the very different environment of Brookfield; Langlois, kindergarten classroom teacher testifying that she would need to get A.G. into the classroom environment first). There is no evidence, other than the Parents' speculation (and speculation alone cannot form the basis of a factual finding) to support the Parents' argument that earlier testing would have changed the course and scope of the evaluation, or positively impacted A.G.'s ability to transition successfully to Brookfield.

In response to A.G.'s behavioral difficulties, the school, despite the absence of any provision within her IEP requiring 1:1 support for A.G. in the classroom, promptly assigned a paraeducator to support A.G.'s classroom, and allowed her teacher (in a class of only six) to provide A.G. with more individual attention. A para educator was in place by September 5, 2007. Almost immediately the classroom teacher also began to make modifications in her classroom routine to support A.G. which the Parent admits were helpful and positive. Mary Wright began her comprehensive evaluation of A.G. on September 5, 2007. In a further effort to accommodate the Parents' concerns regarding A.G.'s emotional state after a meeting held on September 24, 2007, the school assigned a 1:1 support aide directly to A.G. with

personnel chosen and approved by the Parent – a step not required by the IDEA.

While there is evidence that A.G. had behavioral difficulties adjusting to kindergarten in a new school, there is no evidence that A.G. was failing to access her education while she was allowed by her Parents to remain at Brookfield or to make reasonable educational progress. This is the testimony of A.G.'s classroom teacher (specifying that she saw progress on elements worked on in class); A.G.'s paraprofessional (who had worked with her the previous spring at Ayer's Brook and was able to compare her academic progress, and who has 35 years of experience working with children in this age group to aid such a comparison); Special Education case manager Edwards, Principal Rosane, and comprehensive education evaluator Mary Wright. Id. Accordingly, there is no evidence that a delay in re-evaluation caused any substantive violation of the IDEA.

In considering the total circumstances of the case, the pertinent inquiry is whether the failure of the evaluation process to occur in January 2007 resulted in prejudice to A.G.'s program based on a consideration of the surrounding circumstances known to the school at the time – not with the benefit of hindsight. A.M. v. Fairbanks North Star Borough Sch. Dist., Slip Copy, 2006 WL 2841054, at 7 (D. Alaska 2006). In this case there is sufficient evidence to suggest that the evaluation process, if it had been conducted in January 2007, would not have resulted in any change in IEP services that were in place for A.G. in the fall of 2007. The evidence demonstrates that earlier testing would not have affected the content and/or outcome, and may have been unhelpful or useless when considering the challenges posed by kindergarten for A.G., and that testing was begun promptly upon her entry to kindergarten which permitted a timely consideration of the challenges

facing her there – not at Ayer’s Brook. The evidence also shows that the absence of any results from such re-evaluation did not prevent A.G. from making reasonable educational process at Brookfield and from accessing her education. Accordingly, the undisputed facts appear to show that any delay in conducting the evaluation resulted in no prejudice to a provision of FAPE to A.G.

II. The District Substantively Met Legal Requirements to Transition A.G. to Kindergarten

The Parents claim that OSSU failed to comply with the legal requirements imposed by regulation to transition A.G. to kindergarten. Schools are by regulation to arrange for the transition by conducting a meeting between three and six months prior to the child’s entrance to kindergarten. VERMONT SPECIAL EDUCATION REGULATION 2361.1(a). The stated purpose of the meeting is to “*ensure that an IEP is ready to be implemented at the beginning of the school year.*” Id. The meeting participants are to include the parents, the receiving kindergarten teacher, a special education teacher or other school representative from the receiving school. Id. 2361.1(b). A proper consideration of the issue of this alleged procedural flaw will require an analysis of whether or not any alleged failure resulted in actual prejudice with respect to the provision of FAPE to A.G., Grim v. Rhinebeck Central Sch. Dist., 346 F.3d 377, 381 (2d Cir. 2003), when taking into account all relevant facts, ML v. Federal Way Sch. Dist., 394 F.3d 634, 653 (9th Cir. 2005), which will require a review of relevant oral and documentary evidence, with an eye to the knowledge the school had, at the time, not merely a judgment of past actions taken with the benefit of hindsight. A.M. v. Fairbanks North Star Borough Sch. Dist., Slip Copy, 2006 WL 2841054, at 7 (D. Alaska 2006).

Given that the purpose of the required meeting is to “ensure” that an IEP is ready to be implemented at the beginning of the school year, in order to evaluate whether or not a substantive violation of IDEA occurred the relevant facts are: (1) the existence of the IEP at the time A.G. began kindergarten; (2) the services to be provided under that IEP; (3) the coordination necessary between the Ayer’s Brook Preschool and Brookfield Elementary School to implement those services; (4) steps actually taken by the school to achieve the obligations set forth under Vermont Special Education Regulation 2361.1(a); (5) the state of mind of the meeting participants required under the regulation at the time the meeting should have occurred.

There was an IEP in place when A.G. entered Brookfield. As of three to six months prior to A.G.’s entry to kindergarten (and indeed up to A.G.’s entry to kindergarten), A.G.’s IEP called only for two thirty minutes speech and language sessions a week with A.G., and fifteen minutes of occupational therapy consultation with A.G.’s teachers. Both A.G.’s sending and receiving teachers and A.G.’s special education case manager at Brookfield concluded the steps taken to transition A.G. were appropriate to permit her IEP to be in place and ready to be provided at Brookfield. (Testimony of Ms. Bowmer that she had done all that was necessary to provide for the provision of services in A.G.’s IEP in kindergarten; receiving teacher Langlois testifying that with hindsight she would not have done anything differently to transition A.G., that there was little if any additional coordination necessary to implement A.G.’s IEP upon her arrival; testimony of Priscilla Edwards that the “appropriate” level of coordination was accomplished based on the information she received from Bowmer, the limited level of support A.G. was receiving in her IEP, and

the information she received from the Ayer's Brook Preschool staff about A.G.'s progress).

While no formal meeting between the sending/receiving teacher, special educator and Parent occurred, the steps actually taken by the school to "ensure that (A.G.'s IEP was) ready to be implemented at the beginning of the school year,"

VERMONT DEPARTMENT OF SPECIAL EDUCATION REGULATIONS 2361.1(a) were:

- (1) that Ms. Bowmer invited Ms. Edwards to observe A.G. at Ayer's Brook and to meet with her staff to discuss A.G., which occurred on May 3, 2007;
- (2) that Ms. Bowmer informed Parent of Ms. Edwards' visit in advance;
- (3) that Parent was introduced to Ms. Edwards on May 3, 2007;
- (4) that Ms. Langlois, the receiving teacher, was not hired until late May 2007 and thus not available for the May 3, 2007 visit by Edwards to Ayer's Brook, but met Parent on two subsequent occasions prior to A.G.'s entry to kindergarten;

Parent argues she was not formally invited to a transition meeting and that this is a fatal flaw to the District's argument that it substantively complied with the requirements for transition under Vermont Special Education Regulation 2361.1(a). Yet it is undisputed that she was told when Ms. Edwards was coming to Ayer's Brook and the purpose of that visit. Although disputed, there is sufficient evidence to support the finding that Parent wanted A.G. to be taken off of her IEP entirely in the spring of 2007.

There is no evidence that failure to hold a formal meeting negatively affected the school's ability to ensure the delivery of A.G.'s IEP services. The undisputed facts show that after only a month at Brookfield, all IEP team members agreed to remove altogether A.G.'s speech and language services. The undisputed facts also show that

the OT services that A.G. was receiving in June 2007 were limited consultation with her teachers, that that was only extended into the fall of 2007 in order to assist with A.G.'s transition, and that her OT provider fully expected that once A.G. was in kindergarten those services would be dropped entirely.

Even if one were to expand the legal requirements of the transition meeting from ensuring proper delivery of services within the existing IEP, Regulation 2361.1.(a) to a more comprehensive obligation to ensure a smooth transition generally to kindergarten, it is undisputed that all of A.G.'s educators involved in her transition to kindergarten, and who evaluated her once she arrived in kindergarten, agree that until A.G. was actually attending kindergarten no further steps could be taken to accommodate that change (Testimony of Alisa Scipio, OT; testimony of Cashman, preschool aide to A.G.; testimony of classroom teacher Langlois; testimony of Mary Wright). Once A.G. arrived in kindergarten, steps were taken immediately to evaluate her, to support her in the classroom with additional supports and modifications to classroom routine, and to arrange for an observation of her behaviors to create a behavioral plan. It is after the fact speculation to suggest that a formal transition planning meeting would have resulted in materially different supports being in place prior to A.G. experiencing the kindergarten environment. See T.B. v. Warwick Sch. Committee, 361 F.3d 80 (1st Cir. 2004) (finding IEP program created by school upon student's transfer to district sufficient despite school's failure to meet individually with student – review of materials that contained evaluations and meetings with parents were sufficient where school intended to revisit IEP content within 30 days of student's arrival at school). Such speculation is also contradicted by the testimony of A.G.'s educators who said it would be important to

see A.G. in the new school for at least six weeks before instituting any such supports. (Cashman testifying that you would want to have a child in the new environment for six weeks before providing her with 1:1 supports, which occurred in this case; testimony of Mary Wright that she would want to have A.G. in the environment before assessing her; testimony of classroom teacher that she would want to observe A.G. in the classroom first before determining additional behavioral supports).

Finally, it is undisputed that A.G. was able to access her education and make reasonable educational progress while at Brookfield (testimony of A.G.'s classroom teacher, specifying that she saw progress on elements worked on in class; A.G.'s paraprofessional, who had worked with her the previous spring and compared her academic progress, and who had 35 years of experience working with children in this age group; Special Education Case Manager Edwards, Principal Rosane, and comprehensive education evaluator Mary Wright).

Accordingly, there is no evidence, beyond mere speculation, that the procedural failure cited by Parents with respect to transition substantively deprived the school of any ability or information to properly transition A.G.

III. District Met Legal Requirements in Responding to Parents' Request for Documentation Prior to October 11, 2007 and Properly Communicated with the Parents Around A.G. Behaviors and Discipline

A. The District Met its Legal Obligations With Respect to Documentation Requests

The Parents' claim that the school failed to provide documentation regarding the imposition of discipline upon A.G. during the fall of 2007. The Parents, however, cite no IDEA law or regulation that requires production of such documentation.

Parents are entitled to review and copy their child's academic records, 34 C.F.R.

§300.5019(a)(1) and this has been done with respect to education records maintained by the school district. 20 U.S.C. § 1232g(a)(4)(A). Parents requested a copy of the student file on October 9, 2007. Parents were given a copy on October 17, 2007.

Parents' complain of the absence of disciplinary records regarding A.G.'s removal from class and other measures taken with respect to her behaviors in school in late August, September and early October, 2007. As of October 11, 2007, the school had produced all documentation of such behaviors in existence at that time. The school had promptly instituted a home/school journal on August 30 in response to the Parents' request of August 29, 2007. The journal stopped being used when the Parents did not return it to school. When Parent by letter dated October 2, 2007, followed up on a request she made by phone on September 28, 2007, asking that further documentation regarding A.G.'s behaviors in class be provided, the only additional documentation available – a summary of classroom teacher Langlois' impressions, which she had previously provided to Mary Wright for her evaluation – was provided by mail on October 7, 2007. At the hearing the Parent spent some time questioning Principal Rosane and suggesting that "pink" disciplinary slips should have been employed to document all of A.G.'s behaviors and to communicate with the Parent about those behaviors. Principal Rosane explained that the purpose of those slips was not triggered by the regressive behaviors exhibited by A.G. as she was transitioning to kindergarten and that those slips would never have been used to communicate with the Parents about those behaviors. There is no obligation to produce documentation that does not exist. Cerra v. Pawling Cent. School Dist., 427 F.3d 186, 193 (2d Cir. 2005). While the IDEA has created procedures to encourage

and enable parental participation, there are no requirements regarding the creation of documentation regarding behaviors.

Nevertheless, the school instituted a home/school journal and communicated at times daily with the Parents via A.G.'s case manager, AND her classroom teacher, AND forwarded all documentation regarding behaviors it had in its possession. At no time during her conversations with the Parents was Edwards told that they were dissatisfied with the information they were being provided by the school. The spirit of communication and contact between schools and parents encompassed by the IDEA was met here.

The undisputed facts show (1) the Parents were provided with all written documentation that was created and existed at the time of the request, and no further documentation was ever created about A.G.'s behaviors in school through October 12, 2007, and (2) the Parents were given a copy of the student's file on October 17, 2007, less than 10 calendar days after the Parents requested a copy of the file. There is no evidence that it failed to produce any documentation it had within its possession on October 11, 2007, or that had been requested by the Parent regarding A.G.'s behaviors in September/October 2007.

B. District Met its Legal Obligation With Respect to Communication Regarding A.G.'s Behaviors and Discipline as of October 11, 2007

The Parents also complain more generally that the District failed to properly communicate with them about A.G.'s behaviors and the discipline it was imposing upon her. In addition to the arguments stated immediately above regarding the District's proper and legally sufficient response to the Parents' requests for documentation, the District maintained open lines of communication both with

respect to the classroom teacher (communicating with the Parent daily during drop off and pick up), and the case manager (almost daily phone communication with the Parent). Two meetings were also held where A.G.'s behaviors were discussed. A.G.'s behaviors were usually addressed within the classroom via small accommodations implemented by her classroom teacher. A.G. was not removed from the classroom at a high frequency and Parents were aware of those instances when this occurred. Prior to October 11, 2007, A.G. was removed on two occasions, September 5, 2007, and September 20, 2007, and Parent was contacted about that on the same day of those events. While a school cannot unilaterally change the placement of a special education student a school deems to be dangerous, it can use "its normal procedures for dealing with children who are endangering themselves or others" such as "timeouts, detention or the restriction of privileges." Honig v. Doe, 484 U.S. 305, 325-26 (1988). While Parents may claim that a behavioral plan should have been in place, the evidence shows that serious behavioral concerns were not raised by the Parents prior to A.G.'s entry to Brookfield and that upon her entry the school immediately took steps to support A.G. at school with additional personnel within the classroom and modifications to the classroom routine implemented by her classroom teacher.

Moreover, as the year progressed, and as communication around A.G.'s behaviors progressed, Parents sought to limit the school's ability to explore and evaluate A.G.'s emotional state. While the school was able to obtain Parent's consent to bring Dr. Cotton in to perform a behavioral assessment, A.G. was removed from school before this could be accomplished.

Where the law fails to create any specific substantive requirements for a

specific behavioral intervention plan, Alex R. ex rel. Beth R. v. Forrester Valley Cnty Unit Sch. Dist. #221, 375 F.3d 603, 615 (7th Cir.), cert. denied, 543 U.S. 1009 (2004), and where the evidence demonstrates that the school acted promptly and incrementally to respond to behavioral issues, often without the cooperation of the parent, a hearing officer “should be leery of imposing substantive requirements ...where neither Congress nor the Department of Education has done so.” T.W. v. Unified Sch. Dist. No. 259, 136 F3d. Appx. 122, 129-30, 2005 WL 1324969 (10th Cir. 2005).

IV. District Met Legal Requirements in Convening IEP Meeting

Parents also claim that the school failed to hold an “emergency” IEP meeting upon request to discuss A.G.’s behavioral issues. The Vermont Special Education Regulations state that a parent may request an IEP meeting “at any time when they believe a component of the IEP should be changed.” VERMONT SPECIAL EDUCATION REGULATION 2363.5(E). When a parent makes such a request, the school shall either convene a properly noticed IEP meeting, or refuse and provide written notice of the parent of the reason why. Id. The undisputed evidence shows that the school complied with every such request.

The Parent first sought a meeting to discuss A.G.’s behaviors and a meeting was held on September 24, 2007. This meeting was not an IEP meeting. Parent did not ask for a meeting to discuss changes to A.G.’s IEP and did not request any such changes while at the meeting. Accordingly, there was no legal obligation for the school to hold an IEP meeting at this time. Nevertheless, when the Parent asked that an IEP meeting be held, by letter dated September 25, 2007, delivered by hand on September 26, 2007, the school forwarded to the Parents a notice of an IEP meeting

to be held on October 1, 2007, held for the explicit purpose of discussing the Parents' concerns as stated in their September 25, 2007 letter. In addition, on September 27, 2007, Special Education Coordinator for Orange Southwest Supervisory Union Kinney, spoke with Parent at length by phone about the concerns raised in Parents' September 25, 2007 letter. The IEP meeting also went forward as scheduled on October 1, 2007. The only changes to A.G.'s IEP discussed and implemented from that meeting were dropping the SLP services.

The facts are that a meeting was held three (3) business days after the request for an IEP meeting (or for changes to the IEP which would necessitate an IEP meeting) was received, and that Kinney spoke at length with Parents about the concerns raised in their letter within one (1) day of its receipt. Any delay in holding the formal IEP meeting from September 24 to October 1, made no substantive difference for A.G.'s ability to receive IEP services, as the October 1, 2007 meeting simply resulted in dropping her SLP services. No substantive effect upon A.G.'s receipt of FAPE can therefore be proven by any alleged failure to conduct an IEP meeting sooner than October 1, 2007.

V. District Met its Legal Obligation With Respect to Parents' Right to Independent Psychological Evaluation

Parents also complain that the District failed to respond to their request for an independent psychological evaluation. Vermont Special Education regulations require that "upon completion of a school district evaluation, a parent may request an independent educational evaluation at public expense." VERMONT SPECIAL EDUCATION REGULATION 2362.2.7. As a threshold issue, the focus of this hearing is on actions taken by the District through October 11, 2007. In this case the District's evaluation

process was not completed, at the earliest, until November 19, 2007, when the EPT finally met to discuss the results and impact of the evaluations performed to date, and arguably at the latest on December 18, 2007, when the District forwarded to the Parents the evaluation plan and report. When the Parents responded to the evaluation plan and report by letter dated December 26, 2007, and appeared to request an independent evaluation, the District responded by letter dated January 8, 2007, and forwarded information to the Parents on how to obtain an independent evaluation.

Parents may argue that they requested an independent psychological evaluation in late September or early October 2007. The undisputed testimony shows that Parents in fact consistently communicated to the District their strong preference that any evaluation of psychological issues would be pursued “independently” outside of the school’s process. In addition, as A.G.’s emotional state had not been the focus of any of the evaluations performed within the District’s re-evaluation process, and indeed as the school was being prevented from exploring those areas by Parent’s specific request, no right to an “independent” psychological evaluation would have yet ripened – the District had not yet conducted the original evaluation. The undisputed evidence demonstrates that the Parents’ right to an independent evaluation – either with respect specifically to psychological issues or more generally – was not ripe at the time of filing on October 11, 2007; and therefore that the District cannot be found to have failed to have met its legal obligations with respect to any such request for an independent evaluation under the relevant time frame. Furthermore, the undisputed evidence demonstrates that when such a request could become ripe (December 2007), the District responded

with information to the Parent on how to obtain such an independent evaluation. Accordingly, the undisputed evidence demonstrates that the District met its obligation in this regard.

VI. District Met its Legal Obligations With Respect to Developing and Implementing A.G.'s IEP at Brookfield

Parents finally complain generally that the District failed to meet its legal obligations to develop and implement A.G.'s IEP at Brookfield. To the extent Parents' other claims (untimely evaluation, inadequate transition meeting, failure to convene an IEP meeting upon request, failure to adequately communicate regarding student behavior), impact upon the implementation and development of A.G.'s IEP at Brookfield, those arguments are addressed in depth above. More generally, however (and it is not clear how the District is specifically alleged to otherwise have failed in this regard), the undisputed evidence demonstrates that the District implemented all of the services provided for under A.G.'s IEP upon her arrival at Brookfield, and that A.G. continued to access and make reasonable educational progress while at Brookfield. The undisputed evidence shows that the Brookfield School promptly moved to conduct A.G.'s re-evaluation (within days of her beginning school), even over the reluctance of the Parent. The undisputed evidence shows that there was no behavioral component to A.G.'s existing IEP but that nevertheless the school immediately implemented modifications to A.G.'s program in order to support her behavioral challenges, and that Parent adamantly opposed any efforts to further evaluate A.G.'s behaviors within the school's evaluative process. To the extent Parent consented to having a behavior plan developed by the use of Dr. Cotton, this was only consented to on September 28, 2007, and could not be completed before

the Parent filed for due process on October 12, 2007, and removed her daughter thereafter from school.

Finally, to the extent the Hearing Officer might be moved to order specific changes to A.G.'s IEP, it should be noted that Parents continue to privately seek and obtain evaluations and reports, and then selectively forward those on to the school (and the hearing officer), further demonstrating that the current IEP development process is still underway. The school has requested that the Parent forward convenient dates for the EPT to meet and review subsequent information and data that the Parent has obtained that may be relevant to the content of A.G.'s IEP. The Parent has not responded, instead stating that they prefer for the hearing officer to rule on the pending due process first.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer finds that the District has met its legal obligations with respect to the matters complained of, finds in favor of Orange Southwest Supervisory Union, and declares Orange Southwest Supervisory Union to be the prevailing party.

THE PARTIES HAVE A RIGHT TO APPEAL THIS HEARING DECISION BY FILING A CIVIL ACTION IN A FEDERAL DISTRICT COURT OR A STATE COURT OF COMPETENT JURISDICTION PURSUANT TO 20 U.S.C. §1415(e) AND 34 C.F.R. §300.512, WHICH MUST BE COMMENCED WITHIN NINETY (90) DAYS OF THE DATE OF THIS DECISION.

Dated at Middlebury, Vermont this 28th day of February, 2008.

By: _____
Donald R. Powers,
Hearing Officer