

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH CASE NO. 2010090344

v.

REDONDO BEACH UNIFIED SCHOOL
DISTRICT,

REDONDO BEACH UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2010070140

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

Administrative Law Judge (ALJ) Richard T. Breen, Office of Administrative Hearings (OAH), State of California, heard this matter in Redondo Beach, California, on December 6-9, 13, 14, and 16, 2010. Telephonic testimony was also taken on December 21, 2010.

Ronald Gilleo, Attorney at Law, represented Student. Student's Mother (Mother) and Father (Father) attended the hearing on all days.

Nancy Finch-Heuerman, Attorney at Law, represented Redondo Beach Unified School District (District). District Special Education Director Aaron Benton (Dr. Benton) attended the hearing on all days. District Program Specialist Sue Hall briefly attended the hearing in Dr. Benton's absence as well.

The District filed its request for due process hearing in OAH case number 2010070140 on July 1, 2010. Student filed her request for due process hearing in OAH case number 2010090344 on September 8, 2010, and the parties waived a resolution session on September 10, 2010. Student's motion to consolidate and continue the hearing was granted on September 15, 2010, and all timelines applicable to OAH case number 2010090344 were

ordered to apply to both matters. At hearing, the parties were granted a continuance to file written closing arguments by January 7, 2011. Upon receipt of written closing arguments the record was closed and the matter was submitted.

ISSUES

1. Whether District's occupational therapy (OT) assessment dated May 4, 2010, was properly conducted for purposes of determining if Student is entitled to an independent educational evaluation (IEE)?¹

2. Whether Student's Individualized Education Program (IEP) developed on May 21, 2010, June 2, 2010, and June 16, 2010 (May-June 2010 IEP) provided Student a free appropriate public education (FAPE) in the least restrictive environment (LRE), such that it may be implemented without parental consent?

FACTUAL FINDINGS

Background

1. Student is a 15-year-old young woman, who, at all relevant times, lived within the District boundaries with her Parents. At all relevant times, Student was eligible for special education under the categories of autistic-like behavior and other health impaired. In general, Student had significant delays in communication, social/emotional functioning, and behavioral functioning. Student had Grave's Disease, which is characterized by impaired thyroid function. Student took medication for her Grave's Disease. Parents reported that Student needed to go home for lunch due to Grave's Disease and suffered from a deviated septum, severe allergies, and night fevers that sometimes required her to take medication in the morning before coming to school. Student's primary language was English. Student was called as a witness by District. The ALJ did not find Student to be competent as a witness because she could not communicate whether she understood the concept of telling the truth.

2. Student and her family moved within the District's boundaries in November of 2009. Student attended middle school in another district until June of 2009, but did not attend high school during the fall of 2009. Student's transcript from her prior district showed that in general education subjects, such as math and science, she generally received grades of "F" with some sporadic "D" grades.

¹ This issue is common to both District's and Student's complaints. If District prevails, it need not fund an occupational therapy IEE. If Student prevails, she is entitled to an occupational therapy IEE at public expense. Student withdrew her allegations that the District failed to properly assess Student's assistive technology needs. Student's second issue in her complaint, alleging violations of section 504 of the Rehabilitation Act and the Americans with Disabilities Act, was dismissed for lack of jurisdiction.

3. Student's last consented-to IEP from her prior district was dated December 4, 2008, and was the result of a settlement agreement. This IEP provided Student with the following placement and services: placement in general education for all classes except language arts and physical education (PE); individual resource specialist program (RSP) services for language arts 52 minutes per day; individual RSP three times per week for 52 minutes during regular education PE; two, 30-minute group speech therapy session per week plus 15 minutes per week of speech therapist consultation per week; one, 60-minute individual speech therapy session per week at a non-public agency (NPA); 60 minutes per week of NPA clinic occupational therapy (OT); two, 30-minute behavior intervention service sessions per month; and adapted physical education for six, 30-minute sessions per month. Student was provided with a 1:1 instructional aide throughout the school day. The IEP also included up to 58 hours of inclusion support services to be paid for by Parents and reimbursed. The inclusion support services included meetings with Parents and Student's teachers every six weeks.

4. The December 3, 2008 IEP noted that the prior district considered Student to have significant cognitive and adaptive delays as a result of her disability, that inhibited her ability to function adequately in the general education setting; that she was easily distracted; that she had difficulty understanding the lessons at grade level; and that she required constant prompting to accomplish tasks. The present levels of performance in all areas describe Student as severely delayed and nowhere near grade level. The IEP also included present levels of performance and behavior goals to reduce inappropriate self-stimulatory talking and vocalizations during classes. The IEP included a notation that Parents disagreed with the prior district's interpretation of Student's test results and performance. The IEP also noted that Student's triennial assessment was due in December of 2009.

5. An intake IEP team meeting was held by District on December 17, 2009. Student's mother attended with a special education advocate. Parents were asked at the meeting to sign an assessment plan dated December 14, 2009, but they did not. After the meeting, Student registered for school and attended Redondo Beach Union High School for one day prior to the holiday break. The high school was on a "block schedule" meaning that on Mondays, students followed a 55-minute schedule for each period, followed by an alternating schedule of 110-minute periods for the remaining days of the week.

6. District provided services comparable to those set out in Student's December 3, 2008 prior district IEP on a temporary basis until Student could be assessed. The IEP included a behavior support plan (BSP). All services were the same and placements were the same as the prior district except for language arts, in which Student was enrolled in a special day class (SDC) equivalent to her prior language arts RSP, and the addition of Learning Strategies Management (LSM), which was a special education class equivalent to her formerly individual RSP. District did not provide the inclusion support services set forth in the December 3, 2008 prior district IEP because the December 3, 2008 IEP on its face showed that the services were provided by the settlement agreement for a limited time, with Parent funding the services and being reimbursed for up to 58 hours of service.

7. District special education teacher Marie Koorsen (Koorsen) was assigned to be Student's case manager. As case manager, Koorsen was responsible for coordinating and implementing Student's IEP through contact with Parents, Student's teachers, and various service providers. Koorsen was a credentialed special education teacher and chair of the special education department.

8. Koorsen solicited input from Student's teachers regarding her progress in preparation for a review of Student's temporary placement. As of February 9, 2010, Student's general education Algebra teacher, Laurie Hamm (Hamm), expressed concerns that Student was not appropriately placed in the class because Student had not demonstrated any ability to attend to or complete work in the classroom, and because Student was dependent on her aide for getting materials out of her backpack and for prompts to complete work.

9. As of February of 2010, Student's general education art teacher reported concerns that Student was unable to follow class directions and did not spend the appropriate amount of time on projects. The art teacher recommended that Student be graded on a pass/fail basis. Student's general education science teacher expressed these concerns: that Student had limited attention to task, even with frequent prompting; that Student could not understand the material, and at most could process literal information; that Student was not engaging with general education peers; that Student could not complete the required in-class work; and that Student needed to leave class due to inappropriate laughter, touching, or other off-task behavior.

10. Student's SDC English teacher, Robert Rainey (Rainey) was a credentialed teacher with master's degree in special education. Rainey expressed these concerns: that Student could not work independently for more than two or three minutes; that Student required continuous prompting to start and complete work; Student was at a much lower level and unable to keep up with the other special education students in the class; Student was unfocused and either made repetitive vocalizations about "Scooby-Doo" or inappropriate laughter; and that Student would either erase or repetitively trace written notes that were prepared for her. Rainey believed a more appropriate placement for Student was in an Essential Skills English SDC.

11. LSM teacher Kathleen Madden (Madden) also provided input to case manager Koorsen about Student's progress. Madden was an experienced, credentialed special education teacher, who, at the time of hearing was working on a master's degree. Madden explained that LSM was intended to help special education students who were in general education classes with issues like time management, work habits, and timely completion of assignments. Madden expected students to work on their homework during part of the LSM session. Madden was concerned that Student was not bringing homework for completion, which was one of the purposes of LSM. In addition, Madden persuasively concluded that the activities in LSM were too advanced for Student, as she was unable to independently complete a daily planner or engage in activities like listening skills exercises. Student sometimes vocalized inappropriately, which was disturbing to the other special education students seated near her.

12. District school psychologist Yuki Aguilar (Aguilar) provided behavior support consultation services to implement Student's BSP during the spring semester of 2010. Aguilar was a state credentialed school psychologist with a bachelor's degree in school psychology and a master's degree in counseling. Aguilar became a Board Certified Behavior Analyst (BCBA) in 2007. During January of 2010, Student's vocalizations of non-functional "scripted" speech, inappropriate laughter, noises, and loudly saying "no" in her academic classes was a concern of Student's teachers. In response, Aguilar observed Student and took data to determine the function of Student's behavior and make recommendations to correct it. Aguilar's observations were hampered by Student's frequent absences, however, the five vocalizations Aguilar observed in 105 minutes of academic class time all correlated to work demands being made on Student. Aguilar also reviewed daily behavior notes made by Student's 1:1 instructional aide Claudia Hatfield (Hatfield), which generally demonstrated that Student's vocalizations stopped when academic demands were removed or delayed. Aguilar persuasively concluded, based on her training, her observations, and Hatfield's notes, that the function of Student's vocalizations was avoidance of academic tasks.

13. District held an IEP team meeting on February 10, 2010. The purpose of the meeting was to review the temporary placement, including the BSP, and review teacher reports. As of the February 10, 2010 meeting, Parents had not signed the December 14, 2009 assessment plan. Nothing substantive was discussed on February 10, 2010, because Parents did not want to continue without their attorney.

14. Mother signed the December 14, 2009 assessment plan on February 22, 2010, and District received it the same day. The assessment plan called for assessments in the following areas, by the following personnel: academics by a special education teacher; social and emotional development by a school psychologist; motor ability by an occupational therapist and adaptive physical education (APE) teacher; language, speech, and communication by a speech therapist; general ability by a school psychologist; health and development by a school nurse; post-secondary transition needs by a special education teacher; and an assistive technology (AT) assessment by an AT specialist.

15. The IEP team continued the February 10, 2010 IEP to March 5, 2010, to accommodate Parents. Mother attended with an attorney on March 5, 2010. District provided Parents with a notice of procedural safeguards. District algebra teacher Hamm expressed concern that Student was not capable of doing the work and that Student spent her class time tracing the problems rather than solving them. Hamm was also concerned that although Student's homework was being turned in completed, Student was unable to do the same level of work in the classroom. In addition, Hamm was concerned that Student had to be removed from Algebra at least once every period because of disruptive vocalizations. There was also discussion that Student was missing instruction time because she left early for lunch. Mother expressed that this was due to Student's medical issues and the District asked for medical documentation demonstrating that Student needed to leave early for special meals. Although an assessment by a prior district had recommended this, Parents never provided any contemporary medical documentation or information to District on this issue. Finally, the IEP team discussed Student's behavior of making in-class vocalizations. District

only tracked vocalizations that were loud enough to disturb other students. Based on their observations and data collection, District staff concluded that the function of the behavior was to avoid or escape class work because the vocalizations were most likely to occur in the second hour of academic classes. Parents agreed to a temporary behavior support plan (BSP) that would add scheduled breaks for Student to avoid frustration, as well as to encourage Student to replace her inappropriate vocalization behaviors with a non-verbal request for a break. Mother's attorney also asked for a BSP goal directed to increasing Student's attention.

16. To address the concerns raised by general education teacher Hamm, District gave Mother an opportunity to demonstrate how she worked with Student on homework. Math teacher Hamm, case manager Koorsen, and 1:1 aide Hatfield were present in a quiet room used for speech therapy. Using a math problem that had already been used on a quiz in class, Mother sat next to Student and rewrote the problem by breaking it down into a series of steps. Mother then prompted Student with a series of non-verbal, vocalized prompts of changing tone and inflection. Mother's prompts served as corrections to Student as she proceeded through the problem. Student required 43 prompts over a ten-minute period to complete the problem. Koorsen persuasively opined that the level of prompting was not workable in a general education class because Student still required too much time to complete a problem, and the number of vocalized non-verbal prompts needed would be distracting to other students.

17. By letter dated March 11, 2010, and at the request of Mother's attorney, the District offered additional BSP goals that were directed to increasing Student's attention. Parents never approved the offered increase to Student's goals.

18. Instructional assistant Hatfield was Student's 1:1 aide during the spring of 2010. Hatfield had many years of experience as an instructional assistant, had received in-service trainings on autism, and had experience with children on the autism spectrum, as well as children with cognitive impairments and emotional disturbance. Hatfield implemented Student's accommodations such as prompting, help with reading, use of a calculator, and getting to classes. Hatfield also implemented Student's BSP and related data collection under the supervision of school psychologist Erin Jurgensen.

19. Hatfield never saw Student initiate interaction with a peer, and Student only responded to her peers when prompted. Without prompting, Student generally only communicated in one to three word utterances. At no time did Student independently arrange her work or complete it. Instead, Hatfield had to assist Student by arranging the materials followed by consistent prompting to finish the task. If not prompted, Student would stop working and would doodle or trace the assignments. When asked to write independently, Student would write sentences that were off topic, for example, about "Scooby Doo." In Algebra, Student was not able to complete the problems, and generally just copied the board work of other students, including the answer. In physical education, Student was unable to participate in partner or team sports because Student would not pay attention and return the ball unless prompted. Overall, Hatfield saw that Student was not

able to complete any work independently at school, yet Student's homework came back completed.

20. In class, Student sometimes laughed inappropriately for what was happening around her and talked loudly about unrelated subjects like "Scooby Doo." Generally, Student was not easy to redirect because the vocalizations started low, then increased in volume even after redirection. Hatfield suspected that the function of Student's vocalizations was avoidance of the classroom because the vocalizations occurred when a task was demanded or Student was not interested. At the direction of school psychologist Yuki Aguilar, Hatfield kept data on Student's vocalizations. Hatfield only kept data on vocalizations that were loud enough to have disturbed other students, as measured by whether other students turned to look or the volume was louder than the teacher. Hatfield saw Student crying in academic classes and asking for "mommy" more than 10 times during the semester. Hatfield did her best to console Student by reminding her that Mother would come by at lunchtime.

21. As of the end of the third term in the spring of 2010, Student received the following grades in academic classes when held to grade-level standards: SDC English – F; general education Physical Science – F; and Algebra I – F. That same term, Student received a C+ in general education Art, a B in the special education LSM class; and a D+ in PE. Although Student missed instruction time for being late or leaving early for lunch, the absences were not factored in her grades.

Assessments Prior to Annual IEP

22. In preparation for Student's annual IEP, Koorsen administered standardized academic testing to Student beginning on March 15, 2010. As a credentialed special education teacher, Koorsen was qualified to give the test and had performed approximately 100 academic assessments per year for over 13 years. Koorsen gave Student the Woodcock-Johnson III Test of Academic Achievement, Form A (WJIII). To get the best performance from Student, she administered the test over a three week period, with Student completing two or three subtests per testing session. Instructional aide Hatfield was present for the testing and assisted Student with prompting. Although not yielding standardized results, the test was given in conformance with the test instructions, which included allowance for "additional cues" such as prompting, when appropriate and properly interpreted. Koorsen noted the difference in test conditions in her written report, including the number of prompts required for each subtest, and noted that the test results would still be useful for determining appropriate placement, services, and goals for Student.

23. A standard score between 90 and 110 was "average." Standard scores below 69 were "very low," between 70 and 79 were "low," and between 80 and 89 were "low average." Student scored "very low" in all test cluster areas, including mathematics, with the exception of "low" scores of 75 in basic reading skills and 72 in brief writing. The basic reading score of 75 represented a relative strength in decoding, however, Student's standard reading comprehension scores were 40 in passage comprehension and 50 in reading fluency,

which included a comprehension component. Student's lowest standard scores were in listening comprehension, with a standard score of 5 in story recall, which required Student to repeat information from a story she had just heard. On the listening comprehension subtest for understanding directions, Student achieved a standard score of 22, but required 53 prompts to do so. The accuracy of the District's results was corroborated by generally similar results when the WJIII was given to Student by different school districts in 2004 and 2006. Koorsen persuasively explained at hearing that Student's very low scores in listening comprehension demonstrated that Student would have a difficult time recalling the information covered in her coursework and following directions in class.

24. David Feldman, Ph.D. (Dr. Feldman) conducted a psychoeducational assessment incorporating Koorsen's WJIII assessment results during the spring semester of 2010. Dr. Feldman prepared a written report dated May 20, 2010. Dr. Feldman was a state-licensed school psychologist who also possessed a bachelor's degree and a master's degree in psychology. At the time of the assessment and hearing, Dr. Feldman was employed by another local school district as a school psychologist where he performed similar assessments in addition to providing counseling and program development services. Dr. Feldman had approximately 10 years of experience as a school psychologist and presented as a persuasive and knowledgeable witness. Dr. Feldman gave Student formal assessments in greater than 18 minute intervals in a quiet environment in order to work within Student's fatigue and interest level.

25. As part of his assessment, Dr. Feldman conducted interviews of Parents and school personnel. Parents declined a personal interview, but telephonically conveyed to Dr. Feldman their belief that Student could perform all work required at grade level. In particular, Parents believed that Student had demonstrated grade level math skills based on the demonstration of Mother's prompting method that had been shown to math teacher Hamm and coordinator Koorsen. Parents also reported that Student enjoyed her peers at school. Parents' perceptions of Student's abilities did not match those of her teachers. General education math teacher Hamm reported that Student had no interaction with peers, and was unable to independently complete any of the steps required to solve an algebra problem. Student's general education science teacher similarly reported that in class, Student had no meaningful peer interaction and was unable to perform any role in group work. Student also demonstrated only literal skills of identifying things with a significant amount of prompting. Student's SDC English teacher reported that Student's maximum attention time was one to two minutes, that Student only responded to peers with a great deal of prompting, and that Student was unable to make academic progress. Student's general education art teacher reported that Student had little peer interaction, could not follow the verbal lectures, but was able to complete projects with aide support. Student's 1:1 aide reported a concern that Student was unable to complete the academic tasks demanded of her and appeared stressed when academic demands were made.

26. Dr. Feldman's own observations of Student showed that he was only able to engage her in a minimal verbal exchange of one or two words that were not really appropriate, even when Student was asked to complete sentences about topics like her

feelings. His observation of Student in Algebra showed that Student was not focused on the lecture and was unable to follow directions about the proper time to turn in homework. Student had no peer interaction and did not participate in class discussion.

27. Dr. Feldman reviewed Student's 2006 psychoeducational assessment scores from another school district. These results showed a full scale IQ score of 50 with strengths in subtests for perceptual reasoning. On a non-verbal intelligence test, Student had a standard score of 95. On the WJIII, Student's highest subtest standard score was a low average 87 in letter-word identification, with all other scores so low as to be below one tenth of one percentile.

28. Dr. Feldman also administered standardized tests in conformance with the test manufacturer's instructions with the maximum number of prompts and breaks permissible.

29. To assess cognitive functioning, Dr. Feldman administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV). Dr. Feldman omitted the verbal comprehension index subtests because they overlapped with the speech-language assessment. The WISC-IV results revealed that Student had significant weaknesses in working memory and processing speed, which resulted in extremely low standard scores of 50 in both areas. Student's processing speed score was a function of her inattention to task and inability to follow the test instructions, even with prompting. Dr. Feldman was unable to calculate a valid full-scale IQ score because there were more than two standard deviations between Student's abilities in these areas and her standard score of 84 on the perceptual reasoning index. The results were corroborated by reports and observation of Student's performance, which showed that she had weaknesses in her ability to retain and apply information and process information at the pace expected of her age group. Because of Student's limited language ability, Dr. Feldman also gave the Test of Non-Verbal Intelligence (TONI). Student's TONI standard score of 82, correlated with her standard score of 84 on the perceptual reasoning index of the WISC-IV. Dr. Feldman also considered Koorsen's administration of the WJIII and explained that the areas of relative strength showed by Student in word attack and basic reading skills correlated with Student's strengths in perceptual reasoning; however, Student's overall low scores in reading comprehension and math correlated with Student's weaknesses in working memory and processing speed.

30. Student's weaknesses in memory were correlated by the administration of the Learning Efficiency Test – Second Edition (LET-II), on which, Student's standard score was below 55 in visual and auditory memory. Similarly, administration of the Wide Range Assessment of Memory and Learning (WRAML) corroborated the WISC-IV results. On the WRAML, Student achieved a first percentile score on picture memory, which was consistent with her working memory weakness on the WISC-IV. Student achieved a sixteenth percentile score on visual learning, which involved repetition, and was consistent with her relative visual reasoning strength on the WISC-IV.

31. Dr. Feldman also administered the Developmental Test of Visual-Motor Integration (VMI), which measures the subject's ability to transfer visual information

through motor channels. Student's standard score of 77 was in the low range (sixth percentile). Consistent with this result, a writing sample from Student was below average, as was Student's response to the "Draw a Person" test, on which Student was unable to draw anything but a stick figure despite repeated direction not to.

32. In the area of adaptive functioning, Dr. Feldman interviewed Parents and had them complete the Vineland Adaptive Behavior Scales – Second Edition (Vineland). Inconsistent with reports from school personnel and Dr. Feldman's observations, Parents reported that Student enjoyed working with peers and was "good" at communicating her needs and wants at home. Even as reported by Parents, Student's adaptive functioning was below average, as reflected in Vineland standard scores of 69 in communication, and 72 in daily living skills.

33. Overall, Student's demonstrated weaknesses in working memory and processing speed led Dr. Feldman to plausibly conclude that Student would not get an academic benefit from general education college preparatory classes. Instead, in his opinion, an appropriate classroom placement for her would include material at her level of understanding, with built-in repetition to address her working memory deficits. Thus, overall, Dr. Feldman recommended a placement that combined general education electives with a functional academic curriculum at Student's level. Dr. Feldman's specific recommendations included: pairing visual supports to auditory information; preferential seating; extra time; externally imposed structure through cued feedback, multimodal presentation, presentation of information in smaller visual units, and repetition; breaking tasks into smaller parts; scheduled breaks; and attempt difficult subjects first, or immediately after a rest.

34. District hired Russell Dwiggins (Dwiggins), the owner of Believability, Inc., to perform an assessment of Student's need for assistive technology (AT). Dwiggins possessed a bachelor's degree in psychology, a teaching certificate, and an assistive technology practitioner certificate from the Rehabilitation Engineering and Assistive Technology Society of North America (RESNA). Dwiggins had 10 years experience in determining the AT needs of the disabled, and that was the specialty of his company.

35. Dwiggins assessed Student for AT in May of 2010. He was familiar with Student prior to his assessment because he had met her in 2008 when he assessed her on behalf of another school district. Based on observation and asking Student to write work samples, Dwiggins determined that although Student was functional with handwriting, she sometimes perseverated on retracing the letters she had formed. Consequently, Dwiggins concluded that Student should have a device like an "Alphasmart" available to her for writing. For reading comprehension, Dwiggins assessed Student by reading aloud to her, followed by comprehension questions, and by having Student read to herself followed by comprehension questions. Regardless of the form presented, Student got two of eight comprehension questions correct. Student was unable to answer questions when a computer voice read to her. The comprehension assessments demonstrated that AT would not necessarily improve Student's reading comprehension. Dwiggins also attempted to use

software called “Algebrator,” which broke down math problems into component parts without prompting. Student was unable to solve the problems, even when presented in a broken-down form, leading Dwiggin to plausibly conclude that Student did not have the basic skills to benefit from the software and that no software existed that could provide the level of prompting Student required. He recommended two hours of training services with the Alphasmart, followed by two hours per year of follow-up consultation.

36. District Adapted Physical Education (APE) teacher Amy Sayre (Sayre) worked with Student during the spring semester of 2010 in a small group setting with other special education students. Sayre also assessed Student’s APE needs at that time in preparation for Student’s annual IEP. Sayre had a bachelor’s degree in kinesthesiology, a master’s degree in education, and was credentialed to teach APE and physical education. Sayre was a credible and persuasive witness based on her qualifications and eight years of teaching experience.

37. Sayre’s assessment consisted of interviews with Student’s general education PE teacher and Student’s 1:1 aide; a review of a 2007 APE assessment by the Los Angeles County Office of Education, observation of Student, and administration of the Adapted Physical Education Assessment Scale (APEAS). The APEAS was a standardized assessment normed for Student’s age group that assessed Student’s abilities in the following areas: perceptual; motor functions; motor achievement; motor development; physical fitness; and posture. The assessment used multiple measures, was given in Student’s primary language, and was performed in a way that was designed to get the highest functional skill demonstration from Student.

38. Sayre’s observations and interview with the general education PE teacher showed that Student needed consistent prompts and assistance to complete physical fitness tasks or physical activities such as sit-ups, push-ups, throwing, and kicking. Student had great difficulty interacting with typical peers and disabled peers. For example, Student appeared unaware of what was expected, and incapable of physically performing the act of hitting a tennis ball back to a peer. Student performed better when given specific demonstrations and verbal and visual prompts. On the APEAS, Student demonstrated relative strengths in static balance, catching a tossed ball and kicking, but had weaknesses in throwing, catching quality, dynamic balance, skipping, and hopping. Overall, Student demonstrated low to very low levels of physical fitness on tasks like push-ups or running. Sayre recommended that, given Student’s physical and motor skills needs, she would benefit from APE services at the rate of four, 45-minute sessions per month, for a total of 180 minutes per month.

39. District speech therapist Phyllis Schumacher (Schumacher) also assessed Student in March and April of 2010 in preparation for the IEP team meeting. Schumacher had a bachelor’s degree in audiology and speech services and a master’s degree in communication disorders. Schumacher was state-licensed as a speech therapist and had a certificate of clinical competence from the American Speech-Language Hearing Association since 1980. At the time of the assessment, Schumacher was familiar with Student from

providing her speech therapy for approximately 90 minutes per week. Schumacher described Student as a pupil who did not verbally initiate with peers during group therapy, who sometimes required prompting to stay on task, and whose therapy generally focused on increasing the length of Student's utterances using visual supports. Given her credentials, experience and familiarity with Student, Schumacher was a credible and persuasive witness. Schumacher's speech and language assessment of Student included a review of speech assessments from other districts dated 2004 and 2006. These assessments showed that historically, Student had manifested severe delays in expressive and receptive language that required interventions focusing on increasing language production and social pragmatics. Schumacher's classroom observations of Student revealed that Student did not verbally interact with peers, and required assistance to stay on task.

40. Schumacher assessed Student over five days for 30-45 minutes each testing session. Student was accompanied by her aide. Mother declined an opportunity to observe the assessments. The assessments were done in a quiet room with no other students present. Student had difficulty paying attention for more than three to five minutes. Student required frequent redirection because she would lose attention, play with her hair, or make off-topic vocalizations, such as talking about "Scooby Doo." Student did not spontaneously greet Schumacher, but it was reported that she would say goodbye to her clinic-based speech therapist. When Student spoke, her articulation was sufficiently clear to be understood but generally lacked changes in pitch. During informal assessment, Student was able to follow simple three-step directions, but unable to do more complex three-step directions. Student was unable to answer basic "yes/no" questions, such as, "are you a girl," and did better when given multiple choices.

41. Schumacher administered standardized assessments in Student's primary language in accordance with the test instructions. The test results were generally consistent with prior testing from other districts, indicating the results were reliable. The tests were selected to determine Student's current functioning and provide information to develop an IEP. On the Peabody Picture Vocabulary Test (PPVT), Student scored extremely low for her age, with a standard score of 51 (less than the one tenth of a percentile). The PPVT tested receptive language ability and required Student to answer by pointing to one of four options of what the word was. On the Expressive One Word Picture Vocabulary Test, Student received an extremely low standard score of 61 (first percentile), demonstrating that she was generally not able to verbally express the correct name for objects when asked. The Comprehensive Assessment of Spoken Language (CASL) was also given. The CASL was intended to assess the oral language skills needed for successful grade-level academic achievement. Overall, Student had significantly weak skills for her age, with her highest score being a standard score of 62 (first percentile) on the meaning from content subtest. On the antonyms subtest, Student achieved a standard score of 55 (less than one tenth of a percentile). On subtests of synonyms, grammatical judgment, nonliteral language, pragmatic judgment, and grammatical morphemes, Student's standard scores were in the forties, and were so low as not be able to convert into a percentile. Because Student's CASL scores were so low, Schumacher also gave the "basic concepts" subtest of the CASL. Although this subtest was not normed for Student's age group, it was appropriate to give it to establish a

baseline for Student's skills after Student scored so low on the other subtests that a percentile score could not be generated. Student was only able to get 21 of 43 "basic concepts" questions correct, demonstrating that Student needed additional work on mastering words that young children were expected to know.

42. Based on the speech and language assessment results, Schumacher concluded that Student would have difficulty in a general education placement for academics. This conclusion was supported by Student's low scores in both receptive and expressive skills and Student's need to work on mastering basic concepts in comparison to the quick-paced demands of college preparatory classes. Overall, Schumacher recommended that Student continue to work on the goals of answering "yes/no" and "wh" questions accurately, mastering basic concepts not demonstrated on the CASL, and increasing her length of utterance to more than four words. Schumacher recommended that if NPA clinic-based therapy was continued by the IEP team for one hour per week, then Student should also receive in-school therapy for 30 minutes per week in a group, 30 minutes per week individual, with 15 minutes per week of therapist consult to high school staff. Schumacher persuasively explained that this amount of service would allow Student to make progress on her goals while minimizing the amount of time she was pulled out of class. In addition, Schumacher discussed her assessment and recommendation with Student's NPA therapy provider, who agreed with both the results and recommendations.

43. District occupational therapist Silke Hamilton (Hamilton) assessed Student's OT needs on May 4, 2010. Hamilton was a state-licensed occupational therapist who possessed an advanced degree in OT from Germany. Hamilton had worked for District since 2005, when she was hired to oversee the creation of an OT department. Hamilton also maintained a private pediatric OT practice. Hamilton presented as a knowledgeable and credible witness.

44. Hamilton assessed Student in English, using a combination of observation, interview, and non-standardized assessment tools. All tests that came with instructions were given in conformity with the instructions. Hamilton persuasively explained that Student was not a good candidate for standardized assessments because she required too high a level of prompting. In addition, standardized assessments in OT were not designed to answer the question of whether OT was necessary as a related service for purposes of special education law, i.e., what OT services would be required to support access to the curriculum.

45. Hamilton observed Student in art class. Student was able to follow one-step prompts that were required to get Student to get out her materials and attend. Student was able to pick up a pen and copy the teacher's demonstration of pen and ink drawing, although Student perseverated on individual lines until prompted to move on. Student sometimes vocalized, but was able to be redirected. Observation and interview also showed that Student was proficient in self-help tasks such as hand washing, carrying a backpack, and retrieving materials.

46. Student was also assessed individually with 1:1 aide Hatfield present. Hamilton administered the Occupational Therapy Skills Assessment, a non-standardized assessment tool that evaluated performance of school-related activities. Student had functional strength to navigate the campus and complete fine motor tasks using both hands. For example, Student could manipulate backpack zippers, use grasp patterns to access writing instruments, and coordinate her movements to cut out a circle using a scissors. Hamilton concluded that Student had mature motor movements because Student did not make associated movements, like sticking out her tongue, during fine motor tasks. Associated movements during fine motor tasks are associated with young children.

47. Hamilton began administering the VMI, but stopped when she learned that it had also been given by school psychologist Feldman. The VMI presented copying tasks. Before Hamilton ended the test, Student was able to complete 18 items with no prompting other than to keep going. Student completed the 18 items without error, indicating strong visual-motor skills in the areas needed for school performance.

48. To assess Student's handwriting legibility, Hamilton informally used the Evaluation Tool of Children's Handwriting – Manual Form (ETCH-M). Hamilton acknowledged that the ETCH-M was designed for use with younger children who required less prompting. However, use of this assessment in an informal manner was still appropriate because it allowed for Student to demonstrate her abilities in the classroom skills of legibility, speed, near and far point copying, taking dictation, and independent sentence writing. Student was provided with visual samples for copying tasks because she did not understand the difference between upper and lower case letters. In addition, Hamilton reviewed samples of Student's school work. Student was able to legibly copy upper and lower-case letters and legibly write the alphabet when dictated. She was also able to legibly complete near and far point copying tasks. She was unable to write an original sentence not because of a lack of motor skills, but because she was unable to formulate an original sentence. Student's class work samples confirmed that she was able to write legibly with visual structure, such that she could access the curriculum.

49. Hamilton also made clinical observations of Student's range of motion and muscle strength. Her upper body strength and range of motion were within normal limits. Similarly, Hamilton made clinical observations of Student's responses to sensory input. Student did not have a resistance to classroom textures or hand-over-hand instruction. She responded appropriately to sounds in the environment like a class bell. Visually, she was able to locate objects when asked, but would selectively focus on preferred objects. Student responded to excessive visual stimuli by covering her eyes and avoided eye contact. Her vestibular system (sense of movement and gravity) was functional, as demonstrated by Student neither seeking out, nor avoiding, body movement. Her proprioceptive system (awareness of body position) was also functional, as demonstrated by her ability to gauge appropriate force and movement for tasks such as using a marker or crayon, or jumping close or far. In the area of praxis (motor planning), Student demonstrated that she was capable of motor planning two-step actions that had been taught, but was prompt dependent for novel actions. Because Student demonstrated praxis with familiar tasks, Hamilton plausibly

concluded that her need for prompting to complete unfamiliar tasks was not a reflection of a deficit in praxis.

50. As an additional tool to assess Student's sensory processing, Hamilton gave the Sensory Profile School Companion inventory to LSM teacher Madden, 1:1 aide Hatfield, and Student's art teacher. Because the focus of the assessment was to make recommendations for whether OT was required as a related service in school, input was only needed from people who were familiar with Student's abilities in a school setting. This assessment required the respondents to grade Student's reactions to sensory stimuli in various categories such as auditory, visual, movement, touch, and behavior, with the responses sorted to discern Student's needs in the sensory areas of registration, seeking, sensitivity, and avoiding.

51. In the area of sensory registration (awareness and processing), Student was shown to be oversensitive to visual stimuli, resulting in her tuning out or shutting down. Hamilton recommended that visual stimuli be decreased, for example, by presenting only one problem on each worksheet page and by teaching Student in a highly structured class with daily routines. In the area of seeking sensory input, Student was less likely to engage in sensory seeking activities. In the area of sensitivity, Student was more likely to be distractible and more likely to limit her sensory input to whatever was most recently presented. For example, given her profile, Student would have difficulty shifting her attention between a classroom white board and oral information from a teacher that was being provided at the same time. Student's profile also showed that she had a tendency toward avoiding or limiting sensory stimuli. Hamilton logically explained that Student's vocalizations in class could not be considered a sensory need because the data showed the vocalizations stopped when a work demand was removed. If Student had a sensory need to make the vocalizations, it would be expected that they would continue whether in an academic class or outside. Instead, Student's vocalizations stopped when she was removed from the classroom.

52. Based on the above, Hamilton concluded that Student had sufficient gross and fine motor skills and visual motor skills to access the curriculum without the need for clinic-based occupational therapy. Hamilton explained that clinic-based therapy was used to build skills before generalizing them in the environment and Student had demonstrated functional levels of motor ability needed to access the curriculum. Instead, Student's needs could be met through consultation services with occupational therapist. Hamilton's recommendation for consultation was based on her conclusion that Student mainly needed accommodations such as: reduction of visual distraction on paper and in the environment; provision of a quiet environment; additional time to complete assignments when Student was overwhelmed by the demands; smaller class size with less teacher and student movement. Hamilton believed that if Student was placed in an appropriate classroom, her need for scheduled breaks would reduce because the breaks were a function of Student's reaction to the environment. Hamilton did not believe that an Alphasmart assistive technology device was required because Student required a high level of prompting to use it, could not independently generate sentences, and wrote legibly within the same amount of time.

53. Beginning in May of 2010, District school psychologist Erin Jurgensen (Jurgensen) took over responsibility for monitoring the implementation of Student's BSP from school psychologist Aguilar. Jurgensen possessed a bachelor's degree in psychology, a master's degree in school psychology, and at the time of hearing was a doctoral candidate in school psychology. Jurgensen was a state certified school psychologist who was also certified as a behavior intervention case manager (BICM). At the time of hearing, Jurgensen was scheduled to take the BCBA exam in January of 2011. In addition, Jurgensen had been trained by the Lovaas Institute to teach instructional assistants how to use discrete trial teaching. Jurgensen was a persuasive witness based on her credentials and knowledgeable testimony.

54. During April and May of 2010, 1:1 aide Hatfield had collected data about the antecedents and frequency of Student's vocalizations that were loud enough to disturb other students. Hatfield's data showed that during April and May of 2010, the number of vocalizations loud enough to disturb other students per period was: during Art – between four and 15; during Science – between five and 18; during Algebra – between two and 18; during English – between five and 20; and during LSM – between four and 15. During this time, Student was only removed from class if she could not be redirected and the vocalizations continued. The only times Student's inappropriate behavior resulted in removal was during academics, such as English, Algebra, Science and LSM. During this time period, Student did not need to be removed from her Art elective.

55. In addition, during April and May of 2010, Jurgensen observed Student in class five to eight times, on at least two occasions for up to 45 minutes. Student did not interact with her peers and did not complete any work independently. Student's vocalizations consisted of, for example, loudly saying "No, no, no," laughing inappropriately, and repeating scripted language from "Scooby Doo." Student's peers demonstrated that they were disturbed by her behaviors by stopping their work and turning to look. The vocalizations corresponded with work demands.

56. Based on her review of Aguilar's behavior assessment of Student, her own observations, and the data collected by 1:1 aide Hatfield, Jurgensen persuasively concluded that the function of Student's vocalizations was avoidance and/or escape of academic demands. In preparation for Student's annual IEP, Jurgensen converted Hatfield's data into a report which suggested that Student's IEP include a functionally equivalent replacement behavior goal of Student communicating that she needed a break or help when overwhelmed by work demands prior to engaging in disruptive vocalizations. Jurgensen also suggested that Student continue to take scheduled breaks that were intended to head off Student feeling overwhelmed by academic demands.

57. Also in preparation for Student's annual IEP, District staff prepared progress reports on the goals Student brought with her from the prior district IEP dated December 3, 2008. In reading comprehension, Student met none of the benchmarks toward the goal of answering "wh" questions at grade level with 80% accuracy on three of five days. Similarly,

Student met none of the benchmarks toward the goal of answering grade level test questions with no more than three prompts with 60 percent accuracy.

58. In writing, Student had not met the goal of forming grade level sentences independently. The prior district reported some progress making simple sentences when provided visual and verbal prompts, including word definitions; however, in District, Student was observed to randomly choose words to fill into sentence starters. Similarly, Student did not meet the goal of independently writing a five sentence paragraph with visual cues and indirect verbal prompting. Instead, with visual supports, Student could write simple sentences about topics already familiar to her, or could write what she was told to write.

59. In mathematics, Student came to District with a mathematical operations goal of solving operations with visual supports, a calculator, and one prompt with 70 percent accuracy. In her prior district, Student never achieved more than 60 percent accuracy, and in District had been unable to complete mathematical operations with only one prompt. District's progress note reflected that Student had been enrolled in a grade-level Algebra class that did not include review of mathematical operations.

60. Both in the prior district and District, Student was unable to meet her goals of packing up her own class materials or navigating between classes. Student required prompting and an escort to navigate the campus. Similarly, both in the prior district and District, Student was unable to meet a goal of independently working on grade level curriculum for five minutes.

61. On her adapted physical education goals, Student was unable to meet a throwing goal and a push-up/sit-up goal.

62. On language and speech goals, Student had made progress on answering "yes/no" questions with 90 percent accuracy, but had not met the goal. Student made limited progress on a goal of orally participating in class by reading or answering a question. It was noted that Student required a long time and a high level of prompting to complete this action. Student made limited progress on a goal of greeting one peer per class period, even with a visual support. The District noted that if orally or visually prompted, Student would just repeat what had just been said or what was written. Student met a goal of turn-taking with peers when prompted during a game. Student met a goal of expressing a need with a two to five word sentence with no more than two prompts with 80 percent accuracy on four out of five trials. Student made progress on a goal of answering "wh" questions about real or pictured events with a complete five to six word sentence with no more than three prompts. Student made limited progress on a goal of engaging in three to four conversational turns with no more than one prompt with 80% accuracy. Similarly, Student made only limited progress on a goal of interacting with appropriate gestures, eye gaze, and proximity with 80 percent accuracy in four of five trials.

63. In occupational therapy, Student had one goal of using the Alphasmart (a word processor with a keyboard and small screen) with 100 percent accuracy to take notes and

complete assignments in the time given. Although the prior district reported progress on the goal, while enrolled in the District, Student required prompting and assistance to use the Alphasmart and did not independently generate sentences. Student required redirection to prevent her from erasing what she wrote and perseverating on it.

May-June 2010 IEP Meetings

64. The District had intended to hold the annual IEP team meeting by no later than April 21, 2010; however, additional time was needed to complete the psychoeducational assessment. District proposed dates as early as May 3, 2010, but the IEP team meeting was ultimately scheduled later in order to accommodate the schedule of Parents' attorney and advocate.

65. An annual IEP team meeting to discuss the assessment results and develop a program for Student was held on May 21, 2010, with subsequent sessions on June 2, 2010 and June 16, 2010. At the beginning of the meeting, Parents were provided with a notice of procedural safeguards. On each day of the meeting, both Parents attended with both an attorney and an advocate. One of Student's general education teachers attended each day of the meeting, as did the school nurse. Special Education Department Chair Koorsen was present on all days, as was District's Director of Special Education Dr. Benton. Both Koorsen and Dr. Benton could answer any questions about the District's special education placements. To address the psychoeducational assessment and BSP, school psychologists Dr. Feldman and Jurgensen attended on all days. AT assessor Dwiggins attended on the first day. District speech therapist Schumacher attended the first two days of the IEP before being excused by Parents. NPA representatives that had been providing Student with clinic-based speech therapy were also present on the first day.

66. At the IEP team meetings, all District assessments and recommendations were discussed and explained by the personnel who performed them. Student's progress on all prior goals was discussed and Parents' input, either directly, or through their advocate or attorney, was included in the present levels of performance and reflected in the IEP team meeting notes. Parents, either directly or through their advocate and attorney, fully participated in the IEP team discussions, including expressing disagreement with the goals, placement and services offered. Parents believed that Student should be placed in general education classes and held to grade level standards on a diploma track, and that all of the District's academic goals were written at too low a level.

67. The IEP team developed the following measureable academic goals, all of which contained short term objectives: 1) an oral expression goal that when asked, Student would respond verbally with a five or more word response about events or experiences at least three times per day; 2) a reading comprehension goal of responding correctly to simple questions after reading a text at the second grade level at least three times per day; 3) a listening comprehension goal of sequencing pictures in a meaningful sequence that corresponded to the sequence of a familiar, orally presented story at the first grade level with 50 percent accuracy; 4) a written expression goal of creating a simple sentence with 80

percent accuracy; and 5) a math reasoning goal of solving 10 word problems involving addition/subtraction facts. All of these goals were based on Student's present levels of performance and achievement level on prior goals.

68. APE teacher Sayre attended the IEP team meeting on May 21, 2010 and June 2, 2010. In addition to presenting her assessment, she presented a measurable, proposed physical fitness goal to address Student's deficits in physical fitness and object control. The goal targeted increasing Student's upper and lower body strength and contained short-term objectives. The present level of performance for this goal was adjusted based on input from Parents and their attorney.

69. School psychologist Jurgensen discussed with the team her conclusions that Student's vocalizations related to academic task avoidance. Two measurable BSP goals were proposed: 1) for Student to independently request help or a break in class rather than engage in inappropriate vocalizations at least twice per period; and 2) for Student's vocalizations to decrease to no more than two per period. Both goals were understandable, measurable, and had short-term objectives. Both goals were intended to increase Student's access to instruction by preventing Student from being removed as a result of her disturbing vocalizations. Overall, Jurgensen believed that Student's vocalizations would decrease if Student was provided with academic instruction at a more appropriate level to her abilities. Consistent with this, Jurgensen supported the IEP team recommendation that Student not be placed in general education academic classes.

70. District occupational therapist Hamilton explained her assessment and conclusions. Hamilton proposed a visual motor skills goal of maintaining attention to a fine motor activity for three minutes with less than two prompts in four out of five trials. The goal was measurable and based on Student's demonstration of the necessary motor skills while simultaneously demonstrating a need to increase her visual attention to school tasks. The goal contained short-term objectives. Hamilton's proposed accommodations and modifications from her assessment report were also included in the IEP offer.

71. District speech therapist Schumacher attended the first two days of the meeting and was excused by Parents on the third day. Schumacher reported Student's progress on her prior goals. The present levels of performance in speech were adjusted based on input from Parents' advocate. Based on the assessments and present levels of performance, Schumacher proposed the following measurable speech goals, each of which contained short term objectives: 1) a receptive/expressive language goal of answering yes/no questions containing verbs, with 80 percent accuracy; 2) a pragmatics goal of verbally greeting one person per class period in two of three periods; 3) a receptive/expressive language goal of accurately answering "wh" questions in four out of five trials with visual supports and no more than two prompts; 4) an expressive language goal of expressing her needs/wants using a complete sentence of five to seven words in four out of five trials; and 5) a semantics/vocabulary goal of demonstrating receptive and expressive knowledge of 10 of the basic concepts she was unable to identify during the assessment. The IEP team meeting notes reflect that Student's NPA speech therapy provider agreed with the proposed goals.

72. The IEP included an Individual Transition Plan (ITP). The ITP was based on interviews with Student and her completion of a career interest questionnaire. Student's responses were either inaccurate (referring to enrollment in social studies and ROTC, neither of which was true), or unrealistic (answering that she wanted to become a doctor and attend college). Student expressed interest in working after high school. The ITP noted that to meet the goal of attending college, she would have to meet all high school requirements and work independently with minimal prompts. The services needed to accomplish this were working on her academic and independence goals in her IEP. To meet the goal of working after high school, the ITP noted that Student should participate in career preparation classes through the Workability program for disabled students and should also explore services from the state Department of Rehabilitation.

73. The IEP team developed the following measurable transition goals, each of which contained short term objectives: 1) a prevocational goal of independently following a picture schedule by transitioning between the activities in the sequence with 100 percent accuracy; 2) a prevocational goal of completing a three item task list for 10 minutes each task with 80 percent accuracy; and 3) a self-advocacy goal of using visual or verbal communication to get her personal needs met, such as requesting a break, with 80 percent accuracy. All of the goals were based on Student's present levels of performance.

74. The District members of the IEP team offered Student placement at the District's comprehensive high school campus with approximately 52 percent of Student's school day outside of general education and 48 percent of Student's day in general education environments. Specifically, for academic classes, the District offered placement in the Essential Skills special day class based on her need for a small group setting and individualized instruction. The remaining three periods of her day (excluding lunch) would include PE, and up to two general education electives, such as art. Student would earn a certificate of completion, rather than a high school diploma.

75. The essential skills placement offered to Student referred to a special day class that had from five to 15 students. A credentialed special education teacher and an instructional assistant taught the special day classes, with many students, such as Student, also being assisted by 1:1 instructional aides. The curriculum included academics that were linked to state standards, but were taught at a level appropriate for the students, rather than grade level. The essential skills classes allowed for more time to work on individual goals because the teacher was not constrained to move at the same pace as general education classes. Essential Skills classes were on the same "block" schedule as general education classes so that the number of minutes spent in class each week was the same as general education.

76. Student's Algebra teacher during the spring of 2010, Hamm, was a member of the IEP team who attended on June 16, 2010. Hamm was a credentialed math teacher with 11 years teaching experience and a bachelor's degree in child development and psychology. Hamm agreed with the District IEP team members' proposed placement. Hamm saw that Student was not able to solve any of the problems during class. At most, with prompting,

Student copied examples from the board, or, during group work, or work at the chalkboard, Student copied the work of other students when prompted. Student did not independently follow directions. Although Student's homework was returned completed, Student was never able to demonstrate understanding of math in a school setting and failed all tests. Hamm did not see Student interact with other students. Student made verbal outbursts during class time such as inappropriate laughing, yelling, or repeating phrases about "Scooby Doo," which only resolved when Student was removed from class. Student's vocalizations disrupted Hamm's teaching and disturbed the other students. Hamm concluded that the vocalized prompting method demonstrated by Mother could not be implemented in a class setting because it required a large number of prompts over too long a period of time, and would also be disturbing to other students. The IEP team meeting notes show that Student's general education science teacher raised similar concerns. Hamm's observations supported the IEP team's conclusion that general education for academics was not an appropriate placement for Student.

77. The IEP offer included the provision of a full-time 1:1 instructional aide and the use of an Alphasmart AT device. The following related services were offered: 30 minutes of individual speech therapy per week at school; 30 minutes of group speech therapy per week at school; 60 minutes per week of individual speech therapy at a NPA clinic; 15 minutes per week of speech therapist consultation at school; 30 minutes per month of speech therapist consultation between school and NPA; two, 30-minute OT consultations per month by a District OT; two, 30-minute behavior consultations per month; four, 45-minute APE sessions per month; and four, 60-minute AT consultations per year.

78. Extended School Year (ESY) was offered in an Essential Skills placement for 220 minutes per day, with the assistance of a full time 1:1 instructional aide and all related services at two-thirds of their regular frequency and duration.

79. Accommodations assist students in accessing the curriculum without making fundamental changes to the content. Modifications refer to fundamental changes to the curriculum, such as reduced expectation of mastery of the subject. The IEP contained the following accommodations and modifications to access the core curriculum: note taking support from an instructional aide; use of visual supports for reading and writing materials; books on tape if available; use of manipulatives, visual aides, or a calculator for math; access to a computer; volunteer peer buddies as available; and use of supplemental publisher materials if available.

80. The IEP contained the following instruction and grading strategies: instructions repeated/rephrased in simplified form using brief specific language, visual cues, and checking for understanding; check for understanding with extended response time; extended time to complete assignments; modified grading in special education programs based on completion of individual goals; PE grade of pass/fail based on effort and achievement of APE goals; and state standard grading if enrolled in general education with only accommodations.

81. The IEP identified that Student was not expected to take state academic tests at grade level and contained the following test situation strategies: tests given in shortened time segments; tests broken into parts; and verbal prompting to stay on task.

82. The IEP contained the following organizational and behavioral supports: flexible, preferred seating in class, as appropriate; use of an assignment reminder binder; short breaks between assignments; use of prompt fading strategies including time delay and fading; supervision during unstructured time to facilitate social skills development and interaction; use of sensory strategies to limit visual information in immediate surroundings; implementation of the BSP; daily behavior support logs shared with Parents quarterly; and use of social stories to teach listening quietly, focusing on the teacher, independently completing work and trying to answer test questions correctly.

IEE Request

83. On June 18, 2010, Student's advocate sent an email to District's attorney stating that Student was requesting an IEE in occupational therapy.

84. On June 30, 2010, District, through its attorney, sent Student's attorney prior written notice that the IEE request was denied. Consistent with its duty to file for due process when an IEE request is denied, District filed the instant action on July 1, 2010.

Expert Testimony for Student

85. On October 4, 2010, Parents had Student independently assessed by occupational therapist Susanne Smith Roley (Roley). Roley is a state licensed occupational therapist with a bachelor's degree in occupational therapy and a master's degree in allied health sciences. Roley had over 35 years experience as an occupational therapist at the time of hearing. Following her assessment, Roley provided a written report. Parents paid Roley \$1,000.

86. Roley observed Student in her SDC English class for 45 minutes. Roley noted that Student took breaks and needed adult assistance to complete the tasks of trying to write short answers to questions about an orally presented story. Roley reviewed Student's IEP from the prior district, dated December 4, 2008, Hamilton's May 4, 2010 OT report, and Dr. Feldman's psychoeducational assessment report. Roley did not review the May-June 2010 IEP.

87. Roley conducted other assessments in a two-hour session with Parents present. Consistent with District occupational therapist Hamilton's assessment, Roley saw that Student required frequent prompting to complete tasks and had difficulty with tasks that required following verbal directions. Similar to Hamilton, Roley used assessment instruments that were not normed for Student's age group because there is a ceiling for development of the functions addressed by OT. Roley thought that use of such tests was still

appropriate for children with Student's profile, particularly in light of Student's apparent slow processing speed and language delays.

88. Roley administered the Sensory Integration Praxis Test and acknowledged that although not designed for individuals with cognitive impairments, it could provide insight into functionality of children with autism. Student generally showed strength in visual tasks like space visualization, figure/ground discrimination, visual motor integration (copying), and bilateral motor control. Consistent with Hamilton's results, Student did poorly on tasks that required her to comply with verbal directions or motor plan novel movements. Although Student scored poorly on measures of vestibular processing (balancing and postural control), it was noted that she had good functional mobility.

89. Student's Parents completed the Adaptive Behavior Assessment System – II, Parent Edition (ABAS). The ABAS was a parent-completed inventory of adaptive functioning, which showed that Student required assistance with daily living skills like organizing herself and her belongings, and making transitions at the correct times. On the Behavior Rating Inventory of Executive Function – Parent Form (BRIEF), Parents rated Student's executive functioning as typical in many areas, and higher than Roley observed. Despite Parent's ratings in the typical range, Roley's observation and conclusion was that Student required a high level of adult support.

90. Roley was critical of District occupational therapist Hamilton's assessment. In particular, Roley believed that her own assessment was more comprehensive and that Hamilton's assessment over-emphasized Student's areas of strength. Roley ultimately recommended that Student receive 45 minutes per week of OT in "multiple environments including the classroom" for a year, followed by a reassessment. Roley also recommended 60 minutes per month of consultation with the family and staff to ensure that the OT program was carried over into the classroom and home. Roley suggested goals to improve postural stability, increase attention, and improve sequencing of complex tasks with diminished adult prompting. Roley also recommended frequent movement breaks be provided as an accommodation.

91. District OT Hamilton rebutted Roley's recommendations at hearing by explaining that Roley was not recommending clinic-based OT, such that even if all of Roley's goals were adopted, they did not necessarily need to be implemented by an occupational therapist. Hamilton's explanation demonstrated that her recommendation for OT consultation, which included time to directly work with Student and coach staff on implementation, was actually similar to Roley's recommendation of OT goals being worked on across environments. District OT Hamilton also persuasively testified on rebuttal that assessment instruments like the BRIEF and ABAS were generally administered by psychologists, rather than occupational therapists, such that Hamilton's failure to perform them did not indicate that her assessment was improper.

92. On October 15, 2010, Parents obtained an independent psychoeducational assessment of Student by Carl Totton, Psy.D. (Dr. Totton), which resulted in a report dated

October 20, 2010. Dr. Totton was a state-licensed educational psychologist and clinical psychologist who had obtained his doctorate degree in clinical psychology from Pepperdine University. In addition to maintaining a private practice for over 20 years, Dr. Totton had 20 years experience as a school psychologist in southern California. At the time of hearing, he was also an adjunct professor at Phillips Graduate Institute, teaching courses in psychological testing and special needs children.

93. As part of his assessment, Dr. Totton reviewed Student's December 4, 2008 IEP from her prior school district and had also reviewed District's May of 2010 psychoeducational assessment by Dr. Feldman. However, Dr. Totton did not review the District's IEP offer from May and June of 2010 as part of his assessment, and did not review it in preparation for hearing. Dr. Totton also did not review any of the District BSP's as part of his assessment or in preparation for his testimony. Dr. Totton's only knowledge of Student was based on the four hours he spent interviewing her and Parents. He did not interview any teachers or service providers, or visit the proposed placement at District's high school. All assessments were conducted in English.

94. To assess cognitive functioning, Dr. Totton administered the Stanford-Binet Intelligence Scales – Fifth Edition (Stanford-Binet). Consistent with Dr. Feldman's results on the WISC-IV, Student's highest scores were in non-verbal tests of fluid reasoning (solving problems with information provided) and visual spatial (spotting patterns) with standard scores of 82 and 71 respectively. Also consistent with Dr. Feldman's results, on verbal tasks such as knowledge and working memory, Student's standard scores were so low as to be less than one tenth of a percentile when compared to the general population. Like Dr. Feldman, Dr. Totton was unable to obtain a valid full-scale IQ score.

95. Dr. Totton, like occupational therapist Roley, also assessed Student's adaptive behavior with the ABAS. Consistent with her autism, Parents reported Student as having below average adaptive function, particularly in social and communication areas. He also assessed motor functioning using the Bender Visual-Motor Gestalt Test, Second Edition (Bender), and the VMI. On the Bender, Student scored in the average range, with a standard score of 97, reflecting her relative strength in visual copying tasks. Student did not do as well on the VMI, with a standard score of 70, which Dr. Totton attributed to fatigue and increased difficulty of the VMI compared to the Bender.

96. Dr. Totton agreed that Student should continue to be eligible for special education. Dr. Totton also made general recommendations including: continuation of her current program if she was benefitting from it; providing structure and consistency in the classroom; hands-on learning with high-interest materials; incorporate meaningful tasks and give Student choice; target social skills with an emphasis on pragmatics; use positive behavioral strategies; and provide functional academic and daily living skills instruction as part of Student's post-secondary transition plan. At hearing, Dr. Totton expressed his belief that Student had made academic progress in general education based on his review of grade reports. However, he was unaware that the only "A" grade Student achieved was in LSM, a non-academic, special education class that was not graded based on academic achievement.

Similarly, Parents had reported to him that Student had obtained a “B” in summer school Algebra (after the May and June 2010 IEP team meetings); however, he was not aware that this grade was for independent study and not academic achievement in general education. Contrary to Parents, who believed Student should be held to grade level standards, Dr. Totton’s opinion about general education was based on an assumption that grade level standards would be modified for Student. Dr. Totton acknowledged that Student could receive more social benefit in general education electives than in general education academic classes.

97. Lynn Smithey (Smithey) performed an inclusion evaluation of Student dated March 16, 2008. At the time, Student was 12 years old and in the seventh grade at a combined elementary and middle school in another school district. Smithey had not seen Student since she observed her at that school in February of 2008. Smithey held a master’s degree in early childhood education and had over 20 years experience in special education. The purpose of the assessment at the time was to develop strategies to work with that district’s staff and Parents to facilitate inclusion in general education at a particular school site. Smithey made recommendations at the time, such as: a BSP should be used to reduce inappropriate vocalizations in class; AT should be used to try to increase Student’s independent communication; that aide support should optimally facilitate Student’s independence; that team meetings should be held; that reinforcement and social stories should be used to diminish prompt dependence; and that “pull out” instruction should be minimized. Although Smithey was earnest and sincere, her testimony was not persuasive because she had no basis to form an opinion about the appropriateness of District’s program on a comprehensive high school campus during the relevant time period.

98. Kathy Dahlum (Dahlum) worked with Student as an inclusion facilitator in Student’s prior District in the 2008-2009 school year. Dahlum also provided home tutoring to Student through July of 2009. At all times, Dahlum had a full time position with a different local school district than Student’s prior district. Dahlum’s full time position for the 12 years prior to hearing was as an inclusion facilitator and over 10 years teaching experience prior to that. She was a credentialed teacher with master’s degree in special education and doctorate in education from Nova Southeastern University.

99. Dahlum’s services in the other school district consisted of two hours per week of support to that district’s staff. Dahlum helped the other district’s teachers to understand the difference between accommodations and modifications and how to implement Smithey’s inclusion recommendations. Dahlum believed based on her interactions with Student that Student had some grade level skills; for example, she recalled Student taking spelling tests at grade level. Dahlum also coached Student’s 1:1 aide in the other district in when to assist and when to fade back. Dahlum concluded that Student was less prompt dependent when one question or task at a time was presented. Dahlum believed that the other district staff found her services beneficial. Dahlum never observed Student at District’s high school campus. Overall, Dahlum expressed her belief that all special education students, including Student, had an unqualified right to placement in general education classes. Although Dahlum was sincere in her beliefs and support for Student and her family, her opinions were

not persuasive because Dahlum had no factual basis to render a specific opinion about District's offer of placement and services in the May and June of 2010 IEP.

Parent Testimony

100. Student's Mother expressed that her post-secondary goal for Student was for Student to have a job like accounting or bookkeeping that did not require much interaction with people. Mother sincerely believed that Student should be placed in general education math and science classes and held to the same academic standards as typical peers, even if it meant Student would repeat classes that she had failed. Mother believed that Student was academically capable of the work and because Student was not social, did not need to participate in community instruction activities like those offered in special day classes. According to Mother, Student could complete her homework in three to four hours a day with Mother prompting Student. Mother had her own prompting method that consisted of making humming vocalizations rather than using words. When Mother worked with Student, she was given frequent non-verbal vocal prompts, praise, and breaks. In the spring of 2010, Mother demonstrated her prompting method on an algebra problem for Student's math teacher, her science teacher, and her IEP case carrier. Mother believed her demonstration showed that Student was capable of grade level work in science and math. Mother also believed that if Student was in general education, she would model the behavior of her typical peers. Mother's belief about Student's academic level was also based on a perception that Student had been unfairly tested by the STAR state standards test given in May of 2010; however, the May 2010 STAR test results were not available at the time of the IEP team meetings at issue. Mother's belief was also based on Student's receipt of a "B" grade for independent study in math during the summer of 2010. Mother never observed Student in a general education class, or in the District's offered placement.

101. Like Mother, Father sincerely believed that Student was capable of grade level work based on Mother's demonstration of her prompting of Student, that the May of 2010 STAR test was unfairly administered to Student, and that Student had received a "B" in summer of 2010 independent study in math. Like Mother, Father also believed that Student would model the behavior of typical peers. Also like Mother, Father never observed Student in a District classroom.

102. Father believed the District's IEP offer was not appropriate because Student should be in general education classes and held to grade-level, diploma-track standards. Father also believed that District should provide inclusion support services, like those provided in the prior district, because Father believed Student showed improvement with the services. In general, Father believed that the goals in the May-June 2010 IEP were too low for Student's ability level and that the present levels of performance on which the goals were based were inaccurately low. Father also did not agree with the IEP because it did not provide extra time for Student to leave class prior to lunch, or to come late to school if ill. According to Father, Student needed to leave campus for lunch because of dietary needs related to Grave's Disease, but Student offered no medical evidence at hearing to support this. Father did not believe that Student would get a social benefit from being in general

education for part of the day because it might confuse Student; however, this opinion contradicts Father's belief that Student was cognitively capable of grade level work. As to OT, Father believed that the May-June 2010 IEP should have included additional OT for sensory issues rather than just the consultation services offered.

Observation of Placements

103. The ALJ observed a general education tenth grade Biology class, which was the type of placement desired by Parents for the 2010-2011 school year. The class had 28 students and one teacher. The lesson involved worksheets that required the students to read a passage and answer questions on the cell processes of transport and diffusion. The teacher modeled for the students how to highlight the important information in the passage before answering the questions. Students were then asked to work independently on worksheets that required reading, highlighting the important information, and writing answers to questions. Students were given approximately five minutes to work silently on their own while the teacher circulated around the room to check for completion. The teacher then called upon students to orally answer the worksheet questions. The teacher's oral follow-up questions included review of related material covered by the prior week's lab experiment in diffusion. The lesson did not involve any interaction between students other than reading their answers aloud when called upon.

104. The ALJ also observed an Essential Skills science class at Student's grade level. The class had five students, a teacher, and an instructional assistant. The lesson involved a lecture on the anatomy of the ear. The teacher used an overhead projection that depicted a labeled diagram of the ear to go over the different parts, their names, and their functions. Students were also asked to use their hands to cup their ears to demonstrate the function of the outer ear. The teacher engaged the students by asking questions about the parts of the ear and their function while pointing to the diagram and labels. The lesson was then reinforced by having the students work on color-coding worksheets of the diagram of the ear while reviewing the different parts. During this lesson, the teacher modeled how to color on the overhead projector while engaging the students by soliciting feedback about what color to use to color the different named parts. All of the students appeared verbal and they engaged with the teacher, the aide, and each other during the lesson.

LEGAL CONCLUSIONS

Burden of Proof

1. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, Student has the burden of persuasion for the issues raised in OAH case number 2010090344 (Issue 1), and the District has the burden of persuasion for the issues raised in OAH case number 2010070140 (Issues 1 and 2).

Issue One – Occupational Therapy Assessment

2. Student contends that District's May 4, 2010 occupational therapy assessment of Student was not properly conducted, such that Student is entitled to an IEE at public expense. District disagrees, and contends that the assessment met all IDEA requirements, such that Student is not entitled to an IEE at public expense. As discussed below, District met its burden of proof by a preponderance of the evidence that the assessment was properly conducted. Accordingly, District need not fund an IEE in OT at public expense.

3. In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be understandable to the student, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) A school district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The proposed written assessment plan must contain a description of any recent assessments that were conducted, including any available independent assessments and any assessment information the parent requests to be considered, information about the student's primary language and information about the student's language proficiency. (Cal. Code Regs., tit. 5, § 3022.)

4. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

5. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education

and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

6. A student may be entitled to an IEE if he or she disagrees with an evaluation obtained by the public agency and requests an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006)²; Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) In response to a request for an IEE, an educational agency must, without unnecessary delay, either: 1) File a due process complaint to request a hearing to show that its evaluation is appropriate; or 2) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

7. Here, District demonstrated that Student had notice of the assessment, and parents consented to the assessment by signing the assessment plan. District OT Hamilton was properly credentialed and had the necessary experience to qualify her to conduct an OT assessment. The assessment was given in Student's primary language of English and used a variety of assessment tools including observation, interview, and non-standardized assessment instruments. The assessment instruments chosen were designed to provide information about whether Student required OT as a related service in her IEP. For example, the Occupational Therapy Skills Assessment required performance of the types of motor movements needed to participate in a classroom and navigate a campus. Similarly, instruments like the VMI and ETCH-M were intended to assess the types of copying and writing skills that one would expect to be used in a high school classroom. Hamilton plausibly explained that even if the assessment instruments were not normally used for children of Student's age, giving them was still appropriate because they required Student to demonstrate school-related skills. Further, Hamilton did not rely solely on these assessments, but also assessed Student's strength and range of motion through clinical observation and her writing through review of work samples.

² All subsequent references to the Code of Federal Regulations are to the 2006 version.

8. Hamilton's assessment also addressed Student's sensory processing through administration of the Sensory Profile School Companion inventory to two of Student's teachers and her 1:1 aide. Hamilton persuasively explained that because her assessment was intended to make recommendations for OT as a related service to access the curriculum at school, it was best to obtain input from people with insight into Student's performance at school.

9. Hamilton's assessment was provided to Mother and Father in writing and was discussed at an IEP team meeting. Hamilton's report fully discussed her findings and made recommendations for Student's IEP program. The District also met the requirement of timely filing a request for due process hearing upon rejecting Student's request for an IEE.

10. The testimony and report of Student's OT expert Roley was not persuasive to demonstrate that Hamilton's report was deficient in any way. Although Roley believed her own report was more comprehensive, Hamilton persuasively explained that her report was appropriately limited to the question of whether Student required OT as a related service, and was not required to be a comprehensive assessment of Student's global OT needs. Hamilton also persuasively pointed out that some instruments given by Roley, such as the ABAS and BRIEF, were generally used by psychologists, not occupational therapists. The inclusion of the ABAS in the assessments by District school psychologist Dr. Feldman and Student's independent psychologist Dr. Totton corroborated Hamilton's testimony on this point. Thus, the fact that Roley may have done more tests did not demonstrate that Hamilton's assessment failed to assess Student's areas of need. Finally, although Roley reached a different conclusion regarding the level of services, Hamilton's recommendations were similar when considered in the entire context of the IEP that was developed. Notably, Roley, like Hamilton, was not recommending OT to be delivered in a clinic setting, but instead concluded that Student required interventions in the school setting itself. The consultation services proposed by Hamilton were flexible enough to include direct work with Student and instruction to other personnel regarding how to implement Student's OT goal. Thus, although Roley disagreed with Hamilton over the amount of service time, Roley's opinion did not demonstrate that Hamilton's assessment was not properly conducted.

11. In sum, District met its burden of proving by a preponderance of the evidence that its OT assessment was appropriate. In contrast, Student failed to meet her burden of proving by a preponderance of the evidence that District's assessment was inappropriate. Accordingly, Student is not entitled to an IEE at public expense. (Factual Findings 1, 6, 32, 43-52, 63, 65, 66, 70, 77, 79-91, 95; Legal Conclusions 3-10.)

Issue Two – Did District Offer Student a FAPE?

12. In Issue Two, District contends that it offered Student a FAPE in the IEP developed on May 21, 2010, June 2, 2010, and June 16, 2010. Specifically, District contends that Student was assessed in all areas of need, the IEP met all procedural requirements, and that the placement and services offered were reasonably calculated to provide Student a FAPE at the time it was drafted. In particular, District contends that its offer of placement was the LRE

because Student was not getting sufficient educational and social/emotional benefit in general education classes when compared to Student's impact on the general education class because of her disability-related behaviors. Student disagrees, contending that none of District's assessments were properly conducted, that District did not have an accurate understanding of Student because it had not fully implemented her prior district IEP, and that the LRE for Student was general education for all classes because Student would receive educational and social/emotional benefit from placement there. As discussed below, District met its burden of proof by a preponderance of the evidence that Student was offered a FAPE in the LRE.

13. FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

14. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

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

16. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation

data, and the placement options, and takes into account the requirement that children be educated in the LRE; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

17. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) "the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.*, *supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

18. An IEP providing for over 50 percent of the child's day to be spent outside of general education for academic instruction was held not to violate the child's right to be educated in the LRE where the evidence showed that the benefits of separate academic instruction outweighed the benefit of full inclusion. (See *Friedman v. Board of Educ. West Bloomfield* (E.D. Mich. 2006) 427 F.Supp.2d 768, 782-783 [cognitively impaired student contended that program should have been in general education 100 percent of the time].)

19. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley*, *supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

20. A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b)(1)(ii).) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services. (34 C.F.R. § 300.304(c)(6).) As discussed in Legal Conclusions 3-5, above, incorporated by reference, the assessments must be valid, and must be administered by trained personnel in conformance with the instructions. (See 20 U.S.C. § 1414(b)(3); see also Ed. Code, § 56320.)

21. An IEP team meeting must be held at least annually to review the pupil's progress, whether the annual goals are being achieved, and the appropriateness of placement. (Ed. Code, § 56343, subd. (d).) The meeting must be held at a mutually agreed-upon time and place. (Ed. Code, § 56341.5, subd. (c).)

22. An IEP team meeting that is required as a result of an assessment must be held within 60 days of the date the assessment plan was signed, excluding days between regular school sessions and school holidays in excess of five days. (Ed. Code, § 56344, subd. (a).)

23. An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).) When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).)

24. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include: a projected start date for services and modifications; and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

25. An IEP must also contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(i)(II);

Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

26. An IEP that will be in effect when a student turns 16 is required to contain an Individual Transition Plan (ITP). (20 U.S.C. § 1414(d)(1)(A)(i)(VIII); Ed. Code, § 56345, subd. (a)(8).) The ITP must include appropriate measurable postsecondary goals based upon transition assessments related to training, education, and employment and independent living skills if appropriate. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa); Ed. Code, § 56345, subd. (a)(8)(A).) The ITP must also list the transition services required to reach the postsecondary goals. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(bb); Ed. Code, § 56345, subd. (a)(8)(B).) "Transition services" means "a coordinated set of activities for an individual with exceptional needs" that: 1) "Is designed within an results-oriented process, that is focused on improving the academic and functional achievement of the individual with exceptional needs to facilitate the movement of the pupil from school to postschool activities, including postsecondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation"; 2) "Is based upon the individual needs of the pupil, taking into account the strengths, preferences, and interests of the pupil"; and 3) "Includes instruction, related services, community experiences, the development of employment and other postschool adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation." (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).) Transition services may consist of specially designed instruction or a designated instruction and service. (34 C.F.R. § 300.43(b); Ed. Code, § 56345.1, subd. (b).)

27. When developing an IEP, the IEP team must consider whether the student requires assistive technology devices and services. (Ed. Code, § 56341.1, subd. (b)(5).) "Assistive technology device" is defined as "any item, piece of equipment or product system [other than a surgically implanted device] . . . that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs." (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.)

28. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

29. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

30. A school district is required to request a due process hearing if it determines that a proposed special education program to which a parent does not consent needs to be implemented to provide a FAPE to the child. (Ed. Code, § 56346, subd. (f).)

31. Here, as an initial matter, District met its burden of demonstrating that Student was properly assessed in all areas of suspected disability prior to the IEP team meetings. Student's contention that all assessments somehow were inaccurate because Student was not provided exactly the same program as in her prior district was not supported by the evidence and was contradicted by prior district assessments reviewed by District personnel and Student's own experts that showed Student historically had severe deficits in almost all areas. As discussed in Issue One, District's OT assessment was properly conducted. As to the remaining assessments, all were conducted pursuant to an assessment plan that had been signed by Parents with sufficient time for them to consider it. As to Student's speech-language therapy needs, District speech therapist Schumacher's testimony was credible and persuasive given her credentials and years of experience. Schumacher used a variety of assessment instruments in Student's primary language that included standardized assessments that were given in conformity with test instructions. The thoroughness of Schumacher's assessment was demonstrated by the administration of the additional "basic concepts" subtest of the CASL when it became clear from the testing that Student's expressive language abilities were so severely impacted that the standardized portions of the CASL were not as helpful in making recommendations for Student's expressive language goals. Schumacher's testimony and assessment results were not contradicted by any other witness with expertise in speech therapy.

32. Similarly, the testimony of Special Education teacher Koorsen that she properly administered the WJIII to determine Student's academic achievement baselines was not contradicted. Koorsen was properly credentialed and experienced to give the assessment. Koorsen persuasively explained that although the test was not given in a way that yielded standardized results because it was spread out to accommodate Student's attention needs, the results were still useful to determine appropriate placement and services. Further, as part of Dr. Feldman's psychoeducational assessment and to provide the IEP team with information about appropriate placement and services, information was obtained from Student's teachers about her progress on goals and classroom abilities. The above information was included in Dr. Feldman's psychoeducational assessment, which the evidence showed was also properly conducted. Dr. Feldman was a state-licensed and experienced school psychologist who was

qualified to give all assessment instruments. Dr. Feldman tailored his assessments of Student to obtain Student's best performance by limiting the amount of time spent making demands on Student. Dr. Feldman used a variety of instruments, including interviews with Student's Parents and school personnel, and classroom observation. The variety of assessments used by Dr. Feldman included both verbal and non-verbal standardized instruments, which was appropriate in light of Student's demonstrated expressive and receptive language deficits. Beyond academics, Dr. Feldman used assessments to obtain information about Student's motor abilities using the VMI and functional skills using the Vineland. Student's own independent expert, Dr. Totton, obtained similar results to Dr. Feldman, corroborating that Dr. Feldman's assessment had been properly conducted.

33. Student's AT needs were appropriately assessed by Dwiggin's of Believability, Inc. Dwiggin's possessed the necessary training, had 10 years experience, and was familiar with Student from her prior school District. The assessment included working with Student and examining work samples to determine if Student could benefit from AT assistance with writing, mathematics, and reading comprehension. Dwiggin's testimony was uncontradicted and persuasive. Similarly, Student's needs for APE were appropriately assessed by District APE teacher Sayre. Sayre was properly credentialed, and obtained information from multiple sources including record review, observation, and administration of the APEAS to establish Student's baseline skills in various motor functions. Sayre's testimony was uncontradicted.

34. District also met its burden of showing that the IEP was conducted in procedural compliance with the IDEA. Although California law provides that IEP team meetings necessitated by assessments must be conducted within 60 days of the assessment plan being signed, an annual IEP team meeting must also be scheduled at a time and place convenient to the parents. Here, although an IEP to discuss assessments should have been held by April 23, 2010 (60 days from February 22, 2010, the date the assessment plan was received) the psychoeducational assessment had not been completed. District offered to have the annual IEP team meeting as early as May 3, 2010, but ultimately the meeting was held much later, to accommodate the schedule of Parents' attorney and advocate. Under these circumstances, balancing the California timeline for holding assessment IEP's, with the interest that the annual IEP team meeting be conducted at a time convenient to parents to ensure parental participation, the District IEP was timely.

35. Further, all necessary personnel were in attendance. On each day of the meeting, one of Student's general education teachers was present. As to special education, District special education teacher and department head Koorsen attended, as did Dr. Benton, either of whom could answer any questions about District special education programs. All personnel who conducted assessments were in attendance, and each of them was qualified to explain his or her results and recommendations. Finally, Parents both participated and brought an attorney and advocate to assist them. Parents fully participated in the IEP team meeting, had an opportunity to ask questions, and their input (frequently through their attorney and/or advocate) was included, for example in the present levels of performance.

36. The IEP met all written requirements, containing full descriptions of all offered placements, services, modifications, and accommodations. In addition, the IEP contained measurable annual goals that addressed all of the areas of need identified by the assessments and IEP team input including goals in academics, expressive and receptive communication, fine and gross motor skills, and behavior. The evidence showed that all of the goals were drafted based on an extensive review of Student's present levels of performance on past goals from her prior District IEP, as well as new information obtained through the assessment process. In addition, the IEP included an ITP based on an interview and assessment of Student that expressed post-secondary transition goals that were consistent with Parents' wishes for Student to participate in higher education and employment. The ITP set forth the steps Student would need to take to meet these goals, including services such as work experience support for students with disabilities.

37. Finally, as discussed below, the IEP was reasonably calculated to provide Student with some educational benefit in the LRE in light of her unique needs. (See *Rowley*, *supra*, 458 U.S. at pp. 200-204.) First, the offer of placement in a combination of general education electives and special education classes was appropriate.

38. Contrary to the belief expressed by Student's inclusion witnesses Dahlum and Smithey, full inclusion is not an absolute right. Instead, although the IDEA expresses a policy preference for inclusion to the maximum extent appropriate as an aspiration for all children with special needs, the IDEA acknowledges that the nature or severity of a particular disability may require separate instruction in order to meet the equally important need for educational benefit. (See 20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. §§ 300.114 & 300.116.) The *Rachel H.* case from the Ninth Circuit demonstrates that the question of whether general education is appropriate requires balancing multiple factors. (See *Rachel H.*, *supra*, 14 F.3d at p. 1404.) Here, applying the *Rachel H.* factors to the facts shows that general education was not an appropriate placement and that the District's offered program still met the IDEA's aspiration of inclusion to the maximum extent appropriate.

39. The evidence showed that the educational benefit of full time placement in general education academics would be minimal. Although Parents sincerely believed Student could function at grade level in all subjects, this belief was not supported by her classroom performance or valid assessments. The evidence from Student's general education teachers and aide was that Student was consistently off-task and required constant redirection. Student's inability to engage with the material at the level presented was demonstrated not only by her failing grades and inability to demonstrate mastery of material in a school setting, but by the persuasive testimony of school psychologists Aguilar and Jurgensen. District's behavior analysis of Student's vocalizations convincingly concluded that the function of the behavior was avoidance, given that the behaviors stopped when academic demands were removed. Frequently, Student was able to sit quietly in class only when given a preferred task at her cognitive level, like coloring. Dr. Feldman's comprehensive assessment demonstrated that beyond the expressive and receptive language deficits Student had, which were typical of a child with autism, Student also had working memory deficits that would make accessing the curriculum at grade level very difficult.

Notably, even Student's own psychoeducational assessor, Dr. Totton, did not express the opinion that Student was capable of grade level academics. Finally, Mother's prompting method that she used at home was time consuming, audible, and did not result in Student independently demonstrating ability in mathematics.

40. Similarly, the evidence showed that there was no non-academic benefit to Student from placement in general education academic classes. Parents had never observed Student in a classroom with typical peers. Of the witnesses that had, all of them testified that Student neither initiated, nor responded, to typical peer interaction without a very high level of adult intervention and prompting. As discussed above, the evidence was convincing that Student's vocalization behaviors were related to avoidance of a situation that was uncomfortable and overwhelming to her.

41. As to the third *Rachel H.* factor, District showed that Student's effect on the teacher and general education students weighed against a general education placement. Student needed constant adult intervention to even minimally participate in class. The testimony of Student's general education math teacher Hamm and aide Hatfield showed that Student's vocalizations had a negative impact on the Students around her as did the need to remove Student if she could not be redirected. The fourth factor, cost, was not a consideration. Overall, the ALJ's observation of general education science classroom at Student's grade level corroborated the conclusion that it was not an appropriate placement for Student in light of her needs. In sum, applying *Rachel H.* to the facts shows that general education was not an appropriate placement for academics.

42. Student was nonetheless offered an appropriate placement with the maximum amount of inclusion in general education. (See *Daniel R.R. v. State Board of Ed.*, *supra*, 874 F.2d at p. 1050.) The evidence convincingly showed that Student's needs were too great to be addressed in her SDC English class. Student could not attend to, or complete the work required, even in a smaller class atmosphere. Dr. Feldman and Student's expert Dr. Totton, both concluded that Student could benefit from a more structured classroom with hands-on learning and high interest materials. In addition, District occupational therapist Hamilton persuasively explained the need for Student to be presented with limited visual information when presenting work. In light of the above, and in consideration of Student's severe expressive and receptive language deficits, the Essential Skills classes offered by District were appropriate. The ALJ was favorably impressed that during observation of an Essential Skills science class, the material was presented orally, visually, and through hands-on demonstration. In addition, in contrast to the silent atmosphere of a general education class, where the only interaction was to answer the teacher, the Essential Skills class observed included more opportunity for interaction between the students and between the students and the instructor and aide. Consistent with the above, and Student's academic performance, the IEP properly identifies Student as being on a certificate of completion track, rather than completion of all requirements to obtain a diploma. Student was offered general education placement for two electives and PE, such that those other classes also met the requirement of being in the LRE.

43. Finally, Student was offered related services in all areas of need at an appropriate frequency and duration to assist her in benefitting from special education. As to speech and language therapy, Schumacher's recommendations were not contradicted by anyone with expertise in speech therapy, such that District met its burden. Student was offered AT services of an Alphasmart for typing, with consultation support. Although occupational therapist Hamilton concluded this was not necessary, Student could still benefit from having an alternative way to respond to class work. This recommendation was otherwise not contradicted by other testimony. Similarly, Student was offered APE services to assist her in improving upper and lower body strength. This recommendation was not contradicted. Moreover, even though the opinion of Student's OT expert Roley is outside the "snapshot" of facts that was considered by the IEP team, the recommended APE services are consistent with Roley's recommendation that Student be provided services to help increase postural stability. As to OT services, District occupational therapist Hamilton persuasively explained that Student's OT needs could be met through consultation and be implemented by other District staff. The IEP team did not have any report other than Hamilton's at the time the IEP was drafted. Therefore, the team's acceptance of Hamilton's recommendations was reasonable. Even so, Student offered no evidence, even from her OT expert Roley, that as of the time of the IEP meeting Student needed clinic-based therapy or goals or services solely addressed to sensory needs. Similarly, the main difference between the recommendation of Student's expert and that of Hamilton was amount of service. Student's OT expert Roley had not reviewed the District's IEP offer prior to her assessment or in preparation for her testimony, rendering her opinions regarding the recommended frequency and duration of service not persuasive for this reason as well. The services of an inclusion facilitator, like Student was provided at her prior school district, were not necessary to provide Student a FAPE. Student required, and was offered, a full time 1:1 aide throughout the school day, whose duties included facilitation of social interaction during non-structured time.

44. In conclusion, the evidence demonstrated that Parents had a sincere belief in Student's abilities and understandably maintained high expectations for her. However, the overwhelming evidence at hearing showed that District's May-June 2010 IEP offered Student a FAPE in the LRE. In particular, the evidence supported that the District's offered placement of Essential Skills academics classes in combination with general education electives was appropriate to meet Student's needs, and that the District's comprehensive offer included all necessary related services, modifications, and accommodations for Student to obtain educational benefit. Accordingly, because the District's proposed program is necessary to provide Student a FAPE, District may implement the IEP without parental consent. (Factual Findings 1-104; Legal Conclusions 13-43.)

ORDER

1. District's occupational therapy assessment dated May 4, 2010 was properly conducted, such that Student is not entitled to an IEE at public expense.

