

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

SOQUEL UNION ELEMENTARY  
SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2006120082

**DECISION**

Peter Paul Castillo, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on September 17 through 20, 2007, at the offices of the Soquel Union Elementary School District (District) in Capitola, California, and on October 10, 2007, at the offices of the Diagnostic Center, Northern California, in Fremont, California.

Attorney Geralyn M. Clancy represented Student. Attorneys Laurie E. Reynolds and Emily E. Sugrue represented the District.

Student's Mother was present during the entire hearing. Mary Bevernick, the District's Assistant Superintendent of Educational Services and Personnel, was present throughout the hearing.

On December 4, 2006, Student filed a request for due process hearing. OAH granted a motion to continue the due process hearing on January 25, 2007. On June 18, 2007, OAH granted the District's motion to continue the due process hearing, and permitted Student to an Amended Complaint, which Student did on June 18, 2007.<sup>1</sup> At the close of the hearing, the parties requested time for written argument. The parties submitted their closing briefs on October 22, 2007, and the matter was submitted that day.

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<sup>1</sup> Student's filing of the Amended Complaint restarted the applicable timelines for the due process hearing, including the issuance of the decision. (20 U.S.C. § 1415(c)(2)(E)(ii).)

## ISSUES<sup>2</sup>

1. Did the District fail to assess Student in all areas of suspected disability by not conducting an occupational therapy (OT) assessment when it initially assessed Student?
2. Was the District's April 4, 2006 OT assessment adequate to determine Student's unique needs, if any, for OT?
3. Did the District deny Student a Free and Appropriate Public Education (FAPE) from October 28, 2005 through June 18, 2007, by failing to provide Student with OT services to meet his unique needs?
4. Did the District deny Student a FAPE by terminating door-to-door transportation without prior written notice?
5. Did Student require door-to-door transportation as a related service to receive a FAPE from the 2006 Extended School Year (ESY) through the present?

## REQUESTED REMEDIES

As a proposed remedy for Student's OT claims, Student seeks OT services for two hours a week of direct therapy, one hour a month of collaboration and consultation with District staff and parents, and any compensatory OT services OAH deems necessary. As remedy for the District's failure to provide transportation, Student seeks mileage reimbursement. Due to the District's failure to provide transportation, Student seeks as compensatory education in the form of tutoring for whole and partial days of classroom instruction missed from the 2006 ESY through the 2006-2007 school year (SY), and that the District make up missed speech and language therapy sessions during this time.

## CONTENTIONS OF THE PARTIES

Student asserts that the District failed to properly assess him in all areas of suspected disability when it initially assessed him for special education eligibility by not performing an OT assessment. Student contends that the District had information from the Regional Center and from the District's own observations that put it on notice of deficits in Student's fine and gross motion skills, sensory integration, and oral-motor skills. Student also argues that District denied him a FAPE by not providing OT services after Student started preschool, which he required because of his low energy and tactile defensiveness in the classroom

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<sup>2</sup> These issues are those framed in the September 6, 2007 Order Following Prehearing Conference. The ALJ has slightly reorganized the issues for clarity, and combined the two issues regarding the District's failure to provide OT services, which denied Student a Free and Appropriate Public Education, into one issue.

(signs of sensory integration deficits), and indications that he had significant gross and fine motor deficits. The District conducted an OT assessment in April 2006, but Student asserts that the District's assessment was not adequate because it failed to accurately document Student's gross and fine motor skills deficits, and did not assess Student's Childhood Apraxia of Speech (CAS)<sup>3</sup>, motor planning, balance, muscle tone or sensory integration deficits. Due to the District's inadequate assessment, Student contends, the District did not provide him with the OT services he required to receive a FAPE.

Student also contends that he requires transportation as a related service to benefit from his special education instruction because he lacks hazard awareness, and his social interaction on the bus would address his social skills deficits. Student also contends that the District improperly removed transportation as a related service from his Individualized Education Program (IEP) by not giving Parents the required prior written notice.

The District contends that it did not need to conduct an OT assessment in its initial assessment because none of the information that it possessed at the time indicated that OT was an area of suspected disability. The District argues that Student did not require direct OT services to benefit from his special education. Further, the District asserts that Student made adequate educational progress with the preschool instruction provided in his special day classroom (SDC), which integrated OT activities into the daily schedule for all students. The District asserts that Student does not require transportation, as his safety awareness and need for socialization are no different from any other child his age. Finally, the District contends that it properly notified Mother that the District was no longer going to provide transportation as a related service and Mother agreed, because she was already driving Student to school for her own convenience.

## FACTUAL FINDINGS

### *Background*

1. Student, born September 12, 2002, lives with his Parents within the District boundaries. Student is eligible for special education services under the category of Language or Speech Disorder. Student began receiving special education services from the District in November 2005 and has attended a District preschool SDC at Santa Cruz Gardens, which is Student's home School.

### *District's Initial Assessment of Student*

2. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of educational needs must be conducted. Assessments must be conducted in all areas related to the suspected disability by persons who are

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<sup>3</sup> CAS is also known as Oral Motor Apraxia.

knowledgeable and competent to perform the assessment, as determined by the school district. Tests and assessment materials must be used for purposes for which they are valid and reliable, administered in conformance with the instructions provided by the producer of the tests, and in the language and form most likely to yield accurate information. The district cannot use any one measure as the sole criterion for determining whether a student is eligible or whether a particular special education program is appropriate. Student contends that the District needed to conduct an OT assessment as part of its initial assessment for special education eligibility, as the District had knowledge that Student's fine and gross motor skills, motor planning, sensory integration and oral-motor abilities were suspected areas of disability.

3. Mother had concerns regarding Student's loss of language after Student hit his head hard in a home accident at the age of 10 months. The San Andreas Regional Center (SARC) assessed Student for possible eligibility for the Early Start program in July 2004.<sup>4</sup> The Pediatric Therapy Center (PTC) conducted the initial evaluation. Mother did not tell PTC that Student had problems with fine or gross motor skills. PTC's July 7, 2004 assessment found Student's fine and gross motor skills to be age appropriate. SARC found Student eligible for Early Start services on July 20, 2004, due to his significant receptive and expressive language deficits. The resultant July 20, 2004 Individualized Family Services Plan (IFSP) provided Student speech therapy and infant development services.

4. Thinking that Student's language disability might be neurological, Mother took Student to the University of California, San Francisco (UCSF) Children's Hospital. Abigail E. Collins, M.D. and Jonathan B. Strober, M.D. saw student on November 30, 2004. Their report noted that Student had "expressive language delay without any other motor or social delay." The report also stated that Student had normal muscle tone and good fine motor control.

5. Student returned to UCSF for further testing on February 3, 2005. This report noted that Student's fine and gross motor skills were developing normally, and that Student was right-handed. The report again noted that Student had "expressive language regression, . . . with language delay, without social or motor delay."

6. The District assessed Student in September and October 2005, to determine his eligibility for special education services. Beth Gray assessed Student's pre-academic skills and readiness for preschool. Ms. Gray is the SDC preschool teacher at the Santa Cruz Gardens, and the SY 2005-2006 was her first year teaching that class. Previously, Ms. Gray taught for a year in a District SDC for kindergarten through third grade students, and before that worked for four years with kindergarten through fifth grade students as a resource

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<sup>4</sup> Early Start is a program for children under the age of three who have or are at risk for developmental delay or disability to receive appropriate early intervention services, and provided through local regional centers. (20 U.S.C. § 1431 et seq.; Gov't. Code, § 95000 et seq.)

specialist in another district,. Ms. Gray received her Level I mild-to-moderate disabilities teaching credential in 2003, and her Level II mild-to moderate teaching credential in 2007.

7. Ms. Gray observed Student on September 27, 2005, in her SDC preschool room. Mother left Student in the classroom, and Student transitioned between activities with no difficulty. Student played on the swing appropriately, laughed when tickled, and could sort items properly in a table top exercise. Ms. Gray noted that Student displayed significant delays regarding his expressive and receptive language skills. Mother did not tell Ms. Gray, and Ms. Gray did not observe that Student had difficulties with his fine and gross motor skills or sensory integration.

8. Jessica Pizzica conducted the District's psychoeducational assessment on October 4, 2005. Ms. Pizzica started as a school psychologist with the District in August 2005, and worked as a school psychologist for another school district for the prior school year. Ms. Pizzica received her Bachelor of Arts degree in Psychology in 2001 and a Master of Arts degree in psychology in 2004, with an Educational Specialist Degree in School Psychology. She has a Pupil Personnel Services Credential in School Psychology. Ms. Pizzica's assessment consisted of a parent interview, review of IFSP documents, observing Student in a play group at a local church, and administering the Leiter International Performance Scale-Revised (Leiter-R), the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI), the Gilliam Autism Rating Scale (GARS), and the Vineland Adaptive Behavior Scales, Interview Edition (VABS).

9. Ms. Pizzica spoke to Mother and had her complete a developmental history questionnaire before observing and testing Student. Mother did not tell Ms. Pizzica that Student had any fine or gross motor skill difficulties, or problems in oral-motor movements or sensory processing. Ms. Pizzica did not notice that Student had any difficulties regarding fine and gross motor movements, or problems with sensory processing during her playgroup observation.

10. Of the formal test instruments that Ms. Pizzica used, the VMI and VABS examined areas that involved Student's fine and gross motor skills and sensory motor abilities. The VMI assessed Student's sensory motor skills, which involved the integration of Student's visual and motor skills and looked for possible hand-eye and motor coordination deficits. A standard score of 100 is the median score, and Student's standard score was 93. Student's score was in the 32nd percentile, which is in the average range for his age. The VABS has a motor skills subtest which assessed Student's ability to perform activities of daily living. Based on Mother's responses, Student's motor skills were rated adequate for his age. Mother reported that Student could manipulate objects, cut across paper with scissors and climb high on play equipment.

11. Ms. Pizzica did not speak to Student's Early Start provider at PTC regarding Student's progress on the IFSP fine motor skills goals, and whether Student required an OT

assessment.<sup>5</sup> However, Student did not present evidence that he did not meet his IFSP fine motor skills goals or evidence from PTC regarding Student's OT needs at the time of the District's initial assessment.<sup>6</sup> Ms. Pizzica spoke to Dr. Strober at UCSF, who did not raise any issues regarding OT needs as an area of suspected disability in which the District needed to assess Student. Mother did not raise any concern regarding Student's fine and gross motor, sensory processing or oral-motor skills during Ms. Pizzica's assessment.

12. Cheryl Williams conducted the District's speech and language assessment in October 2005. Ms. Williams has a Bachelor of Arts degree in Communications Handicapped and a Master of Arts degree in Speech Pathology. She obtained her Communicative Handicapped Teaching Credential in 1981 and her Speech and Language Pathologist license in 1988. Ms. Williams has been a speech pathologist for the District for the past seven years, working with children from preschool through fifth grade. She has had training regarding CAS through conferences and videotaped training.

13. Ms. Williams' assessment did contain an oral-motor component. Ms. Williams looked at Student's oral-motor functioning in eating and volitional functioning, and found Student's structures and movement to be adequate. Ms. Williams was not able to assess Student's articulation ability because Student was not cooperative. Ms. Williams stated that her assessment did not indicate that Student had CAS.

14. Mother testified that Student's Early Start speech and language therapist, Wendy Avolio from PTC, told her that Student had CAS, and that Ms. Avolio worked extensively on Student's oral-motor skills. This testimony was not credible, as Mother did not express any concerns regarding Student's oral-motor skills to Ms. Williams during her initial assessment. Ms. Williams obtained information from SARC regarding Early Start services, which contained a report from Ms. Avolio regarding testing conducted on Student on June 2, 2005, which involved language comprehension and expressive language and not oral-motor deficits.<sup>7</sup> Ms. Avolio did not testify.

15. At the time of the District's initial assessment, Student's primary disability involved his speech and language deficits. However, that would not excuse the District from conducting an OT assessment if Student had areas of suspected disability in this area that might require special education services. The evidence did not establish that, at the time of the District's initial assessment and IEP meeting, OT needs were an area of suspected disability. The District's initial assessment adequately examined Student's OT needs. The

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<sup>5</sup> Ms. Pizzica could not recall which IFSP documents she had reviewed, which would include any IFSP fine motor goals.

<sup>6</sup> Student did not introduce into evidence the June 2, 2005 IFSP, which contained the fine motor skills goals, or IFSP progress reports from PTC.

<sup>7</sup> Ms. Williams telephoned PTC before her assessment, but no one from PTC returned her phone calls.

information available to the District did not indicate that Student had fine or gross motor, sensory processing or oral-motor deficits that required a separate OT assessment.

*Molly Turner's April 2006 OT Assessment*

16. Molly Turner has a Bachelor of Science degree in Occupational Therapy and a license from the California Board of Occupational Therapists. Ms. Turner has worked as an occupational therapist for the District since the start of SY 2004-2005. She works with children from preschool through fifth grade. Her duties include conducting OT assessments, attending IEP meetings, providing individual and small group therapy, and consulting with teachers and IEP team members regarding a student's OT needs. Ms. Turner will also screen students for possible OT services if a teacher informs her that a student is having problems with fine or gross motor skills, endurance, sensory processing, behavior or social skills.

17. The District's OT therapist, Ms. Turner, did not attend the February 2, 2006 IEP meeting, as Mother raised Student's need for an OT assessment to the District for the first time at that meeting. Mother subsequently spoke to Ms. Turner in the school parking lot, and expressed to her concern about Student's sensory integration. Based on Mother's request, the District had Ms. Turner conduct an OT assessment.

18. Before Mother spoke to her, Ms. Turner had observed Student in his classroom and spoke to Ms. Gray as part of her normal class consultative duties. Ms. Turner was in Ms. Gray's classroom once or twice a week for 30 to 45 minutes a week to provide direct therapy to students and for class OT activities. Ms. Turner did not observe that Student had problems with his fine and gross motor skills, nor with sensory processing or integration. Ms. Gray told Ms. Turner that Student was new to preschool and the use of preschool materials, and his abilities appropriate for a student of his age and preschool experience.

19. Ms. Turner's OT assessment consisted of observing Student in class and on the playground during recess, reviewing the November 30, 2004 and February 3, 2005 UCSF reports, interviewing Ms. Gray, having Ms. Gray complete the Sensory Profile Checklist, short form, and conducted the VMI. Based on this information, Ms. Turner prepared her report on April 4, 2006, and presented it at the April 5, 2006 IEP team meeting.

20. Ms. Turner's report noted that Student often appeared fatigued in class as he would lie on the carpet, yawn during class, and performed school activities in an extremely slow manner. Student also often had his mouth partially open, with his tongue sticking out or resting on the side of his mouth. Ms. Turner observed Student using writing instruments and scissors. Ms. Turner noted that Student needed hand over hand assistance to initiate writing tasks, but that his tracing ability was age appropriate. Student did not hold scissors properly, but appropriately held the paper with his left hand while attempting to cut with his right hand. Ms. Turner's and Ms. Gray's recess observations were not included in the report. However, Ms. Turner recalled that Ms. Gray told her that Student played appropriately on the playground equipment and did not have any problems related to OT skills. Ms. Turner

only observed Student playing in the sandbox. Ms. Gray told Ms. Turner that Student often did not wear socks or underwear to school.

21. Ms. Turner asked Ms. Gray and Mother to complete the Sensory Profile Checklist, which asks a series of questions regarding difficulties a student may have with sensory processing and integration, such as sensitivity to sound, tactile defensiveness, or seeking sensory input. Ms. Turner did not receive a completed form from Mother. Mother stated that she received the form, but did not explain why she did not return it. Ms. Turner stated that she did not require information from Mother from the checklist to complete her assessment as Ms. Turner was only looking at Student's classroom performance and whether Student had any OT deficits that affected his ability to make adequate educational progress.

22. From the information that Ms. Gray provided in the Sensory Profile Checklist, Ms. Turner stated that Student had a 'definite difference' in the areas of auditory filtering and energy level, and a 'probable difference' regarding tactile sensitivity. Student was typical of other students of his age in taste and smell sensitivity, movement sensitivity, seeking sensory inputs, and visual and auditory sensitivity, and did not display sensory defensiveness or sensory-seeking behaviors in class.<sup>8</sup> Ms. Turner had concerns about the accuracy of the tactile sensitivity rating, as Ms. Gray did not answer all the questions, because some of the questions related to more of Student at home and not at school. However, Ms. Turner stated that not wearing socks or underwear could be an indication of tactile defensiveness, as Student might not like the way these items felt on his body.

23. Ms. Turner administered the VMI, on which Student had an average score of 100. Ms. Turner did not observe that Student had difficulty tracking items with his eyes or replicating shapes. Additionally, the VMI has an endurance component: if a student becomes excessively fatigued doing the VMI tasks, the student will not be able to complete enough answers correctly to obtain an average score. The VMI requires the student to listen to instructions and then to follow the directions. Even with low energy, Student was able to listen and follow directions on the VMI and complete enough problems correctly to obtain an average score for his age.

24. Based on the assessment results, Ms. Turner did not believe that Student required direct OT services because he was making adequate educational progress and was able to participate adequately in classroom activities notwithstanding any motor or sensory deficits. Ms. Turner noted that Student had problems with auditory processing, which could lead him to miss verbal instructions. However, Student's auditory processing difficulties did not present an OT issue: Ms. Gray could address them with additional verbal prompts and by teaching Student scheduling skills.<sup>9</sup> Ms. Turner's assessment accurately reflected that

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<sup>8</sup> Ms. Turner's report had a typographical error. She wrote "does demonstrate" when she meant "does *not* demonstrate."

<sup>9</sup> Student did not allege that the District failed to assess Student in the area of auditory processing, or that it did not provide Student with adequate services to meet his need in that area.

Student did not have fine or gross motor deficits that required direct OT services. While Student displayed tactile sensitivity, fatigue and an oral-motor issue concerning his tongue sticking out, Ms. Turner felt that the District could meet Student's needs in the regular classroom, where many OT components were integrated into the class schedule. Ms. Turner recommended activities in and outside of the classroom to increase Student's body movement to raise his energy level.

25. The parties met on April 5, 2006, to discuss Ms. Turner's OT assessment. After Ms. Turner presented her report, the IEP team members discussed Student's low energy in class. Ms. Gray expressed her concern that Student would lay down in class and during recess, and that it took him time to get his energy level up and to start engaging in activities. Mother stated that Student was not tired when she brought him to school. However, Ms. Gray recalled that in speaking to Mother about Student's fatigue before the IEP meeting, Mother told her that Student would sometimes only have a breakfast shake and that Mother subsequently enrolled Student in the breakfast program. The IEP team members also discussed that Student typically arrived 15 to 30 minutes late to school, which happened, according to Mother, because she had to drop off Student's siblings at their schools.

26. Student's fatigue, which could be a sign that Student expends a lot of energy to process sensory information and regulate himself, was easily managed; his energy increased during the school day as he became more involved in class activities. While Student was slow to perform school activities, he was still able to adequately complete the activities and transition to new activities. The fact that Ms. Turner recommended additional sensory strategies to increase Student's energy level does not mean that the District failed to meet Student's OT needs or should have provided Student direct OT services, because Student was able to make adequate educational progress and participate in daily classroom activities.

27. Ms. Turner recommended in the April 6, 2006 IEP meeting that Student receive additional stimulation during class, such as through compression or brushing his skin, to increase his arousal level. However, the District did not recommend that Student receive direct OT services because Student was meeting his IEP goals and was able to adequately participate in classroom activities. Mother disagreed with that decision because she felt that Student had sensory integration deficits that adversely affected his education. However, Mother did not provide any examples to show that Student was not making adequate progress in class, or was not able to participate in class activities. Mother requested at the April 5, 2006 IEP meeting that the District convene another IEP meeting to further discuss Student's OT needs and that a representative from PTC attend.

#### *Pamela Flagg's Private OT Assessment*

28. In February 2006, Mother took Student to UCSF for a follow-up neurological examination. Nurse Practitioner Kimberly Elrich observed Student, went over the test results, and spoke with Mother about Student's progress since the February 2005 UCSF visit. Mother informed Ms. Elrich that she had an interest in sensory integration therapy and

wanted specific recommendations for this therapy for Student's upcoming IEP meeting. Mother told Ms. Elrich that Student displayed aggressive behaviors, such as kicking, biting and pinching, which appeared to be related to Student's inability to communicate. Mother told Ms. Elrich that Student did not have any fine or gross motor problems, which Ms. Elrich confirmed during her observation. Ms. Elrich discussed with Mother some sensory integration therapies and explained that Student did not appear to require sensory integration therapy, as Student did not have a problem processing sensory inputs. Ms. Elrich provided Mother a referral to PTC for a private assessment.

29. In response to the UCSF referral, Pamela Flagg conducted an OT assessment at PTC on March 31, 2006. Ms. Flagg is a licensed occupational therapist and has been the clinical coordinator at PTC for the past five years, where she supervises PTC OT providers. Approximately ten to 15 percent of Ms. Flagg's caseload involves providing OT services to preschool and school age children for school districts pursuant to IEPs. Ms. Flagg has attended numerous IEP meetings and acknowledged that the standard for a student to receive OT as a special education related service is whether the student requires OT services to benefit from his education.

30. Ms. Flagg's evaluation lasted 45 minutes and consisted of a parent interview, completion of the Sensory Profile Checklist, and observations. Ms. Flagg did not conduct any standardized tests other than the Sensory Profile Checklist. Ms. Flagg testified that she knew that the District had scheduled an IEP meeting for April 5, 2006 to discuss the District's OT evaluation, that she had prepared a brief report to be presented at the IEP meeting, and that she gave Ms. Turner a copy of that report. However, Ms. Turner has no record or memory of receiving the report, and Student did not present a copy at hearing.

31. Ms. Flagg attended the next IEP meeting on May 8, 2006, and presented her OT evaluation findings. She stated that Student had low energy in class because he exerted a lot of energy to regulate the sensory information he received and to perform in class. She further stated that his releasing of energy because he no longer had to keep everything together as he did at school caused Student's aggressive behaviors at home. Ms. Flagg noted that Student's sensory processing problems were also evidenced by his open mouth and drooling. Student could not control his oral-motor functions when concentrating on fine motor tasks, which is an indication of CAS. Ms. Flagg also stated, based on her evaluation, that Student had safety issues regarding his use of playground equipment. Ms. Flagg recommended that Student receive direct OT services. However, neither Mother nor Ms. Flagg ever stated at the IEP meeting that Student was not making adequate educational benefit without direct OT services. Instead, Ms. Flagg stated at hearing that Student would have made more progress with the OT services she recommended, which was not consistent with the standard for required OT services that she had correctly defined previously.

32. Ms. Flagg criticized Ms. Turner's assessment for not using the full sensory profile checklist, and not fully evaluating the reasons behind Student's low energy. Ms. Flagg stated that Ms. Turner should have given Ms. Gray the visual perception and visual motor subtests from the sensory profile checklist because Student exhibited

deficiencies regarding his visual tracking<sup>10</sup> and motor planning skills.<sup>11</sup> Ms. Flagg asserted that Ms. Turner did not adequately examine whether Student's energy was low because he had to expend so much energy to process sensory inputs and to regulate himself to maintain control. However, Ms. Turner did examine Student's visual tracking, motor planning and low energy during her assessment, and stated that Student was making adequate educational progress with his deficits.

33. Ms. Flagg's OT evaluation, recommendations and criticism of Ms. Turner's assessment are unpersuasive because Ms. Flagg never received information from Ms. Turner or Ms. Gray, or observed Student's performance at school. Ms. Flagg based her recommendations and criticism of Ms. Turner's assessment on clinical observations and information provided by Mother regarding Student's abilities and behavior outside of school. Ms. Flagg admitted that her evaluation would have been more complete if Ms. Gray had completed the sensory profile showing how Student performed at school. Without observing Student at school, reviewing school records or speaking to Ms. Gray, Ms. Flagg could not credibly state whether Student required OT service to make adequate educational progress, or that Ms. Turner did not adequately assess Student.

34. Ms. Turner's assessment adequately described Student's motor and sensory deficits and that Student did not require OT services to obtain an educational benefit. Ms. Turner's assessment accurately reflected that Student's motor and sensory deficits were not so significant that they prevented him from making adequate educational progress and accessing class activities with Student's classroom instruction. Therefore, Ms. Turner's OT assessment was adequate since it uncovered the OT needs that the District was required to address.

*Student's Occupational Therapy Needs from October 2006 through March 2006*

35. Student's October 28, 2005 IEP did not provide direct OT services or OT goals. The IEP offer was for a preschool SDC for two days a week. The District offered speech and language services in a small group, pull-out session, two times a week for 20 minutes each. The District's proposed goals focused on Student's receptive and expressive language deficits and his behavior, with goals in following directions, turn taking, and standing in line. Mother did not object at the IEP meeting when the District created Student's proposed goals, or raise any concerns regarding Student's OT needs.

36. Student started attending the preschool SDC in the beginning of November 2005. The class started at 8:30 a.m. and concluded at noon. While Ms. Gray's class

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<sup>10</sup> Visual tracking is the ability to follow items smoothly with one's eyes, to quickly find items on different planes, such as upper or lower, and to follow items across the mid-line, which is down the middle of one's body.

<sup>11</sup> Motor planning is the ability to think, organizing, and carry out a sequence of events related to body motor movements, such as thinking about getting across the room, which requires one to get up from the chair, and then to walk over to the other side of the room.

consisted mainly of students with speech and language impairments, some students received direct OT services and had OT goals. Ms. Gray's classroom incorporated OT activities into the daily schedule. She and the classroom aide worked with students on fine and gross motor skills as students drew, used scissors and play dough for fine motor skills, and danced or engaged in other movement activities for gross motor skills. Molly Turner, a District occupational therapist, trained Ms. Gray in incorporating OT activities into the daily class routine. During snack time, Ms. Gray worked with students on OT skills through cutting food, pouring juice, stacking items and passing food trays around the table. Ms. Gray also worked with students on oral-motor skills by having student blow bubbles and drink through straws, and observing if students over-stuffed their mouths while eating or had problems with different food textures.

37. From the time Student started preschool through January 2006, Ms. Gray noted that Student was often tired in class, as he would lie on the classroom carpet. Ms. Gray also noted that Student was hungry after he arrived to class. Ms. Gray stated that despite Student's low energy he followed classroom activities with little difficulty, and participated in and completed class activities. She noted that Student adequately transitioned from one class activity to the next activity. Ms. Gray stated that Student did not have difficulty in participating in the daily class activities, as Student got more energy as the day progressed. Finally, Student met the first short term benchmarks for his goals, which demonstrated that Student was making adequate educational progress.

38. At Mother's request, the District convened an IEP meeting on February 2, 2006, to discuss Student's use of sign language in class. Ms. Gray could not attend because she was sick, but relayed her concerns that Student was tired and hungry to the other District IEP team members. At the IEP meeting, Mother, Ms. Williams, Ms. Pizzica and Ms. Bervernick discussed Mother's concern regarding Student's spoken language. They also discussed Ms. Gray's concern that Student was tired and hungry when he arrived in her classroom. The IEP team members discussed Student's bedtime and breakfast in the morning as possible causes. The IEP team also discussed Mother's request that the District conduct an OT assessment due to her concerns regarding Student's sensory integration, and the District agreed to conduct the assessment. However, Mother did not state that Student's problem with sensory integration was preventing him from making adequate educational progress, or hindering his achievement of his IEP goals.

39. The evidence established that the District met Student's motor and sensory needs with the classroom instruction as Student made satisfactory progress on his IEP goals and could adequately participate in classroom activities. Student did not require additional OT services to obtain a benefit from his education. Therefore, the District did not need to provide Student with additional OT services for Student to receive a FAPE.

#### *Student's OT Needs from April 2006 through the Present*

40. At the May 8, 2006 IEP meeting, the District did not agree to Mother's request for OT services beyond those Student received in the SDC because Student was making

adequate educational progress. Student continued to receive OT assistance in Ms. Gray's classroom as part of the normal class schedule and continued to make adequate educational progress and to meet his IEP goals through the remainder of SY 2005-2006. Ms. Gray stated that while Student continued to exhibit low energy, Student continued to make progress in the classroom, to satisfactorily participate in class activities and to access the curriculum.

41. The District believed that it could address Student's low energy if he attended preschool five days a week, as the additional exposure would make classroom tasks routine so that they required less processing. The District offered for SY 2006-2007 that Student attend Ms. Gray's classroom five days a week, and Mother agreed. For the 2006 ESY, Mother consented to the District's offer of placement in a preschool SDC for three days a week.

42. After her March 31, 2006 evaluation, Ms. Flagg provided OT services to Student at PTC, twice a month, 30 minute a session. When the District did not offer additional OT services at the May 8, 2006 IEP meeting, Ms. Flagg increased her OT services to once a week, for 30 minutes. She prepared a progress report on September 26, 2006, that continued to recommend that Student receive direct OT services. Ms. Flagg noted in her progress report that Student continued to have problems with postural and oral-motor control. Ms. Flagg also stated that Student had problems in processing sensory information, in social play (caused in part by Student's sensory processing difficulties), and on the playground, where he took excessive and unsafe risks. Finally, Ms. Flagg noted that Student had impaired fine motor skills, shown by his inability to copy a crossing pattern or cut across a piece of paper with scissors, and did not have an established hand preference.

43. For her September 26, 2006 progress report, as with her March 31, 2006 informal assessment, Ms. Flagg did not observe Student in his classroom, nor speak to Ms. Gray or Ms. Turner. Without that information, Ms. Flagg could not give a credible opinion that Student was not making adequate progress at preschool with the help of the OT activities that were integrated into the daily class schedule. Additionally, Ms. Flagg did not note in her progress report that, due to a dispute regarding Student's transportation from home to school and back, discussed below, Student only attended preschool during the last week of the 2006 ESY. This may have led to regression because Student was not benefiting from the classroom OT activities.

44. Student did not start attending preschool for SY 2006-2007 until the beginning of November 2006.<sup>12</sup> At the September 26, 2006 IEP meeting, the team members discussed Student's progress toward his October 28, 2005 IEP goals, and developed new goals for the next year, which included new present levels of performance. Because Student was not attending school, the District could not determine if Student had met his annual goals. Student had met the two behavior goals and expressive language goal in his June 2006

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<sup>12</sup> The record was not clear the exact date Student returned to school, and how many days a week Student attended school for the remainder of SY 06-07.

benchmarks. However, Student had not met the June 2006 receptive language benchmarks requiring him to point to various body parts when asked, and to recognize age appropriate action verbs in pictures with 70 percent accuracy. Ms. Williams noted in the present levels of performance that in June 2006, Student expressed himself verbally with one or two word requests in the classroom and during therapy sessions, instead of using sign language. Ms. Gray stated in her present levels of performance that, at the end of SY 2005-2006, Student could follow classroom routine with little support, but because of his problems with communication, he needed teacher assistance with peer interaction and independently engaging in spontaneous play with his classmates. Mother did not state that Student did not make the progress that the District observed.

45. At the September 26, 2006 IEP meeting, the District agreed to make a referral to the Diagnostic Center of Northern California (DCNC)<sup>13</sup> for an assessment, which would include evaluating Student's OT needs. The District requested that, to determine Student's OT needs, the DCNC look at Student's lethargy and why Student exhibited aggressive behaviors at home, but not at school. At the IEP meeting, the District increased Student's speech and language services to three times a week, 30 minutes a session. Besides expressive and receptive language goals, the District added pre-academic goals in which Student would verbally count to ten, write his name and shapes, and engage in spontaneous play. Except for the District's failure to offer transportation and OT as related services, Mother consented to the District's offer of placement, services and goals. Student returned to class around the start of November 2006, but did not attend preschool five days a week because Mother could not always get Student to school on time.

#### *Diagnostic Center of Northern California Assessment*

46. The District completed its request for the DCNC assessment on October 20, 2006. The DCNC assessment request form asked the District to pose questions regarding Student that the District and Parents wished the DCNC to address. The District requested that the DCNC identify Student's primary disability, ways to improve Student's communication skills, and the source of Student's lethargy, and explain why Student behaved aggressively at home but not at school. The DCNC accepted the District's referral request, and assessed Student in January 2006. DCNC's assessment team consisted of a school psychologist, Jennifer Simmons, a speech-language pathologist, Virginia Sanchez-Salazar, and a behavioral pediatrician, Kay S. Browne, M.D. Ms. Simons and Ms. Sanchez-Salazar observed Student at school on January 23 and 24, 2004, and conducted a formal interview of Mother. The DCNC team conducted formal testing at Student's school and at the DCNC. Dr. Browne interviewed Mother and Student at the DCNC on January 26, 2007. The DCNC team members met with Parents and District representatives on February 14,

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<sup>13</sup> The DCNC is operated by the California Department of Education and provides assessment and educational planning services to assist school districts in determining the needs of special education students, and technical assistance and consultative services.

2007, to present the team's findings and recommendations and answer questions, and afterwards prepared its report.

47. The DCNC team members reviewed the material submitted by the District before observing Student, which included the DCNC parent request form. They met before the school visit and rephrased the District's reasons for referral so that they asked DCNC to determine the most appropriate psychoeducational diagnosis for Student, whether medical factors existed that interfered with his functioning, any specific strategies to improve Student's communication skills, and strategies to improve his behaviors. The DCNC did not have an occupational therapist on staff to conduct a formal OT assessment. Ms. Simmons and Ms. Sanchez-Salazar did observe Student for indications that Student may have OT deficits, such as fine and gross motor skills, and discussed their observations with Parents and the District. Ms. Sanchez-Salazar was the only DCNC team member who testified.

48. Ms. Sanchez-Salazar is a speech and language pathologist, with a Masters' degree in communication disorders, and has worked in special education for nearly 40 years. She worked as a speech and language pathologist in SDCs for nearly 30 years with the Contra Costa County Office of Education, and has been with DCNC for the past five years. Ms. Sanchez-Salazar has had extensive training and experience regarding CAS, and the overlap between OT and speech and language services.

49. Ms. Sanchez-Salazar observed that Student exhibited problems in keeping up with his classmates. She stated that Student was slower than his classmates in making the physical transition from one class activity to the next. She noted that in class and on the playground, Student's motor planning was slower than his classmates, as he was the last person to put away his work, cross the room to join an activity or get in line. Ms. Sanchez-Salazar also observed Student riding his tricycle extremely slowly on the bike route. The DCNC report noted that Student's slowness in transitioning was also related to his expressive language deficits, and problems with auditory processing as it took Student longer to understand verbal directions.

50. In considering the possibility of CAS, Ms. Sanchez-Salazar observed Student overstuffing food into his mouth, and not noticing when food fell out of his mouth. Student also yawned with food in his mouth, which Ms. Sanchez-Salazar stated indicated fatigue caused by the oral-motor exertion. Ms. Sanchez-Salazar noted that Student exhibited significant tongue movement when focusing on a fine motor task such as using building blocks or tracing an item, which is a sign of oral-motor overflow.

51. In considering Student's energy level, Ms. Sanchez-Salazar observed that Student appeared tired, as he yawned several times during the observation and rested his head on his hands. Ms. Sanchez-Salazar noted that Student became fatigued when seated upright at a work or testing table, and lost his balance twice while sitting during a testing activity, which is a sign of fatigue caused by his need to exert additional energy to maintain his posture. Beyond fatigue caused by Student's motor movements, the DCNC report noted that Student expended significant energy processing auditory information from verbal

directions and commands given to him during the course of a typical school day. Student also expended significant energy in trying to speak, due to his expressive language deficits.

52. In describing Student's gross motor skills, the DCNC report noted that Student had difficulty with his balance, as he could not hop or stand on one foot, and could not skip or gallop. In fine motor skills, Student had difficulty with zippers, buttons and Velcro straps. When writing, Student used light pressure, and grasped his pencil with all his fingers, which caused him to use his whole arm for drawing and fatigued him. The DCNC report noted that Student's ability to sit and attend during the testing sessions was unusually good for his age of four years, five months, as he was extremely focused and displayed excellent work habits. At the February 14, 2007 meeting, Ms. Simmons noted that Student's attention skills were equivalent to a seven-year-old student. Because Student expended significant energy in attempting to sustain this focus, this also contributed to his fatigue. The DCNC team members concurred with the District at the February 14, 2007 meeting that Student had more energy in class as the school day progressed.

53. The DCNC used the Differential Ability Scales – Second Edition (DAS-II) to measure Student's cognitive abilities. On the non-verbal subtests and nonverbal reasoning and spatial composites, Student's scores were in the low-average to average range. However, Student's score on the verbal comprehension subtest was in the 0.2 percentile, in the fourth percentile on the naming vocabulary subtest, and in the 0.5 percentile on the verbal composite scores. The DAS-II results reinforce the DCNC team members' observations that Student expends significant energy following verbal instructions and expressing himself verbally due to his significant deficits in expressive and receptive language.

54. The DCNC made recommendations for the District to work on Student's CAS, and to improve his motor planning and fine and gross motor skills. The DCNC recommended that Student attend preschool five days per week to obtain the most benefit from the classroom instruction. In addressing Student's CAS, Ms. Sanchez-Salazar stated that Student's speech and language therapist at school could work with Student, in conjunction with the occupational therapist. Ms. Sanchez-Salazar did not state that Student required additional OT or speech and language therapy; rather she proposed additional strategies for implementation during the services he had.

55. The DCNC report stated that Student's auditory processing and motor and sensory deficits were neurological in origin. Because the DCNC team did not include an occupational therapist, the report made no specific recommendations regarding additional OT services. Instead, the DCNC report recommended a new assessment by the District's occupational therapist to evaluate the deficits the DCNC team members observed in Student's oral-motor, sensory processing, motor planning, balance, muscle tone, grasping and visual tracking to determine if Student required direct services, and/or additional consultation by the occupational therapist with the classroom teacher. The DCNC report also recommended developing visual cues for Student and giving him additional time and support to complete tasks that require auditory processing, which would reduce his fatigue.

56. The DCNC report did not state that Student was not making adequate progress at preschool, or that the District was not meeting Student's unique needs. The DCNC report did clarify Student's areas of weakness, especially involving Student's auditory processing, CAS and motor planning. However, the DCNC report did not establish that the District did not provide Student with FAPE because the District did not provide direct OT services.

*Denice Torkelson's May 2007 OT Assessment*

57. Denice Torkelson is a family friend of Student, and also a registered occupational therapist. Ms. Torkelson has been an occupational therapist for the past 12 years and at present provides OT services to children in a clinic-based setting for one half of her caseload, and at school sites for the other half. Ms. Torkelson's work with preschool children is between 5 to 25 percent of her caseload.

58. Mother asked Ms. Torkelson to conduct an OT assessment, which Ms. Torkelson performed on May 20, 2007. At Mother's request, Ms. Torkelson looked at Student's sensory processing, inability to focus in class, hyperactivity behaviors, auditory processing, social skills and delays in gross and fine motor skills. Ms. Torkelson's assessment consisted of reviewing the DCNC assessment report, interviewing Mother and giving Mother a sensory profile questionnaire and the Relationship Development Questionnaire in order to examine Student's social skills. Ms. Torkelson observed Student in his home and on a playground. Ms. Torkelson did not observe Student at school, or speak with Ms. Gray or Ms. Turner. Ms. Torkelson's assessment lasted approximately two hours.

59. Ms. Torkelson found, as had Ms. Flagg and the DCNC, that Student had problems with auditory processing, which caused Student to have difficulty in following directions and to need more time to process verbal information, and were a source of his behavior problems because others did not understand him. Based on her personal knowledge of Student and her assessment observation, Ms. Torkelson noted that Student had difficulty processing sensory information about his body position, which caused him to have problems with his balance, posture, and fidgeting. Ms. Torkelson stated that Student had an extremely high pain threshold, did not respond to light touch, and required a harder sensory input to provoke a response, all of which reflect Student's inability to properly process sensory information. Finally, Ms. Torkelson noted that Student had difficulty in crossing the mid-line when manipulating objects, and problems with finger control when employing fine motor skills, such as manipulating a pencil or picking up items. Based on her assessment, Ms. Torkelson recommended that Student receive direct OT services.

60. Ms. Torkelson's assessment, like Ms. Flagg's assessment, is not persuasive because of her failure to observe Student at school and to obtain information from District personnel regarding Student's classroom progress. Ms. Torkelson did not have information from Mother regarding Student's progress in his classroom. Without that information, Ms. Torkelson could state whether Student was making adequate educational progress, or was not able to access the preschool curriculum due to his motor and sensory deficits.

*Ms. Flagg's May 2007 OT Assessment*

61. Parents stopped taking Student to PTC for his weekly OT sessions on February 12, 2007, due to scheduling conflicts with the DCNC assessments.<sup>14</sup> However, Ms. Flagg conducted another OT evaluation on May 23 and 30, 2007 at PTC. She reviewed the DCNC report as part of her record review. However, she did not speak to Ms. Gray or Ms. Turner, or observe Student at school, as part of her assessment. Ms. Flagg gave Mother a Sensory Profile questionnaire to complete. Ms. Flagg also administered the Brunincks-Oseretsky Test of Motor Proficiency (BOTMP).

62. In her second assessment, Ms. Flagg failed again to observe Student at school or to obtain information regarding Student's school progress. Her second assessment thus does not persuasively address whether Student's motor and sensory deficits were preventing him from making adequate educational progress. In assessing Student's muscle tone, Ms. Flagg administered the BOTMP and found that Student had below average postural support, and low endurance and strength. However, without observing Student in class, Ms. Flagg could not state how these problems affected his ability to access the preschool curriculum. Ms. Flagg stated in her report that because Student had low endurance, combined with lack of static balance, Student would not be able to sit and attend. However, the classroom observations of the DCNC team showed otherwise. At the February 14, 2007 meeting, the DCNC team members noted that while Student had balance problems, his ability to focus and attend to given tasks was greater than what they would expect for any child at his age.

63. Ms. Flagg's findings regarding Student's sensory processing, fine and gross motor skills, oral-motor skills and self-care skills are undercut by her failure to observe Student in class. While Ms. Flagg found that Student had deficits that affected his ability to adequately perform in a classroom setting, she formed that opinion without observing Student in his classroom. Ms. Flagg is not aware of the OT activities that the District incorporated into the daily class routine, or of the collaboration between Ms. Gray, Ms. Williams and Ms. Turner. Without information regarding Student's progress in the classroom, Ms. Flagg could not persuasively determine the extent to which Student's motor and sensory deficits degraded his access to the preschool curriculum and educational progress. Therefore, Ms. Flagg's May 2007 assessment report did not establish that Student required additional OT services beyond those he received.

*Student's School Progress and Ms. Turner's August and September 2007 Assessment*

64. Despite the fact that Student missed the first two months of SY 2006-2007, Ms. Gray stated that Student made adequate educational progress in that year.<sup>15</sup> Ms. Gray's

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<sup>14</sup> Student did not provide an explanation why the OT sessions did not resume after the February 14, 2007 meeting at the DCNC.

<sup>15</sup> Ms. Gray went on leave on May 3, 2007.

testimony was credible because she observed Student every day that he attended her class. Ms. Gray stated that she implemented the classroom recommendations made by DCNC. In observing Student's behavior, Ms. Gray never saw Student being physically aggressive. Ms. Gray also stated that Student was a social child who liked to interact with his peers.

65. Ms. Turner conducted a further OT assessment in response to the DCNC report. Ms. Turner assessed Student during three OT sessions in the 2007 ESY<sup>16</sup> and during classroom and playground observations. Ms. Turner also administered the VMI on September 10, 2007.

66. In assessing Student's social skills, Ms. Turner observed Student playing well with his peers on the playground equipment. Student made eye contact with his classmates and waited his turn. Ms. Turner noted that Student transitioned easily between the classroom and the OT sessions. However, Student needed adult prompting at the end of recess to get in line with his classmates.

67. Student had some difficulty with hand strength, as he did not roll Play-Doh hard enough to form a 'hot dog' shape. However, Student could manipulate Play-Doh strands to make letters. When writing, Student needed to be shown how to grip the pencil with the appropriate tripod grip.<sup>17</sup> Student could write several letters, but had difficulty crossing the midline when forming an "X."

68. Student still displayed some weakness in auditory processing, as Student could only recall and implement a three part instruction, such as to get A, B and C toys that were on the ground, in only two out of three attempts. However, Student displayed strength in coordination, as he was able to repeat pattern beats and rhythm in three out of four attempts.

69. Student still had problem with postural control, as Student would sit on the ground in a "W" sitting position, which is typical for children with low muscle tone. Ms. Turner did get Student to sit with his legs crossed, and he was able to maintain that position for almost five minutes while playing a hand game. Ms. Turner noted that Student still stuck out his tongue, but not as much as in prior observations. Finally, Student was able to "bear walk" and "crab walk," but had difficulty with the "cross crawl." The "cross crawl" involves moving the opposite leg and arm together, and requires crossing the midline. Student was only able to perform the cross crawl one out of five times.

70. On the VMI, Student displayed good attention when taking the test and wanted to continue when told it was time to stop. Student scored slightly above his age level of five years old. Student displayed strengths in motor planning when given visual cues and

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<sup>16</sup> The District offered Student five OT sessions during the 2007 ESY for Ms. Turner to assess Student, but he was only available for three sessions.

<sup>17</sup> A tripod grip involves grasping the pencil with the thumb, index finger and middle finger.

performing familiar tasks, even without verbal prompting. Student still had difficulty in performing tasks that required him to cross the midline.

71. Ms. Turner spoke with Joanne Rude, who was Student's teacher during the 2006 and 2007 ESYs, and was his preschool teacher at the start of SY 2007-2008 because Ms. Gray was still on leave. Ms. Rude stated that Student listened to and followed classroom instruction as he followed class routines and rules. Ms. Rude stated that during the 2007 ESY Student acted more mature than the kindergartners and first graders in the class. She also observed that, during the 2007 ESY, Student could run naturally, and climb on the playground structure. Ms. Rude noted that Student had low energy in the morning, and spoke to Mother, who stated that this was probably because the 2007 ESY preschool started a half-hour earlier than the regular school year class. Like other witnesses, Ms. Rude stated that Student's energy picked up as the day went along. Ms. Rude did not see Student overstuff his mouth.

72. Ms. Rude also examined whether Student had met the annual goals on the September 26, 2006 IEP. Student met the receptive language goal by being able to follow two part directions with 80 percent accuracy. Student exceeded the expressive language goal of forming two to three word combinations to make requests 10 times per day for a week, as Student could use five word sentences. Student achieved the pre-academic writing goal of tracing his name and shapes. Student did not meet the counting goal of counting to ten, as Student could only count to six. Student met the communication goal by engaging in spontaneous play with peers for at least 20 minutes a day.

73. Ms. Williams confirmed Ms. Rude's observations that Student met his expressive and receptive language goals in the September 26, 2006 IEP. In considering Student's CAS, Ms. Williams stated that she worked with Student during his speech and language therapy sessions on oral-motor skills and increasing Student's vocabulary and appropriate word sounds. She stated that Student was able to make four to five word sentences, and to make three syllable words with some difficulty. In discussing Student's oral-motor abilities, Ms. Williams stated that by the time of the hearing Student could functionally feed himself and did not drool while eating. She noted that Student still stuck out his tongue when cutting paper.

74. Based on the assessments described above, Student has deficits regarding his motor planning, sensory processing, energy and fine motor skills. However, his deficits are not so severe that he requires direct OT services to benefit from his education. The District met Student's OT needs in the classroom because the class integrated OT activities into the daily schedule, and the structure of the classroom permitted Student to focus his energies on learning. Ms. Turner and Ms. Gray consulted with each other on classroom OT activities that benefited Student. To address Student's CAS, Ms. Gray incorporated different oral-motor activities into the classroom schedule. Ms. Williams also worked with Student on oral-motor activities during the speech and language therapy sessions, and consulted with Ms. Gray. Finally, some of Student's deficits, such as in energy and motor-planning, overlap with Student's auditory processing problems, which caused Student to expend a lot of energy

to focus on verbal instructions and to need additional time to process the information, thus delaying his response to verbal instructions. Therefore, the evidence did not establish that the District denied Student a FAPE by not providing him direct OT services to meet his unique needs from April 2006 through the present.

#### *District's Termination of Transportation Services*

75. A school district must provide a student's parents prior written notice when it proposes to alter the student's educational placement or services. A change in placement can occur if the adjustment in services is likely to affect in some significant way the student's learning experience. This notice must include the following: a description of each assessment, record or report used as a basis for the action; a statement that the parents have protection under the procedural safeguards set forth in the Individuals with Disabilities Education Improvement Act (IDEIA); sources for the parents to obtain assistance in understanding IDEIA; a description of other options considered and rejected by the IEP team; and a description of the factors relevant to the district's proposal. Prior written notice can be the IEP document itself.

76. A school district must comply both procedurally and substantively with the IDEIA. While not every procedural failure constitutes a denial of FAPE, one that impedes a student's right to receive a FAPE, significantly impedes a parent's opportunity to participate in the IEP process, or causes a deprivation of educational benefit to a student, constitutes a denial of FAPE.

77. At the October 28, 2005 IEP meeting, the District offered, as a related service, station-to-station bus transportation for the two days a week Student attended preschool, to which Mother consented. Due to an error on the October 28, 2005 IEP, the District needed to amend the IEP to reflect Student's time not in general education classes or extra-curricular activities. On November 9, 2005, the District, with Mother's consent, amended the IEP, which still provided for transportation. Around the time of this IEP, Student had taken the bus to school two or three times before Mother started driving him, because Mother had to drive Student's siblings to school and could not be at home for the bus pick-up time. Student did not take the bus to school during the remainder of SY 2005-2006.

78. At the start of the 2006 ESY, Mother requested bus transportation, and was informed by the District's transportation office that transportation was no longer on Student's IEP as a related service. Mother contacted Ms. Bevernick's office to find out why transportation was no longer available. Ms. Bevernick's office informed Mother that the District had removed transportation as a related service at the February 2, 2006 IEP meeting, and scheduled an IEP meeting for August 29, 2006, to discuss the issue.

79. At the August 29, 2006 IEP meeting, the District informed Mother that Student was not eligible for transportation as a related service, and that the District had offered transportation in error on the October 28, 2005 IEP. The District stated that it had removed transportation as a related service at the February 2, 2006 IEP meeting. At the next

IEP meeting, on September 26, 2006, the District reiterated its position that Student was not eligible for transportation as a related service. Mother did not consent to the District's withdrawal of transportation as a service. Because of the transportation dispute, Student did not attend preschool until November 2006.

80. Regarding the February 2, 2006 IEP meeting, Mother and the District met to discuss Mother's concern regarding Student's use of verbal versus sign language. On the IEP document, the District listed on the services page that Student would attend preschool and receive speech and language therapy. The District did not list transportation. Ms. Bevernick and Ms. Pizzica attended this meeting. Both recall determining in a previous discussion that Ms. Pizzica should not have offered transportation as a related service at the October 28, 2005 IEP meeting due to the change in the District's policy. However, neither recalled discussing transportation at the February 2, 2006 IEP meeting and the IEP meeting notes do not reflect any discussion regarding transportation. While Mother signed the IEP, the District did not provide any reason why it did not list transportation as a related service or discuss with Mother the change in the District's transportation policy, except possibly that the District did not list transportation as a related service because Student was not using the bus to get to school.

81. The District and Mother met again on April 5 and May 8, 2006, to discuss Student's OT needs. Neither resulting IEP lists transportation as a related service. The IEP meeting notes do not reflect that the IEP team discussed transportation. At the May 8, 2006 IEP meeting, the IEP team members discussed whether Student would attend preschool during the summer, and increasing Student's days of attendance for SY 2006-2007. The IEP team agreed that Student would attend the District SDC preschool three days a week during the 2006 ESY, and five days a week when SY 2006-2007 started on August 28, 2006. The District did not list transportation as a related service for the 2006 ESY. As noted previously, the first time the District explained to Mother that it was not going to provide transportation as a related service was at the August 29, 2006 IEP meeting.

82. The District knew that Student was not utilizing the transportation related service by the time of the February 2, 2006 IEP meeting. However, the District did not inform Mother either that the District was removing transportation as a related service because Mother withdrew consent by deciding not to use the bus, or that the District erroneously offered transportation at the October 28, 2005 IEP meeting. Additionally, because the District offered transportation, the District was required to continue to provide Student with transportation as a related service, or reimburse Parents, until the District removed it as a related service on Student's IEP, despite Mother's decision to drive Student to school. Without notice of the reason why the District no longer offered transportation as a related service, Mother could not make an informed decision whether to agree to its removal. Mother stated that she would have continued to have Student bused to school if the District had arranged a pick-up time when she was not transporting Student's older siblings to school.

83. Therefore, the District failed to provide Student with prior written notice when it removed transportation as a related service on the February 2, April 5, and May 8, 2006 IEPs. The District did not provide an explanation why it did not inform Mother of the correct District transportation policy until the August 29, 2006 IEP meeting. The District significantly impeded Mother's right to participate in Student's educational decisionmaking process by failing to inform Mother that it had removed transportation as a related service, either because the prior offer of transportation was in error or because Student was no longer utilizing the service.

*Student's Need for Transportation as a Related Service*

84. Children who are eligible for special education are entitled to a FAPE that is designed to meet their unique needs. A FAPE includes transportation as a related service, if the transportation is required to enable the Student to benefit from his education. The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) travel in and around school buildings; and (iii) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. Student contends that he requires transportation to school to benefit from his education because he cannot safely get to school, and requires social interaction with peers on the school bus to improve his social skills.

85. The District stated at hearing that it offered Student bus transportation in error on October 28, 2005. Ms. Pizzica stated that, when she offered transportation as a related service, she was not aware that the District had changed its transportation policy for special education students the year before. Ms. Pizzica believed that the District's policy was to offer transportation for all special education students. Ms. Bevernick stated that the District had changed its policy due to budget constraints, and that the District's new policy limited transportation to special education students who were placed in a school that was not the student's home school, or students who required transportation to benefit from special education services. An example that Ms. Bevernick provided of a student in the latter category was a student who may need transportation to attend the student's home school because of a severe behavioral problems and who needs transportation to safely attend school, or a child with a physical disability. Ms. Bevernick admitted that not all District special education staff knew of the District's change in policy at the start of SY 2005-2006.

86. Mother stated that Student lacks hazard awareness, as he often runs out into a parking lot without looking and lacks the ability to communicate with others. Ms. Torkelson noted that Student engaged in dangerous play on the playground when her children played with him. However, Ms. Gray and Ms. Rude stated that they did not observe Student engage in dangerous play on the playground, and that his play was typical for a child of his age. While Student did have significant expressive and receptive language delays, he could understand simple instructions at the start of SY 2006-2007, and make one to two word requests. By the start of SY 2007-2008, Student had significantly improved in his expressive and receptive language abilities, and exhibited age appropriate social skills and hazard awareness.

87. While Student has significant expressive and receptive language delays, he has social skills and hazard awareness comparable to his peers. One does not expect a preschool student to be able to safely walk to school by himself, as preschool students generally lack hazard awareness. The fact that Student, like his peers, is not able to safely get to school by himself does not require that the District provide Student with station-to-station transportation to obtain an educational benefit. Student does not require transportation due to unique needs that require special educational services. His need for transportation is the same as that of his typically developing peers. Therefore, the evidence did not establish that Student requires transportation as a related service to obtain an educational benefit.

## CONCLUSIONS OF LAW

### *Burden of Proof*

1. Student has the burden of proof as to the issues in this Decision. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 537, 163 L.Ed.2d 387, 399].) The burden of proof must be discharged by the preponderance of evidence.

2. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, IDEIA, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).)

3. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs, coupled with related services as needed to enable the student to benefit from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, related services may be referred to as designated instruction and services. (Ed. Code, § 56363, subd. (a).)

4. School districts receiving federal funds under IDEIA are required by section 1414(d)(1)(A)(i) of Title 20 of the United States Code to create an IEP for each child with a disability that includes: (1) a statement regarding the child's then-present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) a statement

of the program modifications or supports that will be provided; (6) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; and (7) other required information, including the anticipated frequency, location, and duration of the services. (See also, Ed. Code, § 56345, subd. (a).)

5. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. (*Rowley, supra*, 458 U.S. at p. 200.) The Court held that a student's IEP must be reasonably calculated to provide the student some educational benefit, but that the IDEA does not require school districts to provide the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) *De minimus* benefit or trivial advancement, however, is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Walczak v. Florida Union Free Sch. Dist.* (2d Cir. 1998) 142 F.3d 119, 130.) Rather, a child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1997) 103 F.3d 1114, 1121.)

6. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program, not the parents' proposed alternative. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams, etc. v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) If the district's program was designed to address the student's unique educational needs, was reasonably calculated to provide student some educational benefit, and comported with student's IEP, then the district provided a FAPE, even if the parents preferred another program and even if the preferred program would have resulted in greater educational benefit. (*Id.* at 1314.) School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

7. When a school district does not perform exactly as called for by an IEP, the district does not violate the IDEIA unless it is shown to have "materially failed to implement the child's IEP. A material failure occurs when the services provided to a disabled child fall significantly short of those required by the IEP." (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 481 F.3d 770, 773.) For example, a brief gap in the delivery of services may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 U.S. Dist. LEXIS 39025, pp. 22-23.)

8. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs must be conducted. (Ed. Code, § 56320.) In California, a district assessing a student's eligibility for special education must use tests and other tools tailored to assess "specific areas of educational need" and must ensure that a child is assessed "in all areas related to" a suspected disability, such as vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (Ed. Code, § 56320, subd. (c), (f).)

*Did the District fail to assess Student in areas of suspected disability by not conducting an OT assessment when it initially assessed Student?*

9. Pursuant to Factual Findings 2 through 15, the evidence did not establish that the District was required to conduct an OT assessment during its initial assessment of Student. Neither Ms. Gray nor Ms. Pizzica observed Student during their assessments displaying fine or gross motor deficits that required an OT assessment. Ms. Williams did not observe Student displaying oral-motor problems. Finally, the information provided by UCSF, SARC, PTC and Mother did not indicate that motor and sensory delays were an area of suspected disability that required a distinct OT assessment.

*Was the District's April 4, 2006 OT assessment adequate to determine Student's unique needs, if any, for OT?*

10. Pursuant to Factual Findings 16 through 34, Ms. Turner adequately assessed Student. Ms. Turner observed Student in his classroom and playground, and spoke to Ms. Gray regarding Student's progress and any potential OT needs he might have. Ms. Turner's assessment properly determined that while Student had low energy and auditory processing deficits, he could adequately participate in class activities and made sufficient educational progress. Finally, Ms. Flagg's criticisms of Ms. Turner's assessment are not credible because Ms. Flagg did not have information regarding Student's classroom performance or progress.

*Did the District deny Student a Free and Appropriate Public Education (FAPE) from October 28, 2005 through June 18, 2007, by failing to provide Student with OT services to meet his unique needs?*

11. Pursuant to Factual Findings 17, 24 through 26, and 34 through 39, Student did not require additional OT services before the District's April 2006 OT assessment to benefit from his education, as he was making adequate educational progress in his preschool SDC. Ms. Gray noted that while Student was tired at the beginning of the school day, his energy increased as the day progressed. Additionally, Ms. Gray established that Student made adequate educational progress and participated in the classroom activities with little difficulty. The District was able to address Student's unique OT needs in the daily class schedule, which incorporated various OT activities to work on fine and gross motor skills and oral-motor skills. While Ms. Flagg's informal assessment found that Student possessed

OT deficits, she could not state that the District was not meeting Student's need during regular classroom instruction because she never visited Student's classroom or obtained information regarding Student's educational progress. Therefore, the evidence did not establish that the District did not meet Student's OT needs and thereby denied Student a FAPE.

12. Pursuant to Factual Findings 40 through 74, the District was not required to provide Student with direct OT services in order to provide Student a FAPE after the April 2006 OT assessment. The District met Student's OT needs with the regular classroom instruction that incorporated OT activities. While the NCDC assessment found that Student had deficits regarding oral-motor skills, motor planning, balance, endurance, muscle tone, sensory processing and fine motor skills, the NCDC report did not state that the District was not meeting Student's OT needs during regular classroom instruction, direct speech and language services and OT consultation. The fact that the NCDC report made recommendations to address Student's OT deficits, which the District implemented, does not mean that the District was not providing Student a FAPE before they were implemented. Before and after the NCDC report, Student made adequate educational progress, as his communication skills improved and he could adequately participate in class activities. While both Ms. Torkelson and Ms. Flagg recommended that Student receive direct OT, their assessments were flawed because they did not observe Student at school or obtain information regarding Student's educational progress and OT classroom activities. Neither Ms. Flagg nor Ms. Torkelson could credibly state that Student required direct OT services to benefit from his special education. Therefore, the evidence did not establish that the District did not provide Student a FAPE by failing to meet his OT needs.

*Did the District deny Student a FAPE by terminating door-to-door transportation without prior written notice?*

13. IDEIA and federal regulations require a school district to provide written notice to parents before they initiate or refuse a change in a student's identification, evaluation, or educational placement. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a) (1999).) Specifically, the written notice must contain:

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

14. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEIA. However, pursuant to section 1415(f)(3)(E)(ii) of Title 20 of the United States Code, a procedural violation of IDEIA does not deny the student FAPE unless it 1) impedes the student's right to FAPE; 2) significantly impedes a parent's opportunity to participate in the educational decision-making process; or 3) causes a deprivation of educational benefits. (See, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

15. Pursuant to Factual Findings 75 through 83, the District failed to provide Parents with prior written notice when it removed transportation as a related service from Student's IEP. While the District was not required to provide Student with transportation as a related service, the District did offer transportation in the October 28, 2005 IEP for the two days a week Student attended preschool. The District never discussed with Mother at the February 2, April 5 or May 8, 2006 IEP meetings that the District had removed transportation as a related service. Even though Mother decided for her own convenience to transport Student to school, the District was nonetheless required to inform Mother that it removed transportation from the IEP either because Mother was taking Student to school or due to the District's policy to only provide transportation if Student did not attend his home school or requiring transportation to benefit from special education. The District's failure to provide Mother with prior written notice significantly impeded her ability to participate in Student's educational decisionmaking, as the District did not tell her that the consequence of her driving Student to school was the removal of transportation from his IEP.

*Does Student require door-to-door transportation as a related service to receive a FAPE from the 2006 ESY through the present?*

16. The IDEIA regulations define transportation as: (i) travel to and from school and between schools; (ii) travel in and around school buildings; and (iii) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.24(b)(15)(1999); 34 C.F.R. § 300.34(c)(16) (2006).)<sup>18</sup> The IDEA does not explicitly define transportation as door-to-

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<sup>18</sup> On October 13, 2006, amendments to the Code of Federal Regulations (C.F.R.) to correlate to the reauthorized IDEIA became effective. Unless otherwise specified, the citations herein are to the version of the C.F.R. that was in effect when the IEP that is the subject of this Decision was drafted.

door services or include in the definition of transportation an aide to escort the child to and from the bus. Decisions regarding such services are left to the discretion of the IEP team. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46576 (August 14, 2006); see also 34 C.F.R. Pt. 300, Attachment 1, § 300.24 (1999).)

17. Pursuant to Factual Findings 84 through 87, Student did not require transportation as a related service to benefit from his special education. As in *Student v. Pajaro Valley Unified School District* (December 18, 2003) SEHO Case No. SN03-01877 (*Pajaro Valley*), Student had speech and language deficits and limited hazard awareness. In *Pajaro Valley*, the decision noted that no one would expect a six year old child to safely walk to school, even for only one-eighth of a mile. In this case, Student lives a half mile from school and one would not expect any preschool child to safely walk to school at that distance. Further, like the student in *Pajaro Valley*, Student's lack of hazard awareness and speech and language deficits are typical of his age group and not so severe as to require transportation to meet his unique needs. Additionally, Student does not have behavioral problems and has adequate social skills. Therefore, the evidence did not establish that Student requires transportation to benefit from his special education.

#### *Remedies*

18. IDEIA empowers courts (and Administrative Law Judges) to grant a request for compensatory services as the court determines is appropriate. (*Burlington Sch. Comm. v. Massachusetts Dept. of Educ.* (1985) 471 U.S. 359 [105 S.Ct. 1996, 85 L.Ed. 2d 385].) Equitable considerations may be considered when fashioning relief for violations of the IDEIA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361, 126 L.Ed.2d 284]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

#### *Student's Request for Compensatory Education and Mileage Reimbursement*<sup>19</sup>

19. Despite the fact that Student missed nearly all of the 2006 ESY, the first two months of SY 2006-2007 and did not attend preschool five days a week, Student still made adequate educational progress on his IEP goals, especially his expressive and receptive language goals. The evidence did not establish that Student requires as compensatory education that the District make up any missed speech and language sessions or instruction for Student to make up for lost speech and language sessions or classroom instruction. The District was still able to sufficiently implement Student's IEP and ensure that Student made adequate educational progress despite the District's failure to provide transportation two days a week during the regular SY 2006-2007 school year. Therefore, the only remedy is for the District to reimburse Parents for Mother transporting Student to school for two days a week during SY 2006-2007 and SY 2007-2008, through the present.

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<sup>19</sup> Student only requests mileage reimbursement from the start of the 2006 ESY.

## ORDER

Within 45 days of this decision, the District shall reimburse Parents for transporting Student to and from school from Student's home, two times a week, for SY 2006-2007 and the beginning of SY 2007-2008 through the present. All of Student's other requests for relief are denied.

### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute:

The District prevailed on Issues 1 through 3 and 5.

Student prevailed on Issue 4.

### RIGHT TO APPEAL THIS DECISION

The parties to this case may appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

DATED: November 30, 2007



PETER PAUL CASTILLO  
Administrative Law Judge  
Special Education Division  
Office of Administrative Hearings